NATIONAL ACADEMY OF SOCIAL INSURANCE

Health and Income Security for Injured Workers: Key Policy Issues

Panel V: How Does the Safety Net Fit Together?

Friday, October 13, 2006

This session convened at 8:30 AM in the Ballroom of the National Press Club, 529 14th Street, NW, Washington, DC.

Introductions

Jackie Nowell, Director of Occupational Health and Safety, United Food and Commercial Workers International Union

MS. JACKIE NOWELL: Good morning, everyone. Come on. When I start a union meeting and I say, "Good morning, everyone," they say "good morning" back.

AUDIENCE: Good morning.

MS. NOWELL: Thank you so much. My name is Jackie Nowell and I'm the Safety Director for the Food and Commercial Workers Union. For folks who don't know, we represent the folks who work in grocery stores. So my California friends certainly remember our strike of three years ago. We are going into negotiations this coming year. We have no plans to go on strike that I know of. We also represent meatpacking and poultry workers. And whenever I come to conferences like this, I always know that I'm in a room with the good guys, but I always feel like it's my job to let you know that there are bad guys out there. The meat and poultry and food processing industry would fall into that latter category, and I certainly don't want to paint too broad a brush, but I do want to tell people in the room about some of the conditions those workers face and I'm just going to take a minute here; since I have a podium I never can miss an opportunity here.

Workers get fired for being injured on the job when they may not have good documentation, when they are worried about losing their jobs, when they're in a precarious situation. So not only is it one of the most dangerous industries in the country, but also if you get hurt, you do get fired or you get a big hassle to get workers' compensation. So again, for folks who may not come across these situations, it's good to understand that those situations exist out there and that's why we need all of you advocating for workers' comp reform and for good access.

The other issue is that we talked about lost time injuries yesterday and I just want to comment on that. For the last ten years, what we've seen, just looking at OSHA logs, is that the lost time injuries have gone away, but that doesn't mean the severity of injuries has gone away or that people are being injured in practically as high numbers that I can see, 30 to 40 per 100, but there are all restricted duty or they've had a change of job. So I just looked at a set of logs where 93 percent of those injuries were restricted duty and a mere 3 percent were lost time, and I saw that shift. It was a shift from lost time to restricted duty about ten years ago.

So I am anxious to hear from our panelists here who not only will be talking about what's going on in comp for workers who actually get it, and we know all the problems with that, but also just keep in mind that they're not all getting it – but also what other systems are out there to try to fill in the gaps.

So we're going to begin with Les Boden, who is Professor of Public Health at Boston University and chairs the environmental health doctoral program.

We're going to hear from John Burton, who is Professor Emeritus in the School of Management and Labor Relations at Rutgers University. Frank Neuhauser, who we heard from yesterday, is on the research faculty at the University of California at Berkeley's Survey Research Center. Finally, Ed Welch, who we also heard from yesterday, is Director of Workers' Comp Center at Michigan State University. So we'll begin with Les.

How Often Do Workplace Injuries Go Uncompensated?

Les Boden, Professor, Boston University School of Public Health

LES BODEN: Thank you, Jackie. Actually, she did the first minute of my talk so now I've got 12 minutes instead of ten. (Laughter.) Allan Hunt talked yesterday about some of the work that's been done recently looking at workers' comp adequacy, where we're trying to understand how adequate are workers' comp benefits by looking at people who have received compensation and looking at the proportion of their losses that are covered by workers' comp benefits. That works very well for people who get workers' comp after they're injured, but of course the replacement rate is easy to calculate for those people who don't get workers' comp: it's zero.

And so it's important to know how frequently people are injured at work and don't receive workers' comp. It's also not easy to figure out how to do this, although in the last several years there have been a number of studies in this area mostly looking at either a specific state or a specific subset of injuries like carpal tunnel syndrome, where they seem to show, for example, that probably at best 10 percent of workers with carpal tunnel syndrome end up getting workers' comp.

So being somebody who likes challenges, I tried to figure out if there is a way to get a bigger picture idea of what proportion of injured workers get workers' compensation. And there are a number of other reasons in addition to the fact that workers are left without the safety net that it's important to study this. To the extent that workers' comp acts as a safety incentive for employers, then workers' not receiving those benefits reduces that safety incentive. And in addition, if we think about workplace safety and health as potentially a national priority, if you're only reporting half the injuries, then you only understand half the problem. So for those reasons and others, it's important to do this.

Well, there are a lot of factors that affect workers' comp filing and receipt of benefits. One of them is just knowing that you've got this entitlement: do you know that a particular injury could be compensated in the workers' comp system? Second is that a lot of people feel like getting workers' comp is kind of like how we used to feel about getting welfare, that it's something you really shouldn't do, that it's a sign that you're a bad worker, and so people understanding that social stigma don't apply.

A third thing, which is the thing that economists mostly focus on, is expected benefits. If benefits are low, you're less likely to file than if they're more generous. A fourth thing, which Jackie referred to before, is what I just call workers' comp hassle. We've interviewed a number of people who have gone through the workers' comp system, and even in states that have the reputation for having a good system, people find it often to be a difficult and demeaning experience.

Employer's attitudes and policies are another issue. So if an employer makes it easy for people to get workers' comp, people are more likely to file. For an employer that either in a positive or negative ways – either by discriminating against people who

apply or by providing group safety bonuses for groups of workers who don't report an injury – you've got the other side of the story. Concerns about job security: also a lot of low-wage workers, particularly if they're illegal immigrants, are going to be worried that filing will not only have them lose their job, but maybe get them sent back to where they came from and, in fact, there is a recent low-wage worker report that CHSWC produced that talks about some of these issues.

So how did I go about trying to figure out the level of underreporting? Basically, I used something called capture-recapture analysis, which looks at information from different sources and links individual injury reports. So you're actually trying to look at the same report and ask the question: How many injuries are reported to both sources? How many are only reported to one? How many are only reported to the other? And given certain assumptions, you cannot only add together all the injuries that are reported to one or the other, but you can also try to estimate the injuries that are reported to neither.

Mostly when you use this method, you assume independence of reporting. What does independence of reporting mean? Let me just go to the sources for a second. One of them is the Bureau of Labor Statistics' Annual Survey of Injury and Illnesses. This comes from the OSHA 300 form that employers are required to fill out. The other is a complete count of all the workers' comp injuries in half a dozen states, and what we're doing then is we're matching the injuries that are reported to both of these on the understanding that each one of them alone probably doesn't get complete reporting.

