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Workers Compensation in South Carolina: A Runaway System Threatening Jobs and Wages

By Neil Mellen

South Carolina's system of workers compensation was once hailed as among the most fair and efficient in the nation. In the last decade the courts have stripped the Commission of its focus, causing premiums to skyrocket. Trial lawyers have rushed in and exacerbated the problems. The ever-growing costs of premiums limit small business expansion and deter firms from re-locating to South Carolina. The burden, over \$275 million in increases over the last five years, is further borne through lower wages for employees and high prices for consumers.

Policy makers should pursue award standardization, setting parameters to guide the commissioners in their decision making. These will provide stability and certainty to the insurance marketplace through a more uniform set of award practices. Employers and workers alike have a right to know up front exactly what the costs and awards will be for different types of injuries and mishaps. Other steps toward a more just and transparent system include a phase out of the costly second injury fund and strict enforcement of anti-fraud measures. Refocusing the Commission along the lines of its founding legislation will benefit employers and employees alike.

THE SYSTEM

The basic intent of workers compensation law is to provide injured workers the money they will not be able to earn as a result of on-the-job impairments. Workers compensation is a tradeoff between workers, who give up their ability to sue employers in tort for workplace injuries, and employers, who cede the ability to contest liability and to assign fault to the injured worker. Unlike the liability of tort law claims, which seek to restore workers to pre-injury status, workers compensation is designed to provide for lost wages and medical expenses. Employers purchase insurance to help distribute the risk of paying these costs should an accident occur. These costs are ultimately borne by employees who receive lower wages, and by consumers who experience higher prices.

The South Carolina Workers Compensation Commission is the state agency that enforces workers compensation laws, as spelled out in Title 42 of the State Code. The Commission was created to



resolve disputes between employees claiming injuries and the insurance providers of their employers. Serious injuries or unresolved claims are reported by employers and claimants to the Commission. When claims are disputed, a single commissioner holds a hearing, the results of which can be appealed to a panel of commissioners. This appealed decision can itself be further appealed to circuit court. The levels of procedural cost and complication, as well as the price of the decisions the Commission issues, are important determinants in the rate of insurance premiums paid by employers. The commission system in South Carolina was originally structured so that injured workers could obtain equitable benefits for on-the-job injuries quickly and efficiently, without the need for lawyers or litigation.

A decade ago, South Carolina was home to some of the lowest workers compensation premiums in the nation.ⁱ Now, it ranks in the middle and the rates continue to rise.ⁱⁱ Rates in the Palmetto State are much higher than regional neighbors such as North Carolina, Arkansas, and Virginia.ⁱⁱⁱ In October of 2006, it was reported that premiums have increased 47.5 percent over the last three years including the recently approved 18.4 percent jump.^{iv} Assessments for the Second Injury Fund, which covers injuries that exacerbated existing conditions, increased nearly 100 percent. In the two years from 2004 to 2006 the Small Business & Entrepreneurship Council tracked a plunge for South Carolina from 10th to 38th place in its national index of premium competitiveness.^v These skyrocketing premiums are a function of changes in how injury claims are filed, appealed, and awarded.

THE CASE FOR REFORM

An examination of the commission workload highlights one of the core problems. When comparing FY 1996-97 data with the FY 2003-04 agency report, several trends emerge. The total number of accidents reported and cases reviewed has dropped significantly (down 28 and 17 percent respectively).^{vi} However, in that same period the number of cases which resulted in some form of appeal actually increased. The appeals process is the most expensive and time consuming aspect of the system. It is also the most litigious.

The number of informal conferences, a less complicated form of mediation, has remained steady despite the rise in appeals. While the average cost to the commission to review and conduct an informal hearing is \$58, a full hearing costs \$658. The total fiscal impact of appeals is not calculated in the accountability report. Appeals made to the circuit court can reach the State Supreme Court and often drag on for years.



