

NATIONAL
ACADEMY
OF SOCIAL
INSURANCE

*Health and Income Security for Injured Workers:
Key Policy Issues*

Panel I: What’s Happening in Workers’ Compensation?

Thursday, October 12, 2006

This session convened at 8:45 AM in the Ballroom of the National Press Club, 529 14th Street, NW, Washington, DC.

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Introductions

Ann Clayton, Senior Consultant, Clayton and Associates

ANN CLAYTON: Good morning. My name is Ann Clayton, and I'm your moderator for the first session of today. We are going to be talking about what is happening in workers' compensation from a number of different perspectives. And to give you just a little bit of background before I introduce the speakers today, let me share some of the information that was in your seminar information.

First of all, what has been happening? Cost as a share of payroll dropped 20 percent since 1990. Benefits to workers dropped 33 percent. A great share of the benefit dollar is being paid for medical care, and this is a national perspective. Significant legislative actions in multiple states, including in California, Florida, Missouri, Nevada, Oklahoma, Tennessee, and Texas over the last three to five years, have made workers' compensation once again a rapidly changing area of law. This is especially true in those states where there is a huge percentage of the workers' compensation premium.

So with the challenges and the changes that have come about over the last three to five years, one of the questions that has been asked the panel members this morning, and the presenters are, "Are we heading in the right direction?" The presenters this morning represent business, labor, government, and one of the largest writers of workers' compensation insurance in the United States.

We will begin first with a presentation by Bob Steggert, who is representing the employer community, as he often does. He started with Liberty Mutual in 1974. He spent his career involved in managing casualty claims and various occupational health programs. In 1980, he joined Marriott, and is currently the Vice President of Casualty Claims for Marriott International, where he is responsible for their global property casualty and EPLI claims activity, as well as occupational health nursing programs. He is also currently Chair of the National Academy of Social Insurance Work Comp Steering Committee.

After Bob makes his presentation, giving you a perspective from employers, Ed Welch, whom you have already been introduced to, will give an employees perspective.

After that, we will have individual comments from Art Wilcox, who is from the New York AFL-CIO, and has been very active in the workers' compensation issue in New York for multiple years. And as you may or may not know, there have been some fairly heated debates going on in New York about the workers' compensation issue in the last two years, I believe. And it looks like those will continue. So Art will give you a perspective from labor on the presentations of Bob and Ed.

After Art, we will have Bob Malooly, who is with the Washington Department of Labor. He, I like to say, is the CEO of the Washington state fund, but he has quite a long government background in the state of Illinois before he went to Washington state. So he

will give you a perspective, probably from government's perspective, but now he holds the title of the head of a workers' compensation state fund.

And lastly, we are pleased to have with us Paul Rodliff, who is with Liberty Mutual Insurance Company, and has spent a significant amount of time in workers' compensation, 28 years in the insurance industry. He is currently the Senior Vice President for Liberty Mutual Insurance group, responsible for commercial operations that include claims, managed care, loss prevention, underwriting, and application development support.

So you will be able to hear not only a perspective of what is currently happening in the workers' compensations' systems nationwide, which is not easy, since they all tend to be state systems, and they are all evolving over time somewhat differently in different states, but we are asking Bob and Ed to give you a national perspective, and then we'll have comments from Art, Bob, and Paul. Bob?

What Challenges do Employers Face in Delivering Cash Benefits and Medical Care?

Bob Steggert, Vice President, Casualty Claims, Marriott International, Inc

BOB STEGGERT: Thank you, Ann. I appreciate that. And welcome, everybody, to Washington, D.C. I am looking forward today and this opportunity, and I'm privileged to be on the first panel and the first speaker on the first panel. I don't know if that is a blessing or a curse. The good part is, Ed got to see my slides and I got to see Ed's slides. The difference is I gave him my slides first, and I have got two, and he has got 30, so he is coming second. (Laughter.)

With that said, I will do my best within 15 minutes. And Ann is going to keep me on schedule to talk about workers' comp from a national perspective and give you some views from an employer's perspective in particular.

State-based systems. Obviously we have 50 different laws around the United States dealing with workers' compensation and the pressures of competition are real between the states and globally for jobs and for effective systems that will draw businesses to those jurisdictions. Now, I don't happen to be in an industry where we choose which states to go to because of their workers' compensation laws, but there are many businesses that do.

The competitions are real and unstoppable, and states that fairly and properly address workers' compensation system from the balance of an employer and employees are going to succeed in the long run. The scrutiny that the states are under is deserved and will be constant. The states that win, if you will, will generally be those where business and labor change the way they work together on workers' compensation and other public policy issues, i.e., they will be less competitive for win-lose outcomes, and more cooperative for win-win solutions.

And while rhetoric perhaps has its place in debates, pragmatism is far more promising than parallel monologues delivered to constituencies, who frankly, on both sides incidentally, don't often really understand the complexity of issues and promising solutions that we are dealing with in modern workers' compensation systems.

One of my big premises in terms of changing workers' compensation systems is we need to look at stripping away unnecessary costs from the system. And I easily define that as those costs that do not improve the outcome of injured workers.

Now, you might find that interesting from an employer perspective, but our workers are our most important asset, and we want them to get proper, timely, and appropriate medical care for conditions that are deemed compensable under workers' compensation statutes. Costs that are unnecessary range the spectrum of wasteful medical care, causation battles, dueling doctor litigation, and the costs of medical cost containment services caused by over-regulation. Ideally, and I say this in an ideal world, these costs can be redirected to deserving and under-compensated workers, and as

Christine touched upon, that is far easier said than done in California and every other state.

On a big picture basis, while system cost is important, perhaps more important to employers is the question, “is the system balanced in working to achieve sound public policy objectives?” I would define those as injury prevention, timely loss reporting, delivery of proper and necessary medical care, and return to work in an appropriate timeframe. This may perhaps be Pollyannaish, but I believe these are the primary premises under which we should be operating. Stated another way, are there obvious practices, perhaps abusive practices and unnecessary costs, not improving outcomes? And is the system attorney-, medical-provider- or vendor- driven, and gamed primarily for their economic benefit at the expense of injured workers and employers?

Moving to medical cost and care under workers’ compensation – and I gave this slide to Ann that just said “Bob S.” I thought we might change it to be consistent with the first heading, but when you have a collaborative effort like this, that’s just it. So I am still the same person who was speaking on the first slide in case you fell asleep. (Laughter.)

Medical care explosion solutions. Again, I don’t have time to cover all of these areas, so I am just going to hit some highlights. As most everyone in this audience likely knows, the choice of physician in workers’ comp has long been contentious. It ranges from total free choice, like Art is dealing with in New York, where, quite frankly, I think their system is antiquated. Under certain rather ordinary circumstances, New York considers employer-directed medical care to be a criminal misdemeanor.

The other extreme is various forms of panels or authorized networks. Thankfully, the trend is moving away from gaming the system in total free choice states towards quality provider panels, whether under collective bargaining agreement carve-outs or state-regulated networks. This trend started well over a decade ago with creative win-win solutions with collective bargaining agreement carve-outs, and it has been adopted by a number of states.

Jim Ellenberger and I had the privilege of serving as co-chairs of a labor management discussion group many years ago that actually was started at the impetus of Gary Countryman, when he was the chairman and CEO of Liberty Mutual. And one of the white papers that we produced dealt with medical care. And we agreed, with certain caveats, that managed care under workers’ compensation not only had a place in workers’ compensation, but also should be encouraged under the law.

Another area of cost containment concern to employers is that modern workers’ comp systems need to address is the proliferation of prescription drugs and the general inadequacy of drug-fee schedules now in place. Another positive trend deals with utilization review. Generally, I think this is positive because it’s designed to curb abuse, promote best practices, and responsibly control costs. And utilization review can be

retrospective, prospective or current, and, again, I won't go into detail but it's something that I think every state should be looking at.

One of the most important positive trends that I heartedly endorse is the importance of nationally recognized and peer-developed evidence-based treatment guidelines in workers' compensation. This is increasingly supported by legislatures and prestigious organizations such as ACOEM, and if you are not familiar with that acronym, it's the American College of Occupational Environmental Medicine, and the Century Foundation also endorses it.

To quote ACOEM's incumbent president, Doctor Guidotti. Quote, "Guidelines are critical to the modern practice of medicine, and ACOEM is encouraging the adoption of guidelines by every state. The philosophy behind the Guidelines is that, properly constituted, good guidelines achieve better and more predictable results from the majority of patients. Properly implemented, they require the physician to justify and thus think through and document why something different should be done but allows physicians to do so if there is good medical reason," end quote.

Let me bring this to life in the workers' comp context through sharing some statistics from Marriott's qualified, and I might add quality, Medical Provider Network that we have established in the state of California. We happen to self-administer our claims in California. And Doug Kim and I may disagree with the results of the California reform, but nevertheless, provider networks were one of the major foundations for that reform.

We have over 20,000 employees in the state of California. And there is a legislative regulation or right for employees to "opt out" of that provider network if they have a family physician that maintains their medical records. We did not have a single employee of our 20,000-plus employees opt out of our network because we had a carefully selected high-quality medical network. We reviewed it with all of our employees, including our union employees, and not a single employee opted out.

The first six months of this year, we reviewed 852 files for utilization review under treatment guideline criteria. Eighty-four recommended surgeries were approved. Twelve recommended surgeries were denied, supported by peer-reviewed physicians and quality assurance measures we have in place under the direction of our managed care director and our California medical director.

Now, ask yourself one simple question. If these 12 inappropriate surgeries were allowed, how many of these 12 workers would have had better outcomes? And what are the corresponding costs of such inappropriate medical treatment, lost time, and incremental permanent partial disability? One state, one employer, six months, do the math anyway you want.

Turning to the Century Foundation. It advocates the quote, "use of evidence-based standards to reduce medical errors and encourage best medical practices," end

quote. Now, let's look at some realities in our healthcare delivery system that unequivocally carry over to workers' comp, and further magnify the need for evidence-based treatment guidelines. In 2004, Massachusetts has an organization called the Institute for Healthcare Improvement that had a "100,000 Lives Campaign." It basically challenged hospitals to adopt six basic measures of care and best practices.

In June '06, the first results from this study were released. It involved 3,000 participating hospitals, which represents three out of four acute beds in the hospital community in the United States. The estimates of savings from this program in two-and-a-half years are that 120,000 lives were saved over 18 months. That is literally unprecedented in U.S. medical history.

A second study, Johns Hopkins University right here in our backyard. The focus of their guidelines was on reducing hospital-acquired infections responsible for the death of approximately 90,000 Americans each year. This study involved only 68 participating hospitals with estimated six-month savings of 1,500 lives and \$165 million. If anybody wants the source of that, I'll be happy to give it to you later. I have got it footnoted here, and you can check it out for yourself.

Extrapolating from these two studies, is it reasonable to suggest that 2 percent of those 121,500 lives were injured workers? Remember, this is three out of four acute bed hospitals in the United States. If 2 percent of those workers were workers' compensation patients, we just saved 2,430 lives. If 2 percent is too generous for you, go 1 percent – 1,215 lives. Again, do the math anyway you want and estimate what workers' compensation systems without appropriate and modern medical case management protocols cost in lives, poor worker outcomes, wasteful medical expenditures, unnecessary lost time, and incremental permanent partial disability.

Now, let me turn to unnecessary litigation. Unfortunately, it still is driven too frequently in our state systems by imbalances and abuses, by a number of players. You know who they are. In response, largely over the last 15 years, states have heightened or clarified eligibility standards for workers' compensation benefits for injuries and conditions deemed truly to arise out of the employment under the law.

California is a classic example that got rid of mental stress claims because it was abused to the tune of billions of dollars a year, and that and other such horribly subjective conditions such as the impossible-to-determine general condition of aging, for instance. States have been forced to legislatively attempt to curb abuses in litigation by increasing legal burdens of proof, burdens of proof that, frankly, become indefensible and highly litigated because the old standard was often a scintilla of evidence of aggravation of any pre-existing condition. Scintilla basically means a gram necessary to find a case compensable. They have moved to what we view as a more balanced and realistic material or predominant cause standard.

Frankly, from an employer perspective, I think that is fair and balanced "arising out of" standard, and it should be adopted in most situations. But it falls short of a, quote,

“employers pay everything under workers’ comp,” end quote, mentality regardless of the degree of medical causation or off-the-job primary injury or condition origin, where, frankly, employers believe the remedy is under general health or disability plans, not contentious workers’ compensation entitlement battles.

Let me give you two simple examples experienced in our company, and it happens to every employer in the world. You have an admitted prior ACL tear in a knee – sports related or weekend warrior, you name it. You then have a contusion on that same knee in the course of work. Under the old scintilla of evidence standard, you just bought that knee. The new modern law says, employer, you pay for that contusion or bruise. For those who aren’t medically oriented, you pay for the bruise, and the treatment for that bruise, and the disability related to that bruise, but you don’t pay for the knee surgery. It wasn’t a material predominant cause of that knee injury. It was an admitted prior ACL tear, documented on medical records, and a bruise.

A second example: there is a two-day housekeeper pushing a cart with comorbidities of being female, obesity and pregnancy, and she claims bilateral carpal tunnel syndrome. This was compensable in the state of Oklahoma many years ago. Those types of situations have forced legislators to look at the liberal construction and frankly judicial activism around the country. Long frustrated by eroding case law, some states have taken the extraordinary measure to specifically affirm in their statute a strict construction mandate. They do not want elected judges or judges who are advocates deviating from the judicial intent of finding cases that arise out of employment if they do not rise to the statutory predominant or majority cause standard.

Permanent partial disability – I can’t do justice to that. Bottom line, we need to develop common agreement on system objectives. We need objective systems to measure permanency while keeping the system affordable. We don’t need subjective systems that waste unnecessary medical dollars for nonconforming treatment and forensic exams, which all leads to excessive litigation, divisive dueling doctor testimony, none of which improves worker outcomes, and it simultaneously alienates workers and employers.

In closing, I have got a metaphor relating to the current movie, “The Devil Wears Prada.” Incidentally, if you haven’t seen the movie, it sounds like a chick flick, but it’s a good movie. (Laughter.) I enjoyed it thoroughly. Neither legitimately injured workers, honorable employers, or capitalistic insurance companies like Liberty Mutual are the real demons in workers compensation. And as an eternal optimist, here is to hoping the 21st century brings less divisive rhetoric, more enlightened vision, leadership and pragmatic solutions to our morally well intentioned, yet still flawed workers’ compensation systems.

(Applause.)

MS. CLAYTON: Thank you very much, Bob. And now... Ed Welch.

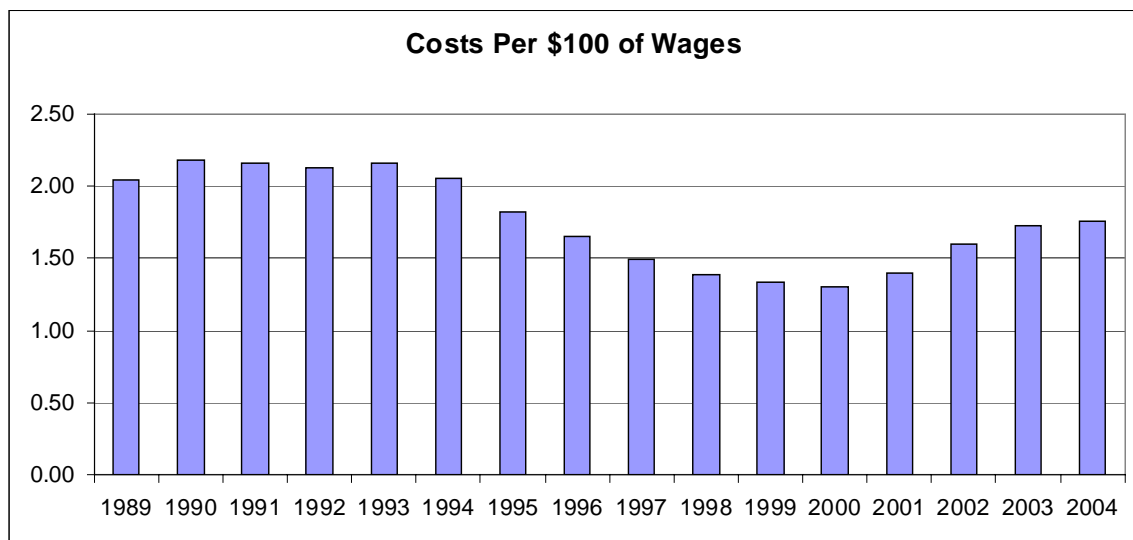
Do Injured Workers Need A Bill of Rights?

Edward Welch, Director, Workers' Compensation Center, Michigan State University

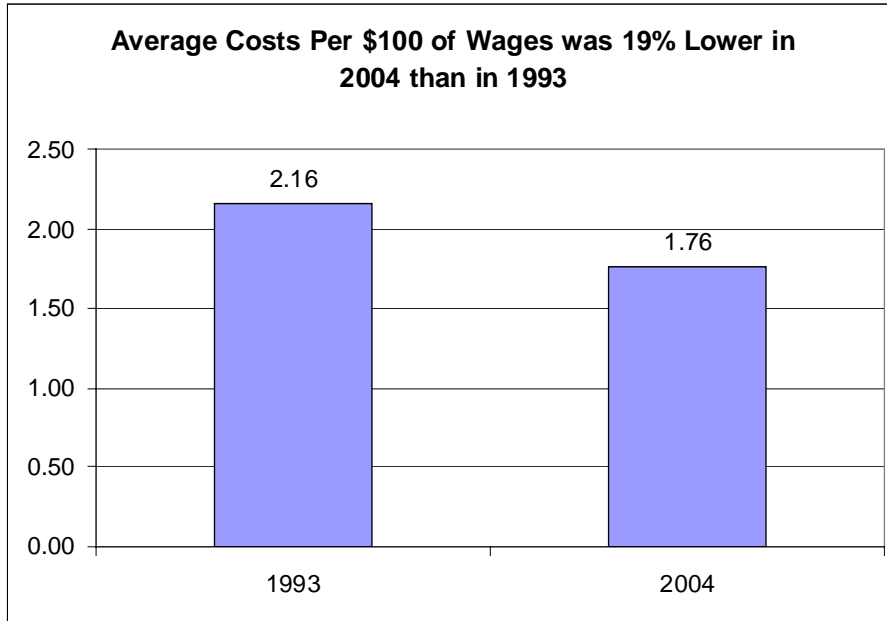
MR. WELCH: Thank you, Ann. I guess I have to go quickly through my 30 slides. (Laughter.)

MR. STEGGERT: You have got 15 minutes.

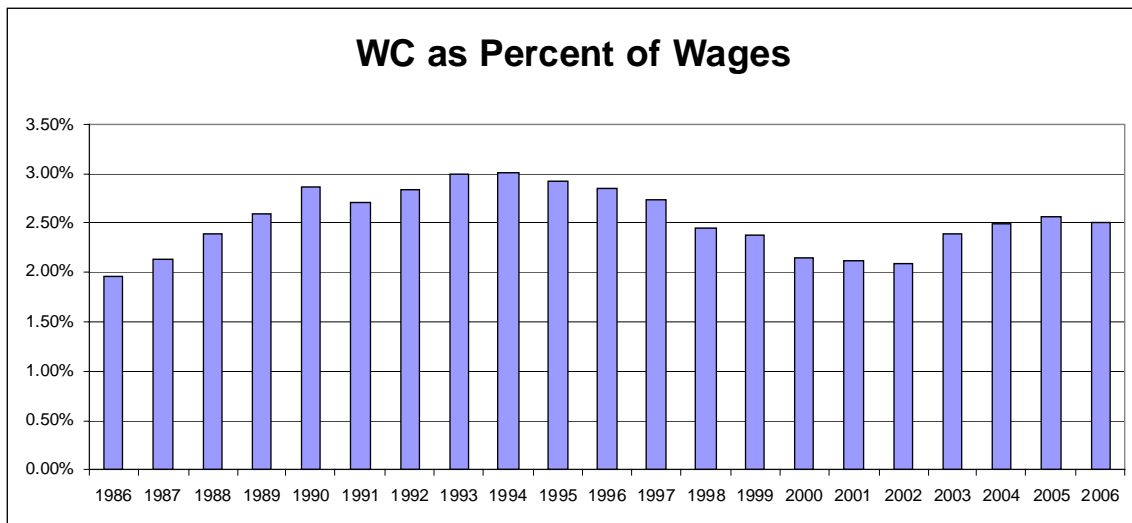
MR. WELCH: The workers' view of the workers' compensation system can be stated very simply. In the last 15 years, employers have done incredibly well, and workers have fared terribly. I'm going to show you several views of costs of workers' compensation.



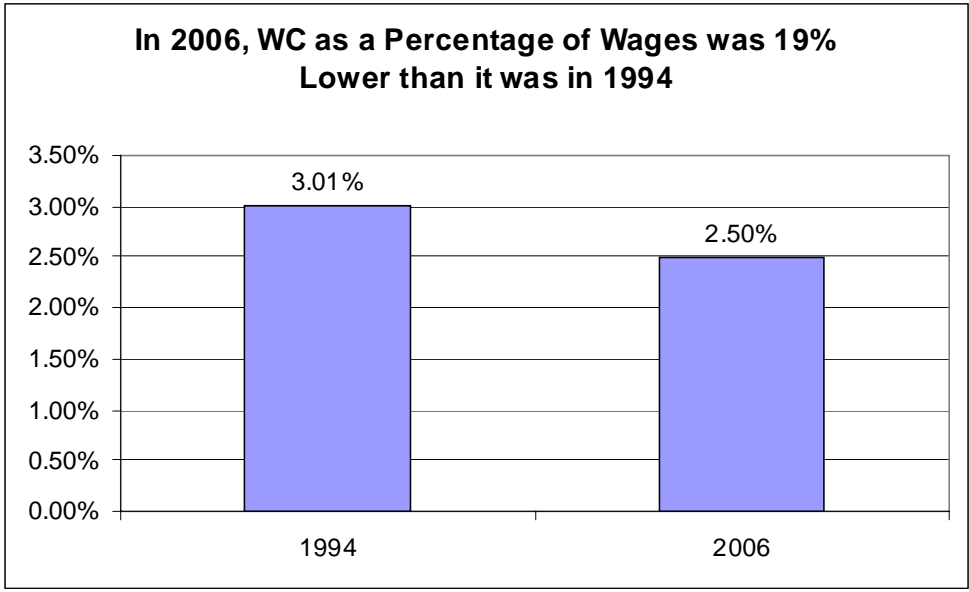
This is a measure of employer costs for workers' compensation published by the academy. (The publication is for sale if you are interested in buying it.) The costs are up slightly in the last few years but down dramatically since the early 1990s.



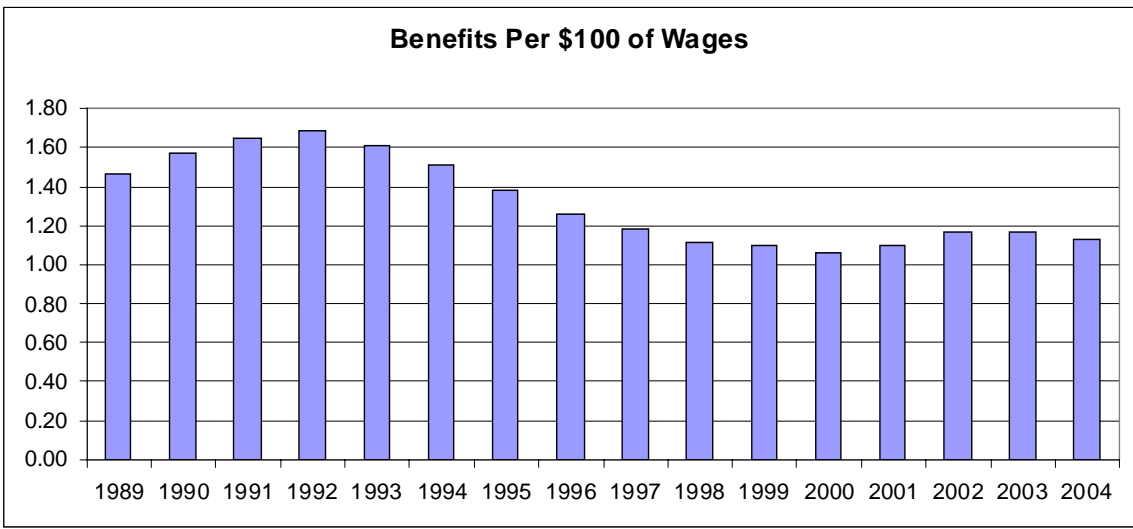
Costs, in the most recent year, 2004, were 19 percent lower than they were in 1993.



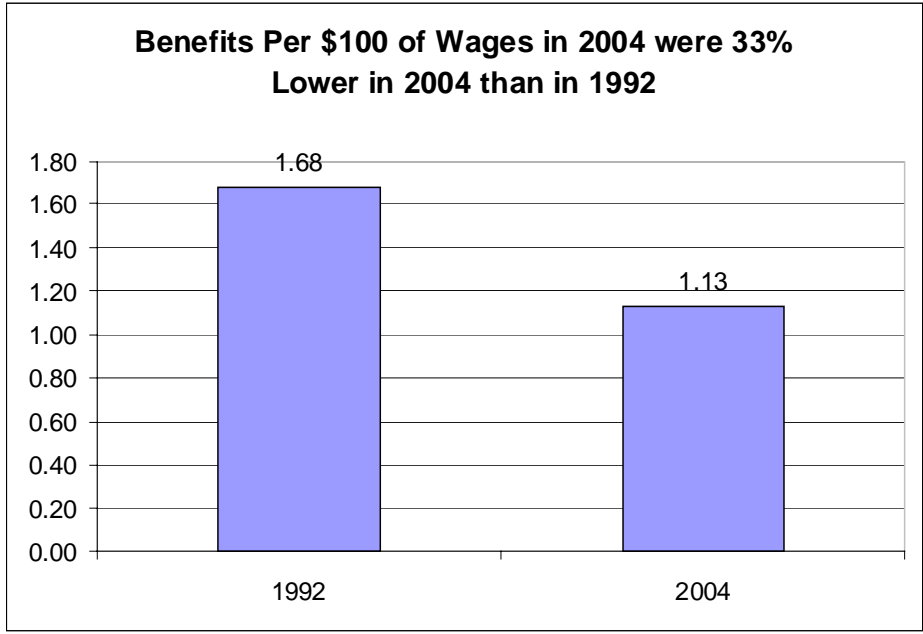
This is another measure of employer costs. It's a survey of the Bureau of Labor Statistics. It is a survey that asks employers what their costs are. Again, we see this same pattern, a high in the early '90s, a dramatic drop to about 2000 and then a slight increase. This series goes through 2006, and it shows that the increase has been reversed, and costs went down in the last year measured.



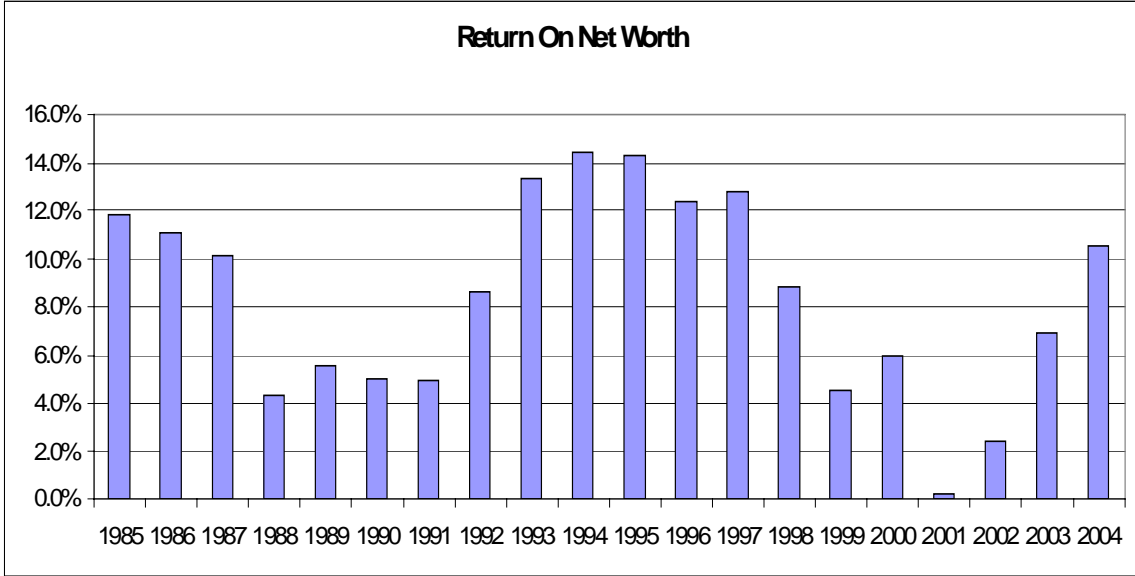
By this measure of employer costs, they are down 19 percent from their high, a little over 10 years ago.



This is another National Academy figure. This is benefits to workers. The pattern is pretty much the same, a high in the early '90s, a drop, a slight increase in the first part of this decade, and a beginning to drop again through 2004. This is benefits paid to workers and healthcare providers.



They are down 33 percent from their highs in the early '90s. What other cost of doing business is 20- to 30-percent lower today than it was 10 years ago?



This is a measure of insurance profits. These are more erratic than the benefits. Part of this, of course, is benefits paid to workers, but it is also a market cycle that has a big influence on this. They are significantly lower than their highs in the mid-'90s, and dramatically higher today than they were a few years ago. Where are they going now? I'll leave that to others who are more informed. In terms of insurance profits, a lot of it has to do with benefits, but there is also a great market influence that affects that.

Employers sometimes respond to these comments by saying, well, costs are down, but they are still too high. And that is a point of view that is probably valid. But the simple answer is employers can control their own workers' compensation cost. We have demonstrated that through research.

And I have to pause a minute and put in a little bit of a commercial here because this is what I do at Michigan State University; we teach employers how to deal individually with their own cost. The traditional approach has been if a worker didn't get benefits, they hired a lawyer and sued. If costs were too high, employers went to legislators and asked them to change the law.

But most employers – and this parallels what Bob was saying – understand that there are things employers can do to control their own costs, through providing good healthcare, through safety, disability management, and good claims management. And we offer a weeklong certificate program for workers' compensation managers dealing with this. Ann Clayton is one of our instructors in that program. So that an employer can legitimately say, well, costs may be down, but my costs are still higher than they should be; I still want to reduce them. And my response to that is there are ways you can reduce costs without taking benefits away from workers.

In workers' compensation in the last 10 to 15 years, employers have done very well and workers have taken the terrible beating. Benefits by every measure are down. I have showed you some trends and I'm going to share with you some anecdotes in a minute. If you listen carefully during a presentation tomorrow, John Burton is going to talk about some research he is about to complete that documents in a more empirical way a tremendous shift in the way workers' compensation benefits and costs are measured and paid in this country.

I think workers need a bill of rights. Undoubtedly, the situation was much more favorable to workers 15 or 20 years ago. And the insurers and the employers said that has got to change, and they convinced everyone that it should change, and I think it's quite clear that it has changed. Those of us who care about workers have to do something to bring that shift back. And I have put this together in terms of a bill of rights, a way of looking at this that I think those of us who are concerned about individuals need to sell to the public and to state legislators.

Workers Should Apply for their Rightful Benefits with Dignity

- "I'm not like all of those other people."**
- Injured workers have a right to their benefits**

The first is that I think workers should be able to apply for their benefits with dignity. Every attorney that I know of has a story that he or she will share that they hear over and over when a worker comes in to apply and says, "I got hurt on the job, my company isn't paying me, will you help me, and the first thing I want to tell you is I'm not like everybody else that applies for workers' compensation. I'm not like all of those other people you hear about on television. I really did get hurt."

Workers gave up their right to sue in return for workers' comp, and we have gotten to a place where they have to apologize to their own attorneys when they want to apply for benefits. This is a right that workers have, and they should be able to go after it

and get it with dignity without being embarrassed by their neighbors or their friends or even their attorneys.

What is the Proper Value to Place on Workplace Injuries and Deaths?

- For 9/11, the average death award was \$2.1 million**
- For 9/11, the average injury claim was \$384,000**
- These figures are about 10 times the average award given to workers who are injured on the job**

What is the proper value of a workplace injury or death? We had this terrible event on 9/11, and as a country, we appointed a commission and sat down and very carefully evaluated what compensation the victims of that awful tragedy should receive. And the average death from 9/11 received \$2.1 million, and the average injury, \$384,000. Now, it's hard to come up with averages across all of the states for workers' compensation, but that is probably 10 times what we pay for the average workplace injury or death. Why were those injuries or deaths worth 10 times the injury or death for an average worker? You can come up with reasons and explanations, but I don't think they were worth more.

Benefit Adequacy

- Most seriously injured workers suffer a large lifelong wage loss that is not replaced by workers' compensation benefits**
- Workers' compensation should replace 80% of the after-tax wage loss for work-related injuries*

There is an impression that workers' fake workers' compensation claims. And you know, it isn't easy to fake; you have to kind of walk that way all of the time and go through all of that. And there is an impression that people do that so they can live very well off of their workers' compensation benefits. Anyone who says that has no idea what it is like to live off of workers' compensation benefits. We should set a goal that worker's compensation will replace 80 percent of the after-tax lifelong wage loss. That is not an unreasonable goal. We should adopt that across the country. I don't think most people would disagree with that as a basic goal.

Defusing Myths

- The widespread belief that workers live well off of workers' compensation is not based on fact**
- States should conduct the research necessary to determine what happens to workers who suffer an on-the-job injury*
- There is a NASI commission report that discusses how to do this**

And as I say, we need to dispute this myth that people do this. We have developed methods and some of the people are represented here today. Christine's organization was a leader in developing this through RAND. The academy has published a study in a book that was edited by Alan Hunt. We know how to do this research. We know how to evaluate it. It has been done in only a handful of states. We need to do it in more states to find out just to what extent workers' compensation is replacing the wages that are lost by workers. And we need to do that.

Cost of Living Allowances

- The purchasing power of workers' compensation benefits erodes as time goes by**
- Workers' compensation benefits should be indexed for increases in the wages*

Every other social welfare system in this country has some provision to protect beneficiaries from inflation. With the exception of Washington, almost no state has anything that protects workers against inflation.

Pre-existing Conditions

- The laws in many states make it harder for a worker to get benefits if he or she works in spite of the presence of some pre-existing weakness**
- No worker should be penalized because he or she works in spite of a pre-existing condition*

Preexisting conditions has been a champion of employers lately. They argue that if you come to the workplace with a preexisting condition and suffer an injury your benefits should be less. In effect, we are punishing people for working in spite of their disabilities, and I don't think we should do that. I think what we want to do in workers' comp is compensate people for their loss of wage-earning capacity. The best measure of a person's wage-earning capacity should be the wages that an employer is willing to pay or was paying at the time of the injury. If the injury, the event that takes place at work, reduces that, then they should get 80-percent-of-the-after-tax value of the loss. It should not be further discounted because they in fact worked in spite of some other disability that they had. But many states have put those provisions in the laws in the last few years, and more would like to add them.

Older Workers

- The laws in some states make it harder for older workers to qualify for benefits and/or reduce the amount of benefits paid to older workers**
- Workers' compensation laws should not discriminate against older workers*

Employers tell me they worry about older workers: "I have this aging workforce. What am I going to do?" In fact, we know pretty well that older workers get injured less

often, but they tend to stay away from work longer, and there are some studies that try to balance those things out. But the message employers are taking to legislators and complaining about is that, “I have an older workforce now; I shouldn’t have to pay them all that will come of workers’ comp.”

Employers never wanted to give any money back to the system when they had a younger workforce when they got the benefit of that. And why is that older men and women are more likely to be injured? Is it perhaps to some extent because they have given their lives, their health and the fluidity of their joints to their employers over years? Yes, perhaps injured workers do stay off of work longer, but I think it ought to be part of the system that they are compensated. We shouldn’t penalize workers because of their age.

Fraud

- Employer fraud adds substantially to the cost of workers’ compensation**
- There should be aggressive procedures for identifying and prosecuting fraud by employers, insurers, and agents. These should include civil and criminal penalties.*

Fraud is a problem. I support the efforts to do away with fraud by claimants. Anyone from an insurance company will tell you that claimant fraud may be more frequent, but it isn’t where the dollars are. The dollars are in employer fraud, in employers who do not accurately report their payroll. And those of you who are insured employers must understand that insurance is a system for spreading the loss, and those of you who accurately report your payroll are paying for the losses experienced by your competitors who cheat in reporting their payroll. We need to have a system that enforces payroll fraud. We need 800 numbers for payroll fraud. We need as much enforcement of payroll fraud as we have gotten over worker fraud in the last few years.

Starving Out Workers

- Many states allow employers to withhold benefits from workers while disputes are resolved**
- Workers’ compensation systems should not allow employers and insurers to starve out workers while they await an adjudication of their rights*

There is an approach – and some of these apply to some states and not to others. But in quite a number of states, employers can literally starve out their claimants. They can deny benefits and not pay anything to workers while workers wait a year or more for a hearing. At that point, workers take settlements and take much less in settlements.

Ann is signaling the time is running out. I’ll go a little faster through some of these.

Pay What You Owe

- **Many states allow employers to withhold from workers benefits that are not disputed**
- *Employers should be required to pay immediately amounts that are clearly owing*

Pay what you owe. In many states, if an employer concedes that it should pay 5 percent disability and the worker wants 10 percent, it can withhold the 5 percent that it concedes in order to make it more difficult.

Penalty for Denying Claims

- **In many states, there is no incentive for employers to pay promptly, and no disincentive for employers to withhold benefits**
- *There should be a penalty for employers who unfairly deny the payment of benefits, and/or an incentive for employers who pay promptly*

There should be a penalty for denying claims. Very few states have any penalty for employers that deny claims.

Prompt Hearings

- **In many states, there is a long delay before hearings can be held**
- *Within 30 days of filing a claim, there should be at least a preliminary hearing, which will determine whether benefits will be paid pending the outcome of the litigation*

We should have prompt hearings so that employers do not wait.

Attorney Fees

- **Most states limit the amount of money a worker can spend on his or her attorney, but put no limit on the amount an employer can spend**
- *All parties to workers' compensation proceedings should have the same access to effective legal representation*

If I were to propose a law saying that if a realtor sues a bank we are going to cap how much a realtor can spend on his or her attorney but the bank can spend as much on its attorney as it wants to, everybody would say that is a denial of due process. In workers' comp, we limit what workers can spend on their attorneys, but do not put any limit on what employers can spend.

Withholding Healthcare

- In many states, employers can withhold healthcare from workers**

- Employers should not be allowed to withhold needed healthcare while a workers' compensation dispute is being litigated*

And in some states, employers can withhold healthcare while they are litigating a claim. That is a terrible and unfair tool to have.

We need to restore balance to the workers' compensation system. Thank you.

(Applause.)

MS. CLAYTON: Thank you very much, Ed. And now the panel members in response: First is Art Wilcox who is not only a past firefighter, but he is also a certified work-comp professional. Art?

Commentary

Art Wilcox, Public Employee Division Director, New York State AFL-CIO

ART WILCOX: Well, I guess what I have to do first of all is try to speed along because I see how the presenters had to go quick, and certainly the responders will have to go even quicker. And this is a tough job because as I look at the panel, it's labor, and that is me, and the rest are all folks who are not labor, with the exception of Ed, who I agree with probably all of what he said this morning. But at the same time, I thought he was a friend until he whispered to me from Michigan in my ear just when we sat down, "we sure took care of those Yankees, didn't we?" (Laughter.) So I think I have no friends on the panel. (Laughter.)

And as Ann said, you know, I'm just a former firefighter; I'm just a union guy. So I am going to try to get through this complex discussion that Bob talked about and seemed to imply that union folks didn't understand, and try to get to the same goal he has, which is getting rid of costs that really don't affect the outcome. But in order to do that, I think I have got to back up. I think we have got to talk about why workers' comp happened, and where the sides are at and what they wanted.

Now, labor didn't want workers' comp. This wasn't our idea. I mean, if we were to read what Gompers said about what labor want, he doesn't mention comp. I think Gompers says, what does labor want? We want more school houses and less jails, more books and less arsenals, more learning and less vice, more leisure and less greed, more justice and less revenge, in fact, more of the opportunity to cultivate our better natures. But he doesn't talk about workers' comp because that wasn't what Gompers wanted. And our state AFL-CIO president in New York, George Meany – both of them were afraid that labor couldn't keep the pressure on legislatively to keep the benefits going to where they had to be. You know, they were right. You know, like what Ed said this morning, they were right.

And what did business want? Business was upset because folks were bringing lawsuits, and in the middle of production cycle, it impacted on their costs unpredictably. Employers wanted a method that got rid of unpredictable costs and replace it instead with an insurance policy that they knew at the beginning of the year how much it was going to cost.

Then we got this other group, because when it was designed, it was an insurance product. And what the insurance industry wanted was an extremely socialized program where everybody was covered, where you could spread the risks, and they wanted a product that had a long tail with small payments over a long period of time so that they could invest and make money during that time period.

Well, let's fast-forward a bit from where labor was in the 19-teens. I mean, all of the sudden we started accepting things like unemployment insurance, Social Security, and they were okay. But one of the factors that was missing in that piece was the vendor. I mean, when we furnish unemployment insurance, we don't hire Liberty Mutual, or

AIG, which is our soon-to-be governor's favorite in New York. They don't bring a vendor in to dispense unemployment checks to workers who are out of work. But for some reason it has been okay in a workers' comp system.

And what has happened with employers in this situation? Employers no longer want predictability; they want to pay less. It is no longer about not being able to be sued in a spike and cost of production; it's about paying less. And as things go on, you know, where has the insurance industry gone? Well, the insurance industry in recent days – and with all due respects to the profit figures, just like banking, they change what they do.

I mean, when we were much younger, when you went to a bank, they loved to have that savings account because they took your savings account, and they gave it to folks in loans and made investment income. But now, banks now are happy to get your checking account. They are happy to get things that have service fees to it.

And so has the insurance industry changed. They have changed now to where they have got all kinds of ancillary companies to make additional profits out of the workers' comp arena to have nothing to do with investment income. I mean, they own IME services; they own durable good network companies and PPO panels that they sell to other folks; they do medical cost reviews for self-insured employers. So the whole system of where the money comes from in insurance has changed. And if you really start to think about it, it's really probably why the pressure on changing what workers' comp is all about is happening.

You know, if we really take a hard look at what is going on with premium, there are a couple of real drivers of this piece that nobody seems to mention. The first thing is – and Ed talked about payroll fraud and people not reporting what they actually pay, but there has been a tremendous growth in an underground economy, some of which is legal, and some of which it isn't legal. And certainly we all know about low-paid workers for whom their employer doesn't bother to pay Social Security or taxes, and certainly not unemployment. But there has also been a tremendous growth of folks who are deemed to be independent contractors, people with high-paying jobs, who no longer pay into the system.

So all of the sudden, that piece of premium is gone. And the other thing that has happened in workers' comp is there has been a tremendous growth in self-insurance. And labor has always been supportive of self-insurance because we always thought that self-insured folks had a real interest in keeping injuries down, and that is what we like. But the other piece that is happening is that good employers to have less injuries that for the most part pay their employees higher also don't pay premium any longer to the process.

So what is happening is there is more and more bad apples in the pot when it comes to premium, and premium is going up. So things have to happen in the legislative arena to push premium down. But it's about loss of premium. It's about the de-

socialization of the workers' comp system, of all of these folks that no longer are covered or pay premium.

So, and I mean, we hear about people that come in with a preexisting condition, and the answer is, well, cut them off. Well, I think the answer is that an independent contractor who comes down with some degree of carpal tunnel as an individual contractor should have been paying some kind of premium all along. And then when they switch to go to work for some other employer later – and I'm getting the two-minute warning – then when they go to work for an employer later, there is some way to go back at the policy that was there previously.

Now, as Ed said, it's not just about the adequacy of benefits; it's also about the accessibility of benefits. And one of the things we see as a real problem in the labor movement, is the consumer really isn't truly identified in the workers' comp system. And what I mean by that is I think we need to take a real look about whether we are going to have a system where carriers that make profit and unneeded cost with no outcome to workers continue to be in this process as they currently are.

I think we need to make a decision whether, one, we decide to let government agencies, through a collection of surcharge for workers' comp, pay benefits and run medical care, or do we start to give employees the option of who their carrier is? I mean, think about it, right now, the only criterion for which insurance company you select is the cost is for the employer.

It has nothing to do with the way you're happy or not happy, but how you were served as an injured worker. So I think either we, one, move to a system where there is a surcharge, like Social Security or unemployment insurance, where a government agency runs and administrates it, or we move to a system where the employees have a choice of carriers, and over a period of time, with information about the performance of the carrier, can decide to stay with that carrier or move to somebody else.

I have been given the signal that time is over. I need to, as a point of personal privilege, just to clarify that in New York, it is not a criminal act to direct medical care by an employer, but it is a criminal act not to tell the employee their rights under the law before you direct the care. And that is a far different than what our employer rep said.

(Applause.)

MS. CLAYTON: Thank you very much, Art. Interesting perspective because the next panel member is in fact the head of a mandatory state fund for the state of Washington. Bob?

Commentary

Bob Malooly, Assistant Director, Washington State Department of Labor and Industries

BOB MALOOLY: Well, thanks, Ann. I don't know if you noticed, but I was sort of stuck sitting between the labor guy from New York and the capitalist insurance company. (Laughter.) It's sort of the position that I find myself in pretty often because that is where we sit in Washington. We are sort of between business and labor. And when I was Chairman of the Industrial Commission in Illinois, I was sort of in that same position. You are between both sides.

And one of the problems that I see in workers' comp is there are lots and lots of good reasons for business and labor to fight. But unfortunately, those fights get so intense that both sides frequently lose the recognition that they have a very, very powerful common interest in making these systems work well.

I have the pleasure of conducting rate hearings around the state every year, and you may know that Washington had a 40-percent rate increase a couple of years ago, just after I came on board. (Laughter.) And it wasn't because of uncontrolled costs; it was because we lowered rates substantially in order to return excess capital to the ratepayers, both the workers who pay into the Washington system and the employers. We returned \$2 billion.

But that was a good excuse for both sides to fight, and I was at a hearing in Mount Vernon, which is north of Seattle, and after the hearing, we usually allow time for discussion. And one woman said, "Whose side are you on?" Since I was the new guy, she wanted to know. And I said, "Well, I'm on neither side; I'm really sort of in the middle." And she said, "No, you have to choose – (laughter) – are you on the side of the employer or are on the side of the injured worker?"

And I really took offense at it because when you think about what is best for workers in these systems, and you think about controlling costs and all of the other kinds of things the employers think about, they are exactly the same thing. You want workers to get good care. They get good care by good physicians. The costs are lower. The residual disability is less. So providing the best benefits and the best care for injured workers really is in the interest of employers. And you back up a step, providing safe work environments that avoid the entire cost is really in the best interests of both sides.

And so I find my job is trying to get both sides to stop fighting and recognize they really have a powerful and common interest. If you want to fight, then you can wind up with these systems not working very well, not serving the interests of workers or employers, and the consequences from an economic perspective – as Bob said, some employers look to workers' comp to make decisions about where they are going to put jobs. You want to keep the high-paid jobs here. So these systems should work together toward that goal because that is key to successful economic outcomes.

And one thing about workers' comp, in mentioning Ed's comments: good news is bad news and bad news is even worse. Success in safety. If you can imagine for a moment if you were driving a car from, maybe the 1960s, and you got in a fairly serious accident, back when they had the chrome knobs sticking out of the radio and all kinds of hazards and everything designed into the car: no airbags, no safety belts, none of that stuff, no crash zones.

Well, how many workers are killed on the job driving? And when you think about improved safety, not only the deaths that are avoided because of the design of cars, but think of the orthopedic surgeons that are getting less work as a consequence of safer automobiles. Well, that is good news for the general driving population. It is good news for workers, and it drives down costs.

So if you look at declining costs in this system and say that is bad news, if it is driven by increased safety, better healthcare, and better return to work, that is good news; it's not bad news. And so we really need to understand the complex interactions here when we are making assessments about what this system is doing. Washington has a 38-percent decline in claims. Why? How much is due to better safety? We think that there is some discouraging of filing claims, and that is a problem. We want people who are injured to file claims, but I think most of it is driven by improved safety in the system.

And we talk about healthcare for a minute. One thing you don't want to do is make your health policy decisions using a trial-lawyer mode. You know, I dealt with a lot of trial lawyers when I was running the workers' comp court in Illinois, and for individual rights, trial lawyers are great. Under workers' comp, you know, this person was helped; focusing on that individual worker, the trial lawyer, doing what they are supposed to do, says, "Pay my guy."

But if you looked at that technology from a broader perspective and said some people are helped. Maybe it's a placebo effect for some folks. For some people, they were lucky. The technology really helped them. But on the other end of the spectrum, you have workers who might be dying from it. Long-acting opioids, we have had 60 workers killed in the course of about three years from overdoses in Washington state. We have set healthcare policy using evidence-based medicine. What is the whole story? Not just what one trial lawyer's client story is, but what is the whole story? And if we use evidence-based medicine, we will pay for things that help, and stop paying for things that harm.

You know, we have all kinds of controversy about spinal fusions and all of that sort of stuff. Well, really what is helping injured workers on balance? When you can't tell in advance who is going to be helped and who is going to be hurt, what should we do? And those are very, very difficult positions that are very easily criticized. And I think evidence-based medicine is one very powerful tool.

And the other tool I think is strategic medical payments. I think Bob mentioned hospital-acquired infections. I think the accountants are the key to that. And accountants

don't have many opportunities to save people's lives, but I think you could design a system where the accountants would save people's lives. And when you think about hospital-acquired infections, a lot of them are simply because people don't wash their hands.

And if we had a strategic payment system that said if somebody goes into the hospital, for surgical procedure, and they come out without an infection, we will pay them more for that whole episode of care, not a lot more, just a little more. If somebody goes in and winds up with a hospital-acquired infection, pay them less, and I'll bet you you'll have the accountants running around the hospital making sure everybody washes their hands. That is what we are trying to do with workers' comp in Washington. We want the best orthopedic surgeons to be willing to treat injured workers because those are the guys that are busy, and those are the guys that will say, "look, I'm the best in this business, and I don't think surgery is going to help you."

Now, how much more valuable is that opinion than a surgeon that is having trouble filling up his surgery calendar? You know, when you want good outcomes from injured workers, it means that you have to be able to get the best docs willing to treat, and we are really trying to do a lot to cut down the hassles, the time and delay in the system that are driving out the best providers. We want to pay those guys more so the injured workers get the benefit of it.

And Ann is telling me I have got to leave here – (laughter) – so my closing message is focus on the common interest because that is the key to success in this program. Thank you.

(Applause.)

MS. CLAYTON: Thank you, Bob. And now, last, we have Paul Rodliff.

Commentary

Paul Rodliff, Senior Vice President, Liberty Mutual Insurance Company

PAUL RODLIFF: I may be given signal as soon as I step up here, given how much time we have taken. Thank you. There were a couple of kind comments about Liberty Mutual, and I would remind all of you that we do sell workers' compensation insurance if you're in the buyers market, and that we are also the seventh-largest writer of personalized insurance, so all of you, I'm sure, buy auto and home. So take those kind comments as a reflection of what our organization is all about.

The good news I guess is that I'll go quickly. If you look at the first four bullets, I guess you would say that all of the constituencies agree on certain things. A good comp system should have fair benefits. The incentives embedded in the system should reward good behaviors for all of the players. Access to quality care is critical and there should be an efficient process for handling claims and resolving disputes.

The two parts that are probably unique to an insurer's perspective on this slide is that we do like stability and predictability in our business. And if you think about it, we write a policy and we try to kind of guess what the costs ultimately will be. Most people in a business know their costs and price their product accordingly. We are in a business where in some regards we don't know our costs.

I happened to be in California selling insurance from the years 1998 to 2001, and those were very bad years, which led to California insurers going insolvent. And at the time, we were putting out rate increases of 40, 50, and 60 percent. It is not good to go to an employer and ask them to pay that kind of rate increase. And now you see rate decreases of significant amounts in California. So there is predictability about our business that is good for all of the players, I believe, and we like that.

And finally, you might be surprised that we like competitive marketplaces, but we do. And when you see residual markets getting up to 25 or 30 percent of the market share – I won't make any comments about state funds; I'll keep that out of it –there is an issue about having plenty of competition in the marketplace, and we are all in favor of it; we don't mind competing.

I'm going to give you some observations on some data, and we'll have the benefit again of knowing where everybody was going. But I think if I was sitting in the room after a few slides that I do, maybe there will be some interesting confusion, if nothing else.

Let me just say that the Bureau of Labor Statistics has been reporting workplace injury rates since the 1970s, well over 30 years ago. Workplace injury rates are at the lowest point in that 30-year period. That has an influence on the cost in the system. And I'll show you some data. But the next point about what we are paying on a per-claim basis to individuals for both wage replacement indemnity and medical benefits is outpacing some of the baseline indicators of both wage and medical inflation.

So as I said, if you look back over 1992 to 2005, workplace loss time accidents are down 40 percent. This is a good thing. I don't know how something like this becomes a bad thing in our business. Employers should be congratulated; employees should be congratulated. There are a lot of reasons for this but the reality is there has been over a 40-percent decline. It's pervasive.

If somebody wants to tell you the reason for this, it's across every state, it's across all industries, and it's across claim types. There are a host of reasons why, but for instance, we are safer in our cars, we are safer in our homes, we are safer in our businesses. So before you go to any conclusions that the reason why you have seen this decade-long trend in reduction of frequency, take into account the pervasiveness of it.

It can't be because there are bad employers out there, here and there. You would have to have every employer across every state and every industry to say, you know what, let's stick it to somebody. To me it doesn't make any sense. If you look at core wage inflation and you look what the benefit costs per claim, again, everybody agrees there are less aggregate costs in the system today. I would suggest it's a good thing.

If you look at it on a per-claim basis, over the last 10 years, wage inflation is up about 33 percent, so three-and-a-half percent a year or so. At the same time, we can't pay on anything else other than the claims we have, so I don't know what else you measure it on. But benefit replacement costs per claim are up 80 percent over that period of time. Medical costs are part of the benefit. I don't know if the providers are bad. You know, when we all know what is happening on the group side and why things like Medicare are threatened from a solvency point of view. Medical CPI in the last 10 years is up 42 percent. Medical benefits paid on behalf of the injured worker are up 125 percent over that 10-year period.

So, not surprisingly, we have some concerns. And, again, most of these have been mentioned: high growth and medical costs. Workers' comp is unlimited medical. It's lifetime medical. Let's put it this way, there are no insurance products sold today that have no limits or caps and are lifetime in their nature. Workers' comp is. We sell a product today. We charge it today's prices. If medical inflation is 10 percent a year and we have to provide treatment to that injured worker 40 years from now, you can do the math. Yeah, long-tail line of insurance is a good thing except when medical inflation rocks along at the kind of increases we have seen.

Prescription drugs. I would make one particular point here. In the state of California, provider-dispensed prescriptions drugs are 36 percent of the costs. In the rest of the country, it's 3 percent. You can go on websites in California by these folks that are pushing how doctors can make money by prescribing drugs out of their offices. The websites boldly state that you can make a hundred thousand dollars a year by giving that person that prescription in your office rather than sending them to the Walgreen's down the street. And they are very bold. They say, "hey, if it's worker's comp, we can charge two or three times what the same drug would be down the street." So just a little area we might have to address.

Finally, one concern probably not raised by other people is catastrophic events. Again, there is not another insurance product in the marketplace that you write with no exclusions and no limits. So needless to say the industry does look at issues of catastrophic events and that is why you hear a lot of talks about TRIA and federal back stubs.

My last slide: suggestions of regulations that I think are win-win. You have heard so many divergent points of view. At some point, we all believe in the fundamentals of this system, but why are we so divergent in how we go about crafting the right system so that everybody is well served? Here are some things that, in my experience, work in various states.

One, why you don't pay some benefits right away? Because in many states, you make that first benefit payment, you own that case, and so you better be real sure. And in many states, you have to make that decision within 14 days. You go look at some files where somebody has a heart attack at work and try to figure out within 14 days whether that heart attack is compensable or not. That is a tough job.

States that allow pay-without-prejudice periods essentially say for 90 days or 180 days you can in fact pay somebody, which is probably the right thing to do in many instances, but you're not on the hook indefinitely. If during that 90-day period you have the opportunity to obtain the evidence that says this is not a work-related injury, you then can stop the benefits. You are not on the hook then to apply and wait a year-and-a-half to do that. So pay-without-prejudice periods I think reduce litigation, do get benefits to injured workers more timely, but it protects the employer/insurer from buying a case prematurely.

The rest of it, we have talked about PPD ratings. And, again, I would just echo that there is a lot of science about this and shame on us if we don't use the science of the day. With the AMA and the ACOEM guidelines, there is enough science on this to figure out what really should be appropriate disability ratings.

Other than that, I think you have heard this stuff from other speakers. So I would say that the treatment within networks that the HCN and healthcare networks in Texas and the NPN medical provider networks in California from our perspective are great solutions to providing adequate quality medical care and at the same time taking a shot at controlling costs. Thank you.

(Applause.)

Discussion

MS. CLAYTON: We have purposefully left plenty of time for questions and discussion. One of the purposes of the day is to stimulate discussion and maybe even some new ideas or problem solving. I think that you have gotten plenty of issues raised by the speakers and the panel members about current workers' compensation, what is happening, and their perspectives on that. We now open the floor to questions. I would encourage you to come to a microphone because we are recording the sessions and that way we'll hear your question; everyone will hear your question. So open it up to questions, comments.

Q: It's more comments than questions because I am a physician. I don't know how many other doctors there are in the room. I practiced occupational medicine for 25 years trying to get benefits for people with occupational disease rather than injury. I also worked for a large hospital here in D.C. doing employee health and workers' comp. So I have the medical perspective.

And so I was writing down all of these things that everybody said that showed you knew nothing about the practice of medicine. There are two things I want to say, which is that evidence-based care sounds like a great idea, but it's amazing how much medicine we practice without any evidence on which to base it. And so, if you say we're going to just provide medical care based on what we know is good care, you're going to stop providing a lot of care, workers' comp and everything else.

Now, it's absolutely true that a lot of hospitals and providers don't treat to the evidence, and we do have evidence for treatment of stroke, treatment of coronary disease, treatment of risk factors like hypertension and high cholesterol, and you may be familiar with the Cochran review system, which is doing a wonderful job of going through specific diseases and really developing the evidence base. But it takes a couple of years for each condition.

So I think in the area of workers' comp, there is a good deal of evidence of work-related injuries and still much debate about treatment of back injuries, most of which says we don't really know how we can help these people. That is not at that helpful if you want to be a provider or you want to get the people back to work. But a lot of the other orthopedic injuries, there isn't a lot of evidence. So I caution people and say, "well, the problem is we're not using evidence-based care."

But I do think the approach of using the most experienced physicians gets you expert-based care, which is probably the next-best thing to evidence-based care. So that is just the doctor perspective. It's like the difference between pay-for-performance and pay-for-expertise. And if you're rewriting workers' comp systems, paying people more if they don't get a hospital-acquired infection makes sense. Medical societies are trying to deal with it, as are the insurance companies and Medicare.

MS. CLAYTON: Thank you for your comments. Any of the panel members want to address –

MR. STEGGERT: I have got one. Evidence-based medicine is absolutely not the panacea, and as ACOEM particularly acknowledges, there might be good reasons to deviate for patient outcome or reasons. In my view, all this evidence-based medicine does is ask the physician to document the whys and wherefores, and give the payer a responsible position to make a determination.

As respects such things – and every condition obviously is not addressed in terms of acute stages down the road, and there are certainly difficult aspects to address. But, for instance, in the area of intervertebral discs that are still experimental in certain circumstances, we have got experience for recommendation for back surgeries for artificial disks. In some circumstances we approve it; in some circumstances we don't approve it. If a peer-reviewed physician backs it up and says in this circumstance it's appropriate; we pay for it. If it's not, then we take a tough decision and don't pay for it.

So it's clearly not a panacea, but it's better than doing doctors and systems where you don't have any checks and balances on quality and the purchasing of medical services.

MR. WELCH: I think also you have to understand the level that we are dealing with. I had a colleague who hurt her back, went to her family doctor and he told she needed bed rest for three days. Okay, there are still physicians out there that these people are paying to give bad advice like that, and they are just very frustrated trying to raise that level of care.

MS. CLAYTON: Yes? And please introduce yourselves.

Q: I am Bob Aurbach.

Several of the panel members have noted my interest over the years in reforming the federal bankruptcy's treatment of workers' compensation, but I don't think I have ever had a chance to talk to either Art or Ed about it. And, Ed, I noticed with regards to your bill of rights, you had expressed concern about the starve out of injured workers that sometimes occurs. I'm just wondering whether you and Art had considered the de facto starve out that occurs every time a self-insured employer goes into bankruptcy protection and leaves the worker to the general administrations of the bankruptcy system.

MR. WELCH: Oh, sure – (laughter) – that is an issue; that is a problem. I guess I would say, Bob, that Bruno gets enough extra security that we don't do that, but if Delphi goes under, everything falls apart in Michigan. Insolvency of self-insured employers and the ability to get repayment through the bankruptcy system is a continuing problem that I agree we have to deal with.

MR. WILCOX: And I agree that most workers' comp boards have power that they don't utilize today. Some have it administratively. Some might need new legislation to do it. But I feel that once a case is decided, and there are periodic payments into the future, that those reserves should be put some place where they are then safe from bankruptcies, whether it be a fund within state government, but some place where that workers' payment wouldn't be impacted by a bankruptcy.

Q: There is a live proposal for reform of the federal bankruptcy code with some surgical language that does address that.

MS. CLAYTON: Thank you, Bob. That is okay, Doug, and then we will come to Peter.

Q: Doug Kim with the Applicants' Attorneys Association in California. I have two questions, one for my good friend, Bob Steggert; the second for the gentleman from liberty.

You both indicated that you think that the causation standard for compensability should be increased to predominant causation or some such. That goes against the exclusive remedy bargain. If you want to have a higher causation standard, would you support civil damages for negligence against employers?

And my second question for Rodliff is you indicated this staggering long-term trend in decline and claims frequency. You attributed part of that to better safety in the workplace. I hope that is true. I just wondered if you were familiar with a Los Angeles Times series about three years or four years ago that indicated the decline in claims frequency was in large part due to a national campaign by the industry to depict all claimants as frauds. And secondly, I was recall there was a study done by the state of Minnesota presented at an IAIBC conference a few years ago, which indicated that in that state, there was a precipitous decline in claims frequency following an extended media campaign on the issue of workers' compensation fraud. Thank you.

MS. CLAYTON: I think the first question went to Bob.

MR. STEGGERT: Okay, Doug, to address your question on predominant cause, as you know, in a lot of states they don't address that necessarily across the spectrum of all injuries; they do it in subcategories in many cases. In California, as you know, they had the mental-mental abuse stress claims that they threw out entirely. Other jurisdictions have elected to address it by the more subjective injury claims that relate to aging workers or other circumstances. Obviously, if you have an acute fracture arising out of work, that is compensable in all jurisdictions. That doesn't require a predominant cause finding it; it is compensable on a de facto basis.

As to supporting civil damages, when a state has made a carefully balanced public policy decision for entitlement under workers' comp and civil damages, no, I do not support a tort remedy there. Exclusive remedy is the remedy, and unfortunately, if it is

not payable under the workers' comp system because of a public policy decision of what is appropriately payable and what is defined under the law as a rising-out employment, there should not be tort liability to employers or insurers.

MS. CLAYTON: And Paul?

MR. RODLIFF: The predominant cause issue. I think you just have to recognize again that people are living longer, there is an aging workforce, there is this question about co-morbid conditions and how much of it do you owe, and you are operating in the environment where medical is lifetime medical.

We took a look at the top-one percent of our claims that on average were about \$600,000 in medical care. Well over a third of those claims were soft-tissue injury claims, but every single one of them had significant co-morbid conditions around hypertension, diabetes, and psychosocial issues. There becomes a point where what is the obligation to – for the life of that individual to treat it in its entirety and you get away from a low back strain. At a point, low back strains resolve, yet there is plenty of cases where 10 and 20 years later, with no surgery, no radical interventions, but lots of pain management, these cases become incredibly costly.

So it's a difficult issue. I don't mean to imply it's a simple one to say how do you get to this point where you say benefits associated with the industrial injury are resolved and ongoing disability is related to a general aging process, in co-morbid conditions. These are difficult issues, but you have got to give some relief to the employer community and not just have it that they continue to pay; the person who is disabled continue to pay. I just think that that is a system that will eventually go bankrupt.

The second issue is, no, I'm not familiar with the L.A. Times series. I was out of California by then. So I'm not familiar with it at all.

MS. CLAYTON: We have two other panel members that would like to comment on the questions. Art and then Ed.

MR. WILCOX: I'll take the second question first, and that is the issue of the decline of injuries. I'm a member of the New York state rating board. And what we have been told is that although there has been a decline in injuries, there has been an increase in severity. And if folks in the room from various states think about it, it's not just about an increase in severity. In recent years there has been legislation in a lot of states that no longer require you to report band-aid injuries. So the minor injuries are falling off the chart; the more major injuries are staying there, so of course there is an appearance that the injuries are more severe.

And the other thing on the predominance of evidence on the injury, I mean, either we are going to have a system that really is an insurance product or we are not going to have it. I mean, if I was to buy life insurance for someone and somebody died and it took me a year of hearings to get the benefit, I would think sooner or later I would say we are

not going to buy from that company any longer. And if I was to buy auto-insurance, and they would say, no, go to the junkyard and get your parts because we don't want you to get them from the new rack, I would think sooner or later I would say no to that carrier.

And if I was to buy disability insurance, and it wouldn't pay me, and I have to fight all of the way through the process to get paid, I think I would say I don't care how much that damn duck quacks on TV, I'm not going to buy the product. So either we are going to have an insurance line that really delivers or we have got to change the system.

MR. WELCH: If I can just comment. Paul suggested that part of the decrease in injury frequency is due to a real decrease in fewer workplace injuries, and he's undoubtedly correct about that. Doug suggests that part of the decrease in reported injuries is a decrease in who reports injuries and how we define a work-related injury, and Doug is undoubtedly correct as well. The question is how much is attributable to which and I think John has taken a very important step in trying to describe that. There are other ways we could examine that.

There is, for example, a national survey that asks a sample of Americans if they had healthcare expenditures that were related to a workplace injury. We could compare those responses to workers' comp claims, and there are probably five or six of us in this room, who, if you would give a grant to any of us, we would help you find some answers to that.

MS. CLAYTON: Okay, Peter, I think you were next, and we'll come to you, Bill.

Q: My name is Peter Rousmaniere. I would like to pick up on a really interesting observation by Mr. Wilcox, and then direct a question to Mr. Rodliff, and that is, Mr. Wilcox, your comment, which, if I got it correctly, is that we are going through in effect the de-socialization of risk. Now, we all know that it has, from the very beginning there were a lot of risks that were outside of the system; for example, agriculture. But we are now faced in 2006 with an increase in risks, which are not being covered.

One is the co-morbidity, which gets awfully complicated. And I would agree the quacking-duck scenario is exactly right. It may look like an insurance policy, but it doesn't seem to be; there is something wrong with it. There are no villains here. But I think the more pressing issue has to do with disease. And the most pressing issue has to do with disease is the greatest occupational tragedy we have had, well, since asbestos, and that is the World Trade Center cleanup workers. There were no heroes there, except for a few, and from – I have done some research on that, and by the way, the AFL-CIO is one of the few heroes in this tragedy.

Mr. Rodliff, if I were to accept all of the statements that you have made about the system working and the system that needs improving, how would you approach what appears to be an extremely large gap in the system in covering disease, particularly in the context that looking forward, if anything, we are going to see a much greater increase in disease issues than in acute injuries?

MR. RODLIFF: Occupational disease is a tough issue. And how to close a gap? I'm not sure; we would have to have a discussion about those diseases and so forth. One of the things that we do in our organization at least is we know we have industrial hygiene, and we get out to our employers' work places, and we do air samples, and quality samples around the workplace environment. So where the gaps are in the occupational disease coverage – most states – again, my recollection is provide three years for somebody to bring that – an occupational disease claim. So you would have to be a little more specific as to the gaps that exist in the workers' comp arena where somebody doesn't have a chance to bring that occupational disease claim.

Q: I'm not an expert on New York, but what seems to have happened was there is a massive collapse of the system, and that you cannot solve it by fine-tuning a few sentences in law, or fine-tuning court procedure. The system was never designed to handle this scale of disease. So we are getting with co-morbidities one obese body after another. Here we have 40,000 workers, and if you socialize the cost of these injuries, you probably double the cost of workers' comp in the state.

MR. RODLIFF: Yeah, I think if you look at the issues around the World Trade Center, you might find it's tort litigation that is underlying that, not workers' comp litigation.

MR. WILCOX: As an expert from New York, I don't think that is completely true. I mean, tort is an issue. Let's say this. First of all, you talked about heroes of the World Trade Center, and cleanup and rescue and recovery, and you gave some credit to the state AFL-CIO, and the AFL- – the gentleman in the back of the room, Bob Snashall, was the Chairman of the Workers' Comp Board when that happened, and I truly believe he is one of the heroes of the World Trade Center, for what he did with the injuries that happened within a very short period of the collapse. The fatalities and the injuries that happened in the first 48 hours have been fairly well taken care of by a board that became very involved in the case.

But what has happened is there are a lot of occupational disease cases that happened and are coming up now, and that the system just has not worked well with. And the case load that has been developed in New York on incidental exposures to toxics made it so that even deputy mayors who were high up in the chain couldn't get taken care of under the workers' comp system. And we have done some real little fixes, but as you said, there is going to have to be a lot of other fixes done in this system to make it reactive and comply with the World Trade Center folks.

So it's a work in progress. I think it's been a good job on the injuries and deaths that happened immediately, but a lot of things need to be done on the diseases because the system just doesn't match up well to take care of disease in New York.

MS. CLAYTON: Thank you. I don't want to mislead the audience either in leading them to think that all of the discussions and issues in New York are all related to 9/11. They are not necessarily. So, Bill.

Q: My name is Bill Zachry. I wear several hats. I would like to clarify a few things if I may. First of all, as the Chairman of the Fraud Commission for the state of California, 26 percent of the arrests made in the last fiscal year were injured workers. The rest were employers and medical providers. And frankly, one thing that was missed in the presentation is that one of the major cost drivers in the system is the fraud coming out of the medical providers. I believe Paul talked a little bit about the repackaging problem for which there are regulations that will stop that, and those regulations are in progress now. But I think you're missing a great cost-driver when you don't talk about medical provider fraud, which is pretty rampant.

The other comment that was made earlier was the self-insureds who may go into bankruptcy. Well, as a self-insured, I'm also on the board of directors for something called the Self-Insured Security Fund in California. And we were put in place when Cal-Can went under about 20 or 25 years ago. And to my knowledge, we have never missed a payment in the entire time that the self-insured security fund has been in place in terms of making sure that injured workers get their payments. We also provide a significant amount of money in security coverage so that when we go under, there is money in place to pay those benefits. I don't know of any state that I do business in where we don't have to have that money in place.

And so I am a little surprised that that is such a huge issue. Maybe there are states that I'm not aware of, but I don't think that is a big problem, frankly, and we can talk about that later.

But the other thing I thought was very interesting. I think that Ed, you, started your commentary by saying that the injured workers have really lost out in the system. And if you look at the increase in the benefits that have been paid on the individual cases, yeah, you are going to have an aggregate drop because there has been a drop in frequency, but I don't think that the injured workers necessarily are getting a short end of the deal. I think they are getting a good end of the deal if we are seeing a significant reduction in frequency, and that is where the focus has to be. And, yes, we need an adequacy of benefits on the other side, but I think that your presentation wasn't necessarily taking into account the overall reduction in the frequency of claims.

MR. WELCH: Well, you know, as I said, I think part of the reduction is a real reduction in real injuries, and that is a good thing for everybody. But part of what is driving the reduction in frequency is that we have changed the definition of what injuries are compensable in many states and that fewer claims are reported today. But I don't in general disagree there is a balance, and there is a question about that. We do have the tools to know the extent to which we are replacing wage loss. You have done that in California, but most states haven't looked at that.

MS. CLAYTON: We really need much more time, but we have none. It's 10:15. I would like to tell you that we are going to take a 15-minute break, and come back. I want to thank all of the panel members, and please help me do that.

(Applause.)

And lastly, in closing, hopefully you all have mentioned in your notes, as well as I have, that there are a number of things that all of these panel members support as far as being a fair and effective workers' compensation system. If we could just all get together to create one. Thank you all very much.

(Applause.)

(End of panel.)