So question: If you knew that an injured worker had received workers' comp, would you think it was more likely than another injury to be in the OSHA log? So how many people think that you wouldn't really expect it to be more likely to be in the OSHA log if it had been a workers' comp injury? And how many people think that if you knew it was a workers' comp injury, it would be more likely to be in the OSHA log? Okay. So most of you think like I do that these two things are positively correlated. The statistics show us that when they're positively correlated, that if you use those data that you're going to get a lower-bound estimate of underreporting. Okay.

So I'm looking for a very conservative estimate of underreporting first by assuming that these are not positively correlated. So quickly, these are the states we're looking at: Minnesota, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. We've just recently gotten California data and hopefully by this time next year, I can tell you what the story is in California, and here's what we found. First of all, Bob Malooly should be very happy. Washington on these very conservative assumptions compensates the highest proportion of work place injuries. On these very conservative assumptions, only 6 percent of lost time injuries in Wisconsin go uncompensated. In a second, I'll relax the conservative assumptions and show you some other information.

And our top two, Washington and West Virginia, both are above 90 percent, but our bottom three are below 75 percent, that is, more than one in four injuries with lost time greater than the waiting period didn't receive workers' comp. Now, supposed we

relaxed this independence assumption, which 90 percent or more of you thought was not a realistic assumption, and supposed we assume instead that (and here I'll use an epidemiology term and try to explain it roughly) that the odds ratio for getting workers' comp benefits is five if you've got an injury that's reported to BLS. Basically, what that means is sort of like a horse race. You want to bet on the horse that's reported to the BLS or the horse that didn't report, and basically fair odds would be five to one that the horse that reported to BLS would receive workers' comp benefits.

And what do we see? Well, with an odds ratio of five to one, our estimate of completeness of workers' comp payments drops substantially. Washington goes from 94 percent to 85 percent, that is, 6 percent of workers to 15 percent have lost time injuries, but aren't compensated. But Minnesota and New Mexico actually go below 50 percent. Let me stress that this system probably only works for acute occupational injuries. I don't have a lot of confidence that it works for occupational illnesses, chronic illnesses because basically, virtually none of them get into the system. If you look at the numbers, there are some states where I couldn't even estimate what the reporting rate might be because there were so few reported.

What are the implications for workers' comp? Well, if you think about benefit adequacy and you've got a replacement rate of zero for conservatively 6 to 37 percent of injuries or less conservatively 15 to 55 percent of injuries in the states that we're looking at, you've got a bigger adequacy problem than might already have been indicated by the studies that were based on workers' comp beneficiaries. Safety incentives, to the extent that they exist are going to be reduced as well because employers aren't paying these benefits, and as the CHSWC report and others have said undercompensation may be particularly concentrated among workers who are already low-paid and otherwise marginal, thus exaggerating the problem for those workers.

So I've said my conclusion and my time is up. In four out of the six states under the most conservative assumptions, less than 80 percent of the injured workers received workers' comp benefits; under the less conservative assumptions, it's less than 60 percent in those four out of six states. Important questions are still left: can we identify why it is that particular workers aren't receiving benefits? And what is the impact on those workers? What happens to them? Do they end up on Social Security Disability Insurance? How do they manage? How do the families manage to cope when there is no income replacement from workers' comp?

Here's a list of people I want to thank, but it'll take me five minutes to read the list. So you can take a look at it. (Laughter.) Thank you. (Applause.)

MS. NOWELL: Thank you.

How Do Changes in Workers' Compensation Affect Social Security Disability Claims?

John Burton, Professor Emeritus, School of Management and Labor Relations, Rutgers University

JOHN BURTON: This is an examination of how changes in workers' compensation affect social security disability claims. It's a paper that I'm working on with Steve Guo, a PhD student at Rutgers. Monroe Berkowitz is also involved in this project, although he's not had the opportunity to review and critique the results. I also want to mention that Terry Thomason was involved in the beginning stages of this research and was crucial in formulating some of the variables.

These are preliminary results that were only available as of last week. You're the first humanoids to have seen these results other than Steve and me, and so I want to warn you that these results may change as we do further work. However, we thought it would be interesting to show you these preliminary results. As to the presentation I'm going to make, the best analogy I can think of is when I was a kid I sometimes used to play speed chess, where you had to make a move every 30 seconds or you lost. I feel that's kind of what I'm into now in terms of these slides. So if they're going fast for you, they're going fast for me as well.

Figure 1 shows you what happened in workers' compensation in terms of cash benefits per 100,000 workers over the period from 1985 to 1999. Those are the only years for which we currently have data available for some of the variables. You will see that there was an increase from about $17 million per $100 of payroll in 1985 to a peak of about $25 million in 1989. Then there is a steady decline through to 1997 when there was a little less than $13 million per 100,000 workers, and there was a slight increase by 1999. Steve and I are working on a paper that tries to explain those changes in workers' compensation cash benefits over that period.

Today, however, we're looking at a different question, although it's related, as you'll see it in a moment. This is a look at what's happened to applications for the Disability Insurance program under Social Security, as shown in Figure 2. The DI program, as you probably know, requires that you have an extended work history in order to be eligible for the benefits. It also requires that you have a total disability. So it's obviously not directly comparable to workers' compensation, but one of the questions is whether there's any relationship between these two programs and specifically whether the developments in the workers' compensation program during the '90s might have had an impact on the general increase in DI applications during that period?

There's been some speculation that workers' comp changes affect the DI program. Emily Spieler and I have written a couple of studies saying we thought that there might be some spillover from workers' comp to DI. The NASI annual report on workers' comp has also raised this possibility. Those were qualitative speculation because they only were based on changes in national averages without any real way to quantitatively test the relationships. Today is a first look at what I will call an empirical

examination of this issue. What we have done is to collect data for not only the 15 years, but for 45 or 46 states in each year. So we're looking at a series of variables, with state level data; there are 529 observations that we're using in this empirical examination.

And now I'm going to show you what we did in our study. If you want to think about the data in Figure 2 as being the dependent variable, I'll show you what the independent variables are. I'm going to make you econometricians by the Socratic method – (laughter) – in six minutes or less.

One of the things that we postulate may affect applications to the DI benefit is the level of benefits that you could expect to get from the workers' compensation program. The data in figure 3 shows you our estimate of the generosity of cash benefits prescribed by state workers compensation statutes. The estimate is based upon an actuarial procedure related to procedures used by the National Council on Compensation Insurance (NCCI) when they evaluate statutory changes in workers' comp programs. It's what I'll call an objective assessment. It's an assessment Terry, Steve and I made using the data from each state's law for each year on benefit levels, durations and so on. We estimated the benefits that a representative sample of injured workers would receive. And you can see that the benefits declined over parts of this period, although benefits increased in the last several years through 1999.