Expanding the number of commissioners, now only seven, would shorten the waiting period at every level of the process. A dedicated appeals panel, consisting of only the most senior commissioners, would still hear disputed cases. These commissioners should only review appeals and not address initial reviews, ensuring that commissioners serving on appeal boards would not perform a role that amounts to reciprocal peer review. Such a two tiered system would be more responsive and professional than the current arrangement.

IMPACT OF CASE LAW

A major factor in the rise in the number of appealed cases and the spike in medical costs per claim is the changed understanding of the law. This is primarily the result of three high profile State Supreme Court decisions. These rulings have undermined legislative intent and invited greater levels of fraud and litigation.

The South Carolina Supreme Court declared in *Tiller v. National Health Care* that claimants are no longer required to provide expert witness testimony when proving causation in a medically complex case. This allows for much greater discretion by the Commission than the court has allowed in injury cases brought to trial.^{vii} That discretion has translated into speculative awards and a lack of uniformity in decisions.^{viii}

Brown v. BiLo has complicated the process of information exchange. It dictates that all communication between employers, insurance carriers, and health care providers is written and formal. It further requires such discussions receive written authorization from the employee. In addition to inviting greater attorney involvement, this has resulted in the need to seek depositions from doctors in order for employers to obtain basic information.

The *BiLo* ruling prevents the vital communication needed for pre-litigation settlements. This hurts both employers and claimants. The mediation process itself promotes more effective rehabilitation, and saves money. Research indicates a that correlation exists between better health outcomes and a non-adversarial context for initial disability estimation dispute resolution.^{ix} The *BiLo* decision has made mediation a complicated and unattractive option.

The ruling in the *Dodge v. Brucoli* case extended the Commission's authority to order the payment of future medical benefits in the majority of cases, rather than only those which involve permanent or total disability.



Leaving open the possibility for additional benefits invites fraud. A Vanderbilt University medical study found that disabled patients had a higher percentage of physician-rated symptom dramatization and pain behavior, and a corresponding greater usage of medication, when their financial benefits were not time-limited.^x The findings validated the premise that workers compensation can reinforce pain behavior and adversely influence treatment outcome in chronic pain patients. Those employees with time-limited compensation were more likely to return to work, and there was no reported negative effect on their treatment or outcome.

Standardization of the award structure, which would hold Commissioners to a specific schedule of impairments and compensation, would provide predictability and consistency in awards without leaving payments and cases open indefinitely.^{xi}

FRAUD

Fraud is not restricted to time-limited compensation. It permeates the entire system. A survey by the American Board of Clinical Neuropsychology found that probable malingering and symptom exaggeration occurs in roughly 30 percent of personal injury and disability cases.^{xii} These estimates, based on over 30,000 case studies, involved the comparison of initial claims with actual pattern of impairment, observed behavior, record inconsistency, forced-choice tests, and implausible changes in repeated ability tests.

Manual Materials Handling, or MMH as it is known in the manufacturing industry, is the greatest single source of workers compensation claims.^{xiii} The majority of these claims, roughly 70 percent, are associated with lower back and upper extremity injuries. While the estimated national incidence of fraud in these cases is around 30 percent, the laws in South Carolina invite an even greater level of abuse. Back injuries are the only impairment where the state law defines a specific impairment-to-reward ratio. The law provides for a total and permanent disability presumption if the claimant's back is deemed to be 50 percent impaired. This one size fits all award system for back injuries is unique in its specificity, and conflicts with the American Medical Association's guidelines for this category of injury. Eliminating this mandate will discourage fraudulent claims and intentional miscategorization of back injuries.

Another way of combating fraud and reducing system costs involves enforcement. Clarifying the definitions of "false statement" and "misrepresentation" to include instances of false reporting and



intentional misclassification would be a good start. Enforcement should cover claimants and employers alike. Formalizing these deceitful acts as felonies and pairing them with stiff fines and the threat of incarceration would discourage those who falsely perceive workers compensation fraud to be a victimless crime. Expansion of the Attorney General's resources in the pursuance of fