

Workers' Compensation

BEATING UP ON WORKERS' COMP

Grand Bargain Taking Jabs from Multiple Directions

By Andrew Simpson

The state-based workers' compensation system has stayed on its feet for 100 years in part by being able to defend itself against blows and then counterpunch when necessary. It has shown an ability to reform to fit the economy and workplace while largely upholding its "grand bargain" of no-fault care for injured workers.

Workers' compensation's resilience and its grand bargain are being tested these days. The system is facing jabs every which way it turns. The critics say the system today favors employers over employees, falls short in delivering the medical and wage loss benefits that injured workers and their families need, treats

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fewer and fewer workers, transfers costs to health insurers and taxpayers, and exacerbates economic inequality. Others say it no longer sufficiently protects employers from lawsuits, doesn't return enough workers to jobs and costs too much. It even stifles innovation such as ridesharing.

Through the media, courts and legislation, critics are questioning medical and wage benefit levels, challenging the "exclusive remedy" doctrine, raising issues of constitutionality and calling for states to allow employers to opt-out of the system and create their own.

One year ago, the industry gave its own status report.

"We are finally starting to see an industry in balance with these results," said Steve Klingel, president and CEO of the National Council on Compensation Insurance (NCCI), reporting on the state of the industry at NCCI's annual symposium. "Today, industry costs are largely contained, claims frequency continues to decline and the system in most states is operating efficiently. In short, the market is operating as it should on behalf of most stakeholders."

The challenge now may entail listening to and convincing the remaining skeptical stakeholders and critics that the system is indeed in balance and that the grand bargain remains a good deal for workers and employers.

Benefit Cuts, Cost Shifting

In March, a *ProPublica/National Public Radio* report, "The Demolition of Workers' Compensation," cast a critical spotlight on workers' compensation. The report claims that the system is failing injured workers who need it the most as a result of legislative changes that have favored cost cutting in more than 30 states.

The report highlights case histories of several injured workers. It also includes a comparison of benefits provided by states.

The *ProPublica/NPR* authors acknowledge that the system works for most injured workers, but they focus their attention on underserved injured workers and the effects of recent changes on them.

"While the vast majority of injured workers need only minor medical care and experience little friction in getting it, the changes often affect those who need the system the most," the authors, Michael Grabell of *ProPublica*, and Howard Berkes of *NPR*, wrote.

"The Demolition of Workers' Compensation" claims that years of benefit cuts and tighter limits on medical care have resulted in "hundreds of thousands of injured workers" being denied adequate care and compensation. The costs to support these workers are being shifted onto taxpayers, with the government picking up a tab of \$30 billion through Social Security Disability Insurance, Medicare and Medicaid, according to the report. Meanwhile employers are paying the lowest premiums since the 1970s, the report says.

The public radio report caught the attention of industry leaders, including the head of the Workers' Compensation Research Institute (WCRI).

"It's hard to write a balanced article based on anecdotes," said Richard Victor, referring to the *ProPublica/NPR* stories of injured workers who did not receive adequate treatment or compensation and are featured in the investigative report.

Victor, who has been researching workers' compensation for more than 30 years as executive director at WCRI, said he was not suggesting that the injured workers are not important.

"We should always strive to minimize the number of workers who fall through the cracks," he said. But the public radio articles do not prove the system is failing and, Victor said, they should be considered along with reports that show that the system serves a "huge number of injured workers."

"Are the anecdotes the exception or the rule?" he asked, suggesting the only way to answer is through measuring because nobody can tell.

According to Victor, 100 percent satisfaction, while important as a goal, is not realistic in such a large economy, "although that might sound cold-hearted."

Victor said that workers' compensation tends to go in cycles of crisis and reform. While recent reforms are focused on cost and competitiveness, future changes might address benefits and worker issues. The *ProPublica/NPR* report focused on states reducing benefits but Victor said some states have also been increasing benefits.

Hyperbole

Robert Hartwig, president of the Insurance Information Institute, was more outspoken in his criticism of the *ProPublica/NPR* report in a letter to the WCRI.

"The very title of the *ProPublica/NPR* [report] is at best misleading and at worst erroneous," Hartwig wrote, characterizing the reference to "demolition" of the comp system as "hyperbole of the highest order."

"The fact of the matter is that workers' compensation insurers today provide some \$40 billion in benefits annually to hundreds of thousands of injured workers and to the families of those killed on the job — a basic and important fact that is somehow omitted by the authors. Also omitted from the piece is the indisputable fact that the workplace has become safer — much safer — in no small part due to the relentless loss control efforts of insurers and employers in partnership with state and federal government," Hartwig wrote.

According to Hartwig, the incidence rate of fatal occupational injuries plunged by 36 percent over the past two decades thanks in great measure to "incentives that insurers and workers' comp systems have in place."

He also challenged the *ProPublica/NPR* assertion that businesses and insurers pushed benefit reforms "on the false pretense" that costs were out of control. They were indeed out of control "by any reasonable standard," according to Hartwig. Between 1991 and 2009, the average annual increase in the medical costs of a workers' comp claim was 7.7 percent, he said, citing NCCI figures for claims severe enough to cause injured employees to miss work. That was nearly twice the 3.9 percent increase in healthcare costs in general, he said.

continued on page 24

Workers' Compensation

continued from page 23

In a counterpunch to Hartwig, the *ProPublica/NPR* authors said they do not dispute that the workplace has become safer but stressed that the focus of their series “was on how changes in workers’ comp laws have affected people who are injured on the job.”

They did not challenge that insurers have contributed to workplace safety, but said the decline in fatalities and injuries has “multiple causes,” including the Occupational Safety and Health Administration (OSHA), improvements in auto safety and health research, the growth in automation and a changing economy which has reduced jobs in dangerous manufacturing and mining industries.

They said that the workers’ comp data that the Insurance Information Institute cites deals only with the most severe injuries that “cause an injured employee to miss work” and maintained that this is very different from the data in its report.

Also, *ProPublica/NPR* said that while workplace injuries have indeed fallen, the frequency of claims is only one factor that goes into workers’ comp premiums. Other important components include healthcare costs, the length of injury, benefit payments, overhead expenses and the rise and fall of insurance industry investments.

“Our point wasn’t that rates shouldn’t be going down, but that ‘despite the drumbeat of complaints’ in state legislatures, the cost of workers’ comp is at a historic low and is a relatively minor part of employee compensation,” they said in reply.

Shrinking Coverage

One day after the *ProPublica/NPR* article hit the airwaves, OSHA issued a report that agrees with much of the criticisms and in some ways goes further. The OSHA report says that changes in workers’ compensation have made it “increasingly difficult for

injured workers to receive the full benefits” and that employers provide only a small fraction of the overall financial cost of workplace injuries and illnesses through workers’ compensation.

According to OSHA, workers’ compensation payments cover only about 21 percent of lost wages and medical costs of work injuries and illnesses. Workers, their families and their private health insurance pay for nearly 63 percent of these costs, with taxpayers shouldering the rest.

Also, several studies have found that fewer than 40 percent of eligible workers apply for any workers’ compensation benefits at all, according to OSHA.

‘Race to Bottom’

The *ProPublica/NPR* authors also found that many states no longer comply with the standards recommended in 1972 by a national commission established by President Richard Nixon to improve the workers’ compensation system.

John Burton, a Republican economist and law professor who headed that commission, told *ProPublica/NPR* that recent changes are “unprecedented” in the history of workers’ compensation. “I think we’re in a pretty vicious period right now of racing to the bottom,” Burton said.

The notion that states are in a “race to the bottom” was echoed by attorney Charles Davoli from the Workers Injury Law and Advocacy Group, which represents disabled workers.

Davoli said the system may be in a transition to a civil liability system because the interests of employers and employees are no longer balanced.

“It’s nice to talk about how we compare to the median but what is the standard, what is an adequate benefit?” he asked. “If we don’t answer that, we are continuing a race to the bottom.”

Workers’ compensation is often called a “grand bargain,” in which employers agree to provide a safe workplace and cover any workplace injuries

in exchange for employees giving up their constitutional right to sue their employers over injuries. Workers’ compensation is supposed to be the exclusive remedy for injured workers.

Davoli, who also calls workers’ compensation a “moral commitment,” warned that the grand bargain may have been breached and a “constitutional tipping point” reached. He pointed to court cases in several states challenging the fairness of the current system, including one in Florida that argues that the current system violates due process because the care and compensation that injured workers now get are inadequate to justify them giving up their constitutional rights to a trial by jury.

“How low can you go to where you breach the grand bargain?” Davoli asked.

Exclusive Remedy

Mark Walls, a vice president at Safety National, at a recent Advisen Casualty Insights conference, said there has long been a “push-pull in the system” with the plaintiffs’ bar constantly looking for ways to get around the exclusive remedy provided by workers’ comp.

Now the lawyers may be getting some help from judges in Florida and Oklahoma.

In Florida’s *Padgett* case, in 2014, the 11th Circuit Court judge ruled that the workers’ comp statutes in the state of Florida were unconstitutional on their face because they no longer provided the grand bargain to the injured worker.

The plaintiffs’ representatives and ultimately the judge pointed to “the fact that in the last 10 or 15 years, there have been a number of bills passed in the state of Florida that reduced benefits, increased thresholds for compensability — things that they felt tipped the scales from being balanced against the injured worker,” Walls said.

Walls believes the *Padgett* case may not be legitimate.

“There was a lot of reaction to this but I would temper with the fact that this was a set-up,” Walls told the Advisen audience. “They found a judge in Miami-Dade Florida. They found the right case. They didn’t even

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put the state attorney general's office on notice about the hearing," he said, explaining why the AG's office did not defend the workers' comp law.

Intentional Acts

In Oklahoma, of particular concern is the ruling of a district court judge referring to language of the 2013 reform law eliminating "foreseeable injuries" from workers' comp coverage.

"The intent of that was focused on eliminating degenerative conditions and repetitive issues." But the judge in a back strain case for a tire shop worker said that "given the type of work, they knew this was a foreseeable injury and therefore it's out of the workers' comp statute," paving the way for the worker to sue for negligence, according to Walls.

"When you think of that, what percent of workers' comp claims would be foreseeable under that definition," Walls asked rhetorically. "Most of them," he answered.

Walls says the judge "is completely misinterpreting the statute [and] the legislative intent" of the reforms.

He said similar situations could arise in other states in the wake of the *ProPublica*/*NPR* series of articles.

Speculating about another avenue for litigation that might surface in the near future, Walls noted that every state allows injured workers and plaintiffs lawyers to get around exclusive remedy by alleging that an injury was the result of an intentional act.

In general, it has been "very difficult to prove intentional act," but OSHA could make this easier, Walls suggested, citing a proposal for an online database to give the general public access to employers' injury histories.

"There's fear that this is going to lead to increased penalties from OSHA because instead of just walking into one factory or one store and looking at that record, they'll be able to look at the records across your entire enterprise at a glance and see that you've got 10 different injuries on this machine at your 20 different plants," he said.

"Suddenly you've got not just a regular

violation. You've got a willful violation."

He noted that there is not insurance coverage for intentional acts causing injury to workers. "It is public policy that there's no coverage, and in many state statutes it flat-out says you cannot get coverage for intentional acts," he said. "If we start to see this litigation around 'intentional act,' it's really a scary proposition for employers."

Opt-Out

Davoli and other critics have questioned the growing movement to allow employers to opt-out of state workers' compensation systems and establish their own systems.

At the forefront of this movement is the Austin, Texas-based Association for Responsible Alternatives to Workers' Compensation, or ARAWC, which supports expansion of alternatives to state workers' compensation systems such as the nonsubscriber system in Texas and the recently enacted Oklahoma option, to other states.

ARAWC Communications Director Brent Buchanan said the group wants to work state-by-state with stakeholders to come up with a workers' comp alternative that works best, one state at a time.

Association members include Nordstrom, Best Buy, Lowe's, Walmart, Safeway, J.B. Hunt and Sysco Food Services — large companies that are nonsubscribers in Texas and are interested in the alternative now available in Oklahoma. Such companies would like to have options in every state in which they operate, said ARAWC Executive Director Richard Evans.

Members also include insurance-related entities including broker AMWINS and Great American Insurance, as well as service providers Partner Source and Sedgwick.

Nonsubscriber companies "will set up their occupational injury benefit plan under the federal ERISA laws, like their health insurance plan. It's an employee welfare plan and it's regulated under federal law. That's typical," though not the case with every employer, Evans said.

They work with service providers, such as insurance companies, third party administrators and medical claims management

companies for help in administering their programs, Evans said.

"It's a lot like a health insurance program except it's targeted for occupational injury benefit," he said.

The nonsubscription approach has been available in Texas for more than 100 years. There is no requirement in Texas that workers' comp benefits be provided to employees, but employers that opt out of the workers' comp system, "don't get the exclusive remedy that you do when you're in the system. So there's negligence liability for employers in Texas that elect to be a nonsubscriber," Evans said.

The situation in Oklahoma is somewhat different. In that state, employers are still required to provide benefits either under the workers' comp system or an alternative, and exclusive remedy applies to all employers.

Oklahoma's alternative option went into effect this year and the law was passed before ARAWC was formed, "but we're watching how that program rolls out so that we can learn from that and take those lessons and apply them to the future states," Evans said.

With state workers' compensation systems dealing with so many challenges, an audience member at the Advisen conference asked whether a federal workers' comp scheme might be better.

That would be a change, but it wouldn't necessarily be an improvement, Walls said, referring to the federal government's track record with other entitlement programs. "If we could look at the federal government and say, 'Man, Medicare kicks butt' and 'Social Security disability is great' and 'the VA is just a model of medical expertise,' then that might make sense," he said. ■



Susanne Sclafane, senior editor of CarrierManagement.com, contributed to this report.