Now, here is where the economics comes into this. If you have the data in Figure 3 as an independent variable, what sign would you expect on this variable in predicting changes in the DI application rate (Figure 2)? As benefits get higher in workers' comp, would you expect the DI applications to go down or up? Down. Okay, good. That's what we expected, too. It is nice to have at least one person out there who is into the spirit of this thing. The notion is if your workers' comp benefits are more generous, you're less likely to apply for DI benefits.

Figure 4 gets a little more complicated. This is what we call workers' compensation compensability rules. Every year, the NCCI publishes state-by-state estimates of the effect of statutory changes in workers' compensation laws. They take into account not only the objective changes, that is, duration of benefits and so on, but they also assess the expected changes in benefit payments due to changes in compensability rules. If you change the eligibility rules to make it more difficult to get benefits or easier to get benefits that will be included in the NCCI's overall estimate of these statutory changes. So we can take the overall estimate of the statutory changes from the NCCI and subtract from that our estimates of the objective changes due to objective factors like duration and the difference is what we've termed changes in compensability rules.

So for example, if a state were to pass a law making carpal tunnel syndrome compensable that presumably would make the variable we're measuring here a positive number. If the state pass a law that – along the lines that Emily Spieler and I identified – changes the burden of proof and makes it more difficult for workers to obtain benefits, or requires objective evidence for medical causation, or excludes certain conditions, or

makes medical conditions only compensable if the work injury was a major contributory cause, then you would expect a negative number for this variable. And what you can see in Figure 4 is that over the periods of 1985 to 1999, there was a rather significant and continuing decline in compensability rules for state workers' compensation statutes.

Now, what sign would you expect on this variable if you're trying to predict applications for DI benefits? If workers' comp were easier to get, you'll expect the applications of DI to go down. So this is, as I said, a little more complicated, not quite as intuitive; you would expect a positive change in this variable to have a negative impact on DI applications.

Figure 5 is a variable that measures the relationship between what's reported to BLS and what shows up on the workers' comp system. The higher the value of this variable, the less likely it is that cases reported to BLS show up in the workers' comp system, and you can see over this period of time benefit stringency increased. We expect the sign on this to be positive, that is, if a workers' comp system was tougher to get into, we would expect more cases to show up in applications to the DI system.

The next variable is the disability prevalence rate (Figure 6). This is from surveys of population by state that shows the percentage of disabled persons among ages 21 to 64. And you'll see that the number in general was increasing over this period. We expect a co-efficient on this variable -- the disability prevalence rate -- to be positive; the more disabled persons in the state, the more we would expect people to apply for DI benefits

The next variable shown in Figure 7 has to do with all persons who apply for disability insurance. This is the question: Of all those people who apply for DI benefits, what percentage is accepted? And you'll see it fluctuated quite a bit over time. Here we would expect the sign to be positive. The higher the acceptance rate, the more there should be people applying for DI benefits.

And then finally, in terms of explanatory variables: the unemployment rate, as shown in Figure 8. We expect that the higher the unemployment rate is in a state, the more people will to apply for DI benefits. So we expect a positive co-efficient.

Now, we go to Table 1, which provides a test of the hypotheses. This is what we do as economists. We offer a set of hypotheses and then we test them with data. We have 529 observations and we run regressions. (For those of you who are interested in this "stuff," the regressions control for fixed effects.) The results are in Table 1, which you're going to have trouble reading on the screen, and it's even worse if you try to read the handout: we should have provided magnifying glasses.

Essentially, what we found was this. The unemployment rate has a positive co-efficient that is statistically significant – that is, the higher the unemployment rate, the more people apply for DI benefits. This is what you would expect. The DI acceptance rate had no statistically significant relationship with the application rate. That's quite surprising to me, but that's what we found. Also, the disability prevalence rate in the

state – how many people in the age from 18 to 64 were disabled – had no impact on the number of people who applied for DI benefits? Again, not what I would have expected.

The benefit allowance stringency, that is, what percentage of cases that are in the OSHA system end up on workers' comp? Also, not significant. The results that I find most interesting are that the changing compensability rules in the workers' compensation program had a negative impact on DI applications, which is what we would have expected and the results are highly significant. In addition, the expected benefit levels in workers' compensation also had a significant impact on DI applications. The states that had higher workers' comp benefits had fewer applications for the DI program.

These results are tentative, as I said before, but for what they're worth, we now have some evidence that indicates changes in the workers' comp program have an impact on the DI program. Over the period from 1985 through 1999, which are the years we've looked at, workers' compensation changes were a factor in increasing the number of applications for Social Security Disability Insurance benefits. Whatever the merits of the changes in workers' comp system in the 1990s – and obviously over the last day and a half, we have heard various view points as to whether these changes in the workers' comp system are good or bad – the point of the current study is that we now have some evidence that changes in workers' compensation have a spill-over effect on the DI program. I would like to talk about the political implications of that finding, but I believe my time is not only up, but exceeded.

Thank you.

MS. NOWELL: (Laughter.) Thank you. (Applause.)

How Do Workers' Compensation and Short-Term Disability Programs Overlap?

Frank Neuhauser, Survey Research Center, University of California, Berkeley

FRANK NEUHAUSER: Good morning. It's nice to be here again. And let me start up by wrapping up a couple of things that we've covered the last couple of days that have been a theme and lead well into my talk, actually led even better into John's talk and the session that comes after this, and that's first that we saw a lot of concern by employers about this issue of causation. People discussed the fact that some people interpret the causation, whether an injury is occupational as in terms of the evidence implying that an injury was caused by work.

In California, we use the level of contributing cause, which many people define as 5 percent or more, and many injuries particularly things like psychiatric injuries are hard to assign injuries are given a causation level of preponderance of evidence. So they want 50 percent of the cause in these cases to arise out of work and then the employer is responsible, and one of the big problems with this is none of those standards are easy to define either legally or in practice and that's because increasingly occupational injuries and cumulative trauma cases are what dominates workers' compensation.

Now, on the other side, workers are concerned about what John was talking about, a increasingly limited eligibility for workers' compensation benefits and a strict interpretations of what's an eligible injury. As Les was pointing out, there's really a lot of concern with underreporting of injuries especially on the part of workers because this means that employers are going to underinvest in safety and consequently; it's not that injuries are underreported, it's that the underreporting results in poor safety and poor investments in safety. And all of these things result in something that we don't want, which is lots of conflict and litigation, and with lots of litigation comes lots of extra disability.

The luncheon speaker yesterday, Dr. Christian, was talking about iatrogenic disability, the kinds of things that are caused by the process rather than by the actual work injury. This is a case where this process of trying to define the proper reporting and the proper payer for disability could be leading to problems. Part of the problem that I want to address today is maybe this is just that we've been trying to push this round peg of workers' compensation into a square hole.

Let's think back. A hundred years ago when workers' comp was being introduced and rapidly developed, there wasn't any other social insurance program for NASI to consider. There weren't any DI programs, the Social Security disability program that John was talking about; it didn't exist. There weren't any health benefits from work; workers didn't get those, right? There wasn't a non-occupational health benefit system. There wasn't a Medicare system. There wasn't any social security system. There wasn't any welfare. These were decades away. This was the only system

by which workers could recover. That's not true anymore. There's lots of overlapping systems and there's lots of other support that comes out of work.

In California, over 80 percent of employers offer workers health benefits. So it's a changed world and we're dealing with it like we did before. So this project to look at state disability insurance system in California and the overlapping of benefits has been funded by the Commission on Health and Safety as part of an effort to get at this issue of multiple social insurance programs and how do we make them coordinate in an efficient manner. And so Christine Baker is the first person I want to thank. She's the head of the Commission and the person that has the foresight to generate funding for programs like this, and Tom Rankin, who was actually the head of the Commission when this project started, and then Anita Mathers – she'll raise her hand, many of you've met – is the graduate student that did most of the hard work on this.

Okay, so just a little background, then I'm going to briefly discuss the data and then we'll look at the results and the implications. Like all other states, California has a workers' compensation system. It's paid for by the employers. The costs range from 4 percent of payroll to 60 percent of payroll. It includes medical, temporary disability and long-term disability in the form of partial and permanent total disability. Every state has a program like this.

There are only five states and one territory that have a near universal non-occupational disability insurance system: New York, Hawaii, New Jersey, Rhode Island and California. These systems are paid for by employees; so very different from the workers' comp system. The rate in California is 1.1 percent of payroll and they cover disability payments so wage loss only. In California, it's seven to 365 days. So up to a year, and there's no medical and no long-term disability payments. So two very different systems, but they cover exactly the same thing, at least in part: short-term disability from up to a year.

So our concerns: first off, we want employers to internalize the cost of injuries. So we would like injuries to be reported in a correct system if we care about this process of internalizing the cost. We want employees to have the proper signal about the cost of SDI. Recently, we expanded the state disability insurance program in California to cover family leave. So we're the first state in the nation that not only has guaranteed family leave, but also has paid family leave for up to 12 weeks. And there's frequent litigation over the correct payer between these two systems and that's a major concern. So reporting is not a concern in terms of injury reporting in California. They're all reported. Disability cases get reported in California. The question is do they get reported in the employee-paid system or the employer-paid system.

Now, just to finish up on this. This is a unique effort that the Commission has undertaken because this is really the first time that anybody has investigated these short-term disability systems and the very large dataset that goes along with this in California. There's approximately a million cases in the state disability insurance system each year, a

good portion of them are for pregnancy, which are not included here, but these are quite unique datasets.

We've obtained a 20 percent sample of all cases reported to the state disability insurance system, the employee-funded non-occupational system, and we corrected for the fact that some employers can opt out of this system by self-insuring. So some employers self-insure. I don't know if Safeway is one of them for non-occupational disability. That was supplied by the Employment Development Department and the Commission was very helpful in getting these data for us because the Commission has a mandate to get data for oversight of the workers' compensation system and this has been a very powerful tool.

And then we used Bureau of Labor Statistics data to analyze occupational injuries and compare the frequency of occupational injuries at the two-digit industry level with non-occupational injuries at the two-digit industry level. And if these systems accurately sort cases into occupational or non-occupational and we've accurately controlled for the characteristics in any industry they control for that caused an industry to have higher non-occupational disability, then we should see a scattering of dots when we compare the different industries that would look like this. So non-occupational disability rates don't change, but occupational disability rates certainly change and they wouldn't change, they certainly shouldn't change in a consistent manner.

Now, if some cases from the occupational disability system were being reported as non-occupational, then the scattering of dots would look more like this. As occupational on the Y-axis increases, we would see increased reporting of non-occupational illnesses on the X-axis. This would mean that we were poorly reporting and poorly sorting these cases. And this is what we see: There's clearly a relationship between non-occupational disability and occupational disability even after we've controlled for the characteristics of the people in the industry. This is for injuries and illnesses. It's much worse when we include illnesses. The misreporting is even worse.

So this is a look at these two systems. The top line is the non-occupational disability system. Our state disability system is dominated by illnesses. The occupational disability system is dominated by injuries; there are very few illnesses, and a lot of injuries, and this is really the key statistic in this. That second row shows you the percent of cases that are misreported. In this case for injuries, about 6 percent of occupational injuries resulting in disability in California are misreported as non-occupational and paid in the non-occupational disability system.

That second statistic is the one that really should surprise some people. If it's an illness, three out of four times, an illness is misreported as non-occupational when it's actually occupational. The impact of this, because there are more occupational injuries than there are illnesses, at least reported, is that it's pretty consistent. About 20 percent of our injuries and 20 percent of the illnesses that are reported in our state disability insurance system, the one that's paid by workers, are actually occupational.

And the implications for this: First off, we have substantial misreporting or underreporting by employers. It's not necessarily the employer's fault, but there is misreporting. The workers are getting the temporary disability benefits. They may be getting the health benefits under group health, but there's misreporting of about 20 to 25 percent of injuries. It is very costly to litigate this system and we could save substantially on administrative costs if we could come up with a way to integrate these and not have to resolve the issue of causation. That integration is not that expensive.

If you figure out what this would cost employers, if they accurately paid for the injuries and illnesses that were occupational, it would increase their cost by about 0.13 percent of payroll, just a little more than one-tenth of one percent of payroll. High-risk industries would pay substantially more, but we would internalize cost correctly; we would avoid litigation and the disability related to it; and for a fairly small price, we would integrate two of these systems in a way that might help both employees and employers.

Thanks. (Applause.)

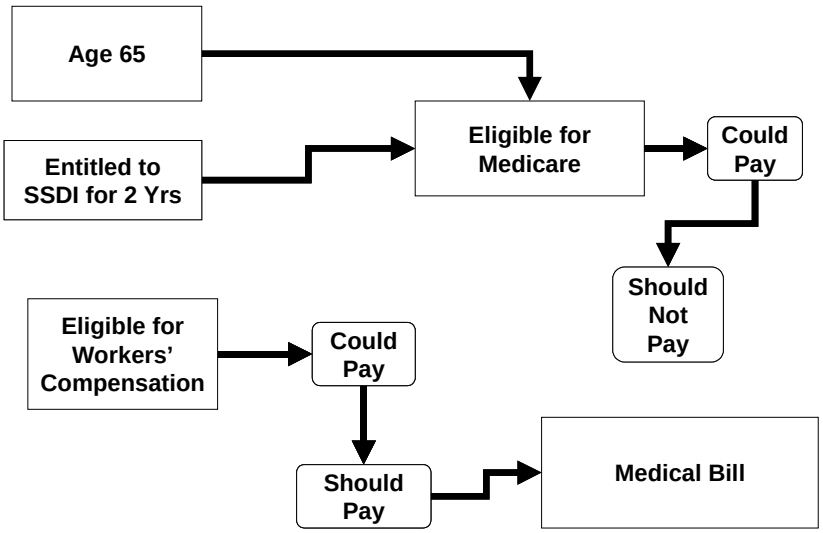
How Are Medicare Secondary Payer Rules Working?

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

EDWARD WELCH: We're going to have a session later this morning in which we say, "What would we do differently if we do this again?" And I think the first answer is: Give each of the speakers a little more time. (Laughter.)

It's difficult to talk about the relationship between workers' comp and Medicare in ten minutes because it's a complicated topic, but I think also because I expect in the room there are people sitting there who didn't know there was any problem between Medicare and workers' comp, and other people in this room who spend about two hours everyday pulling their hair out over this issue, and the challenge is to say something in ten minutes that will be a little relevant to all of you and I'm going to try and do that.

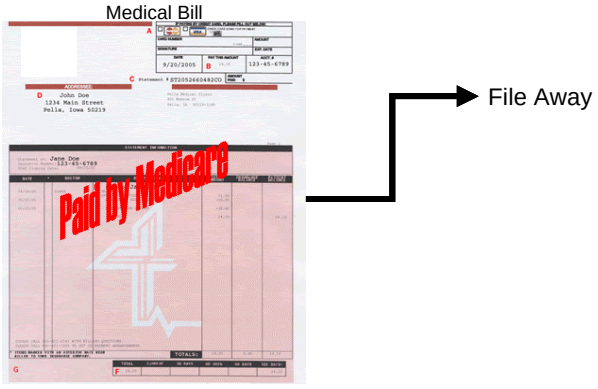
Medicare provides healthcare benefits to everyone who is 65 or older. I've been giving talks like this for a long time and I used to introduce them by saying Medicare is a healthcare system for the elderly, but about a year ago, I qualified and I no longer use the "e" word. (Laughter.) If you have been on SSDI for two years – Social Security Disability Insurance – you are also eligible for Medicare. There is obviously a considerable overlap between men and women who are entitled to workers' compensation and men and women who are eligible for Medicare.



What happens if a medical bill comes in? It is possible that either workers' comp or Medicare could pay this. Since the early 1980s, a federal law called Medicare as a Secondary Payer Act has provided quite clearly that under those circumstances workers' compensation should pay and Medicare should not pay.

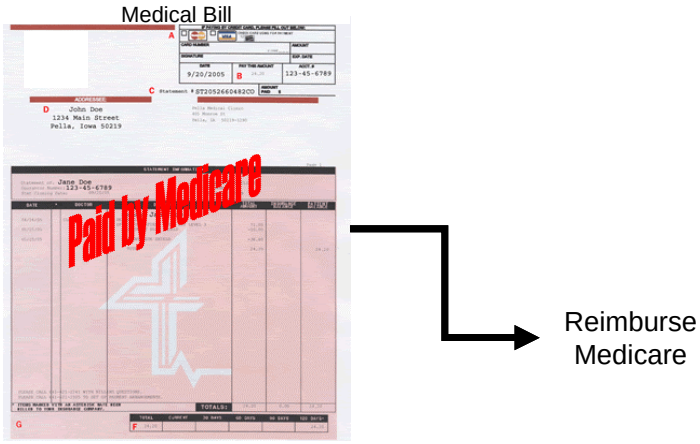
Now, before we go any further, we must confess our sins of the past, and I hate to do this because we are so close to CMS, but the truth is that until about 2000, those of you who managed claims, if a bill crossed your desk that could have been paid under

workers' comp and you noticed that it had been paid by Medicare, you simply filed it away. Now, let's be honest; that's what we all did.

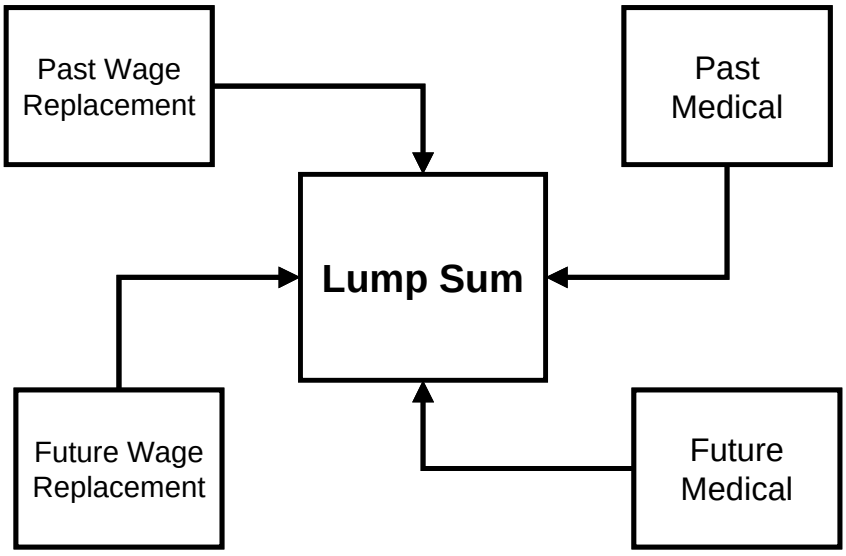


Similarly, those of you who managed claims and those of us who were attorneys representing injured workers until five or six years ago when we were settling a workers' comp claim and the worker said, "How am I going to get my medical paid for?" We said, "Just put it on Medicare." Now, we confess that we did that; it was wrong. I don't think anybody has done that in the last six years. We simply cannot do that anymore.

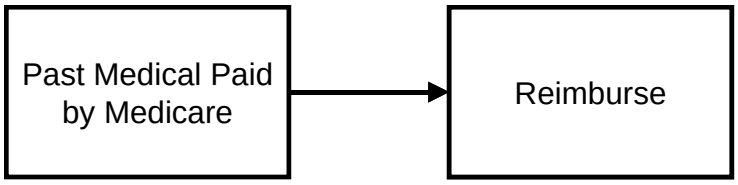
There is an organization that is called Centers for Medicare and Medicaid Services. Is anyone here from CMS? I want to know – they go by CMS – I want to know what happened to the second "M." I've been suspicious of them from the beginning. (Laughter.) They manage Medicare and a memo in July of 2001 is the turning point; since about 2001, they have very aggressively enforced the Medicare as Secondary Payer Act. Some things under this are very clear, there is not much question about them. If you are a claims manager and you see a bill that comes across your desk that was paid by Medicare that should have been paid under workers' comp, there is no question today: you reimburse Medicare. You are just taking a huge risk and I'll explain in a minute why if you don't reimburse that.



That's easy; the difficult thing is settlements. In the typical state, a settlement incorporates four things: past wage replacement, past medical, future wage replacement, and future medical.



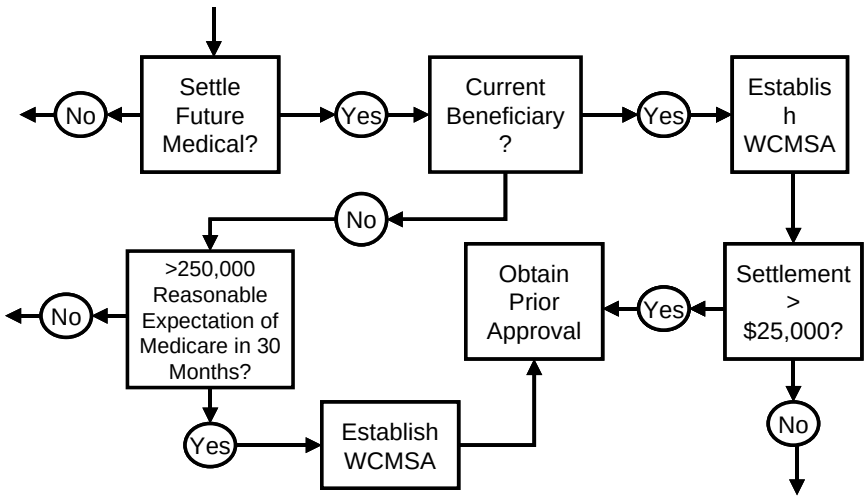
First, let's talk about past. If you're settling a workers' compensation case and there are medical bills from the past that have been paid by Medicare and could have been paid under workers' compensation, you need to reimburse Medicare. That's the first thing. Medicare calls them "conditional payments" because the statutes says that if there's someone else like workers' comp that could pay, Medicare can make the payment on the condition that they get reimbursed. Now, in fact, that isn't what's happened. They are more like inadvertent payments. Medicare didn't decide we're going to pay this because we'll get reimbursed. It just got put through the Medicare system, but there's no question that you should reimburse those.



And there was a case that was decided a couple of years ago, Manning vs. Utilities Mutual, No 98 Civ 4790 (RCC), 2004 us Dist LEXIS 1674, it involved about $200,000 in medical bills that could have been paid under workers' comp. It was not paid under workers' comp; Medicare paid, and the worker sued the insurance carrier and got double damages. That's why if you see that bill, you reimburse Medicare because if Medicare or the claimant's attorney comes after you for that, you'll pay double. That's past medical; that's easy. We know what we have to do. We might like it or not like it, but we know what we have to do.

The problem is that portion that is for future medical. The theory is very simple. The part of the settlement that is for future medical should be set aside and used to pay future medical bills. When they are exhausted, then Medicare should begin paying. It's the implementation that has been a terrible problem. CMS takes the position that the money should be set aside in what they call a Workers' Compensation Medicare Set-Aside Agreement, WCMSA – the acronyms get longer and longer all the time. Even that is not a bad idea, depending on the size of the settlement.

The problem is that Medicare wants to pre-approve settlements in certain workers' compensation cases. Which cases? Is there a settlement of future medical? If you're not settling future medical, you don't worry about this. If you are settling future medical, you ask is the worker a current Medicare beneficiary? If the answer is yes, then CMS says you should establish a Workers' Compensation Medicare Set-Aside Agreement. Next, you ask is the settlement over $25,000? If it is not, then you have to set up the WCMSA, but you do not have to obtain pre-approval. If it's a current beneficiary and the amount is over $25,000, then Medicare wants to pre-approve the settlement of the workers' compensation case.



If the individual is not a current Medicare beneficiary, then you ask is the settlement over $250,000 and is there a reasonable expectation of Medicare within the next 30 months? If it is over $250,000 and the guy's going to apply for SSDI, in my view, any comp settlement where you get $250,000, the guy ought to apply for SSDI, if he hasn't. Then if it's not, then you're okay. If it is, then you must establish a WCMSA and obtain prior approval.

Now, those of you who do this every day are thinking, Ed, you forgot this and forgot that, and I'm going to hasten to say this is an oversimplification. Those of you who are new to this are saying, "That's an oversimplification?" But it is. There's much more to it than that.

Practical problems

- Delay
- Lack of understanding of workers' compensation laws
- Failure to recognize differences among state workers' compensation systems
- Unrealistic accounting expectations
- Cost vs. benefits
- No appeal

Of the practical problems, the biggest is the delay: the amount of time between when you're ready to settle the workers' comp case and when you get it. Other things include the lack of understanding, the contractors who've been hired by CMS to do this, their lack of understanding of workers' comp laws, failure to recognize the difference among states, unrealistic accounting explanation.

They expect workers to put this money aside and the whole thing is if it's a $250,000 settlement, it works. You know, I see these people with catastrophic losses, where you're setting aside a million dollars for future medical. You can spend all the

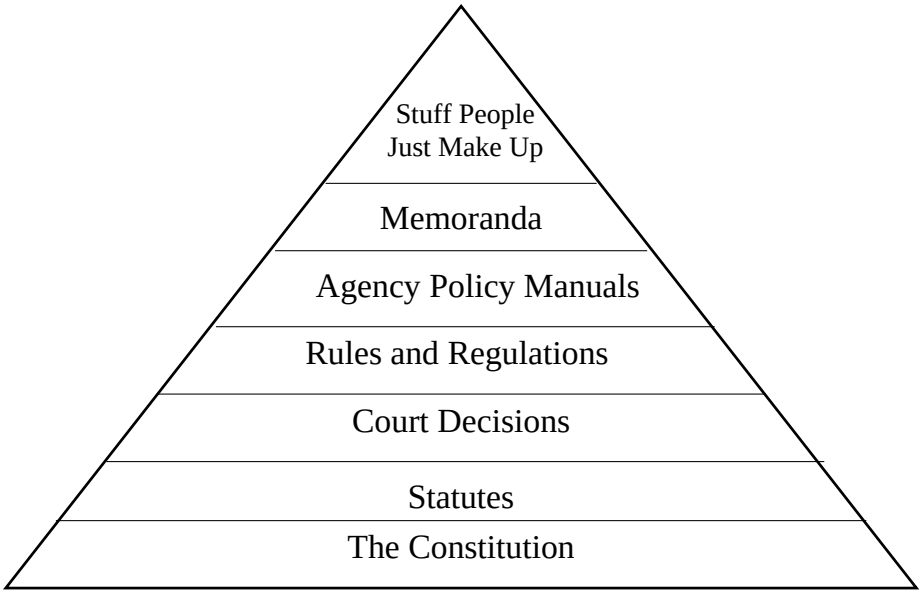
money on this. You can hire a trustee to administer this, but for current beneficiaries, CMS is expecting us to do this for $30,000 comp settlements, and then they are expecting the worker to keep track of all his or her medical bills and account for all this.

The cost versus the benefit is problem. There is no appeal. In Michigan, we currently have 900 cases in which the workers and the employers have agreed to settle and they are on hold waiting for CMS. Some people say the system works; others report terrible problems. I talked about this new bill I'm going to mention and all of the wonderful things in the bill and an attorney said to me, "Ed, I don't care about all that if they just return my phone calls."

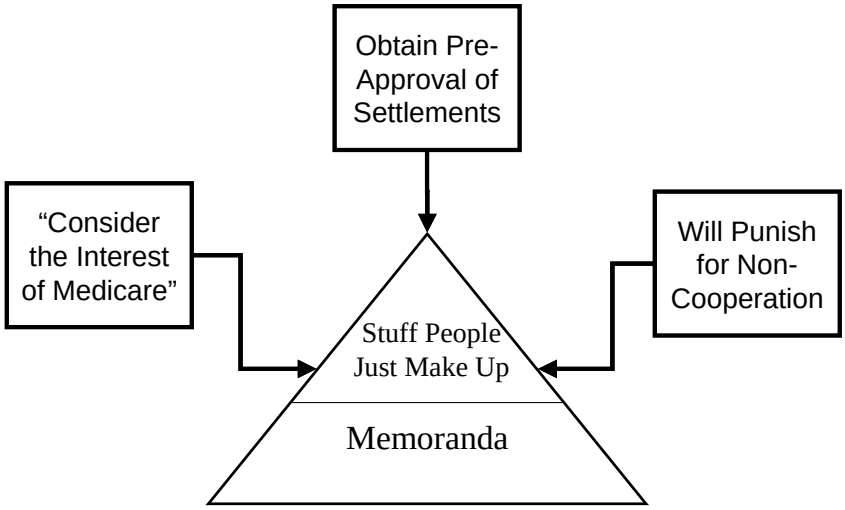
The role of vendors: some people say they can be very helpful, some people say they don't need them, some people say they are what stirred up the pot, that there is a group of vendors that are making money off of this and they are encouraging all of these problems.

There are serious legal problems with the positions that CMS takes. I'll look at a couple of these.

When I went to law school, I was taught that we live under the rule of law and there's a basic foundation for laws in this country, and the Constitution is the bottom level and then there are laws that are passed by the Congress or the state legislatures, and then there are court decisions that interpret all these and it's a hierarchy. Everything has to be within the Constitution. The court decision has to be based on the statutes, and then federal or state agencies can publish rules or regulations, but there's a formal procedure for them to do that and they have to be, again, based on the statutes, and then there are agency policy manuals that are published in a formal way, and then there's memoranda and stuff people just make up. (Applause, laughter.) All right?



Now, the problem is that most of the foundation for CMS's position comes from this category. All right? (Laughter.) They say you must consider the interest of Medicare. That is not in the statute. It is not in their formally adopted regulations. It is in stuff they make up. The same with obtaining pre-approval for a settlement, it is not anywhere. It's just stuff they made up, and finally, the idea that they can punish a worker who doesn't obtain pre-approval; it's not in the statute, not in their very elaborate formally published regulations, has not a word about this. This isn't just memoranda that they have put out.



CMS says it recommends pre-approval. It agrees to review certain cases. (Times up, but I'm just going to take a couple minutes more.) (Laughter.) But here's the catch, it will punish you if you don't get pre-approval. What it says: if you do not get pre-approval, it will treat the whole settlement as if it were for future medical. There is no statutory authority for doing that. They'd tried to do that in Medicaid and they lost at the United States Supreme Court. In the last year, they said, you know, under Medicaid, if you don't do this and that, we're going to treat it as if the whole settlement were for future medical. The United States Supreme Court said there's no basis in law for you to do that.

It's a different statute. It's a different language, but the same principle, I think, will apply eventually. The trouble is if you're a claims manager, you can't take the risk of litigating this all the way to the Supreme Court. So you go along with what they do.

There is proposed legislation that would resolve most of these problems. The lead organization in supporting the bill is UWC—Strategic Services on Unemployment and Workers' Compensation (UWC) (http://www.uwcstrategy.org). Their president is Eric Oxfeld. They can be reached at info@UWCstrategy.org. Those of you who are having trouble dealing with these issues need to contact UWC. You need to contact your members of Congress.

It is a reasonable legislation. We are not trying to cheat Medicare. We know this has got to change. We want to find a workable approach. I think we need somebody to

litigate this, but the solution, I think, is this bill, which we need to get through Congress. It is a bill before Congress that has support of the trial lawyers, the insurance industry, the largest employers in the country and some representatives of organized labor. If we can't get that through the Congress, I don't know what we can. The trouble is Medicare is 25 percent of the federal budget and that's the issue we're up against.

Thank you very much. (Applause.)

Discussion

MS. NOWELL: All right. So this was not like herding cats, it was like herding lions. (Laughter.) Wonderful talks and very fruitful thoughts at the end of each one, but we do have about four minutes. I'm going to break us at 9:35 because you have to be out at your break and back at 9:45.

So, Virginia?

VIRGINIA RENO: This is a very mundane comment, but I would suggest, given the provocative sessions we've have, if we skip the break and have just a little more time to discuss and then go immediately into the next session.

MS. NOWELL: Consensus of the group? Excellent. Well, then we have 13 minutes for questions. (Laughter.)

Q: Hi, I'm Dave Rafferty from the Congressional Budget Office. I had a question for John. I was really surprised to see that there was no statistical – statistically significant correlation between disability prevalence rates and the rate of DI applications?

MR. BURTON: Yes, I was also surprised.

Q: I'm looking at the two – two of your slides, numbers two and six, and they look nearly identical to me.

MR. BURTON: They what?

Q: They look nearly identical.

MR. BURTON: They certainly do.

Q: They are the same slides. (Laughter.)

MR. BURTON: There must be an error in Figure 2 or Figure 6. I don't know which it is. I have not seen that before, but you're correct. I think the data used for the statistical analysis shown in Table 1 are correct because if in fact there had been identical data used for the two variables, the correlation between the two variables would have been one and the statistical analysis would not have been possible.

Q: That's – yeah, that was what – (inaudible).

MR. BURTON: All right. I'll have to correct that and I'll make sure we get the correct data on the NASI website. Good eye. [Figure 6 was corrected before the slides were posted on the NASI website.]

Q: Thanks.

MR. BURTON: As I've said, when I began, these are preliminary results – (laughter) – and when you're on the frontiers of science…

Q: I was thinking about the nature of the relationship between workers compensation and I think that if you look at it longitudinally, if more people apply for workers' compensation, these people, if approved, may be more likely to end up on DI than others.

I know that Les Boden is going to propose a project that uses longitudinal data where you can track, but I think that would be a useful thing to consider. The other thing is you mentioned you were puzzled by this relationship between the DI acceptances and the disability application rate. I think there is an explanation which may have to do with the reverse kind of causal interpretation: that as application go on more and more marginally qualifying people apply and the system cleans them out. And there is quite a bit of literature on DI, which is consistent with this point.

There have been some studies done that look at the DI acceptance rate and applications using some lagging mechanism so the idea is that this is a relationship that should be there, Don Parsons has done I believe the first study on this 1980 and there have been a lot of other studies done that basically did not totally agree with the point estimates he had, but most of the studies I have seen show that there is a relationship of the kind you would expect.

MR. BURTON: Well, I wouldn't be surprised as we revise this, if we find that relationship because as I said before, this is very quick and dirty. Again I think the thing that's interesting to me is whatever the problems are in terms of the DI system in explaining the application rate, it's kind of amazing the workers' comp comes though. And it will be interesting to see where that holds up after we do those corrections. Thank you for your comments we'll follow up on that.

Q: Just a general observation about the concern in the decline in filing rates. As I said yesterday, good news in workers' comp sometimes is bad news. And I agree that there's lots of pressure not to file claims. When you look at the construction industry, if you're a major contractor and you've got a mod above one, you can't bid. So there's tremendous pressure to suppress claims in that industry just to stay alive, but I really think workers' comp should be a declining business.

I think workers' comp should be a declining business because if we're successful on the safety side and we design workplaces with ergonomics in mind, you should have fewer claims. And one of the problems that we're facing in Washington is we looked at average time loss duration; it's a big push to reduce time loss duration. But what we're really trying to do is get people to work faster, avoid disability payments at all because the worker's kept them on salary or has a light duty job. If you can maintain that connection with the employer at time of injury, the outcome for the worker is much better. Breaking that, you wind up with an injured worker who's also unemployed and the prospects of going back to work are very limited. But if we're really successful on

the front end of the claims avoiding time loss at all or getting people back to work in a much, much shorter time – we're looking at cutting the cycle time in every single thing we do – if we're very, very successful what will happen is average time loss duration will grow and it will be made up of a smaller number of catastrophic losses which everybody agrees we're going to pay for, no ifs, ands, or buts.

The percentage of the perceived to be bad claims – people taking advantage of the system and manage to stay in will increase. The system as a whole is getting better because fewer workers are injured, they're getting better care, and they're getting back to work sooner. But the perception could very easily be, boy, look at all these bad long duration claims, we've got to do something dramatic to fix the system. And so when you're looking at the filing rates keep that in mind because we could be doing really good things but it could very easily be interpreted as bad things.

And, John, in your study did you look at the effects of welfare reform on the DI filing rates? Because I think that it drove a lot of people from state welfare systems into Social Security.

MR. BURTON: We haven't looked at that yet. That's a good lead. Just a comment on your thing about workers' comp. I do think, part of what you're saying I certainly agree with: the notion that the best solution would be to get the injury rate down, and that's obviously a win-win situation. What we found, and this is in the results here, we try to explain why the things I showed in figure one – the decline in workers' comp benefits per hundred thousand workers – we found that the injury rate itself was a major explanatory factor in why workers' compensation benefits are going down. No question about that. We also found that a good deal of the drop in benefits was due to these tightening compensability rules.

And another way of putting that which shows up on this thing, if you look at the ratio of lost time cases under OSHA that show up in a workers' comp system, that percentage is going down. It went down during this period, so there's clearly something other than just injury rates and I understand your point about more serious injuries maybe showing up but if the control for this lost time injuries you see a smaller percentage of those lost time injuries getting into the workers' comp system.

Q: Thanks.

Q: Hi, Jay Himmelstein. Great panel. I'm just wondering whether any of you have looked at the issue of Medicaid in terms of overlapping compensation system and interactions with CMS, because my understanding is that in every state, Medicaid is the payer of very, very last resort, even after Medicare. And I think every state has to have a third party liability recovery program by law where they're making sure that Medicaid is not paying bills that are paid by others. And I know in Massachusetts, when they looked at that, within last year alone, they had 20,000 pending workers' compensation cases on their Medicaid rolls waiting for resolution. And it might inform some of the research that you're all doing.

MR. WELCH: I think the experience here is that the difference is that CMS is nationally approaching Medicare and Medicaid is being approached on a state-by-state basis very differently, probably not as aggressively. They don't want to pre-approve things. In Michigan it's basically a reporting and I think they're in for their filing liens and I would say that, in Michigan at least, Medicaid is doing it effectively in a way that is not interrupting the workers' comp system, the way the Medicare approach is.

Q: But they're still attaching liens on the settlements.

MR.WELCH: But they're doing it in a way that the workers comp practitioners can live with.

Q: Right.

MR. NEUHAUSER: There is a pretty aggressive program in California to sort these payments accurately when there's a workers' compensation claim and they should be paying. We're undertaking a program now to look at a related issue which is when you have a workers' compensation case that results in disability, are you more likely to end up on Medicaid – in our case MediCal – for all of your medical treatment just because you're now outside the workforce and you qualify for benefits independent of that particular injury? So that's a future study that we're probably going to start at the end of this year, and looking at that in relation to SSDI, SSI, welfare and that whole panoply of social safety net rather than social insurance.

MR.BODEN: In a way all of us are doing these studies where we're looking at the big picture and trying to figure out what's going on and what we really want to be able to do and I think it's going to be some years before we figure out who to do this is to take people who are injured at work and to see what happened to them. And so the question is okay, so you don't have a lost time injury because your employer is not putting you on workers' comp, you're getting back to work quickly. What happens to that person? Are there some people who just do much better because the employer has brought them back to the workplace? Are there other people who can't do the work even though they're brought back and either they're brought back on some job that really doesn't mean anything and eventually they disappear from the workplace without having gotten workers' comp – end up some other social support program? So there are just a whole bunch of questions that we're just at the first stage really of trying to understand. But this first stage is going to inform I think what we then find later on.

MS. NOWELL: I'm going to cut this off, as much as I hate to. This was a great panel. Thank you so much. We have like a minute or two to set up the next one. I want to remind everybody that there are evaluations in your packet. Please fill them out, the Academy is anxious to hear your comments. And thank you again. (Applause.)

(End of panel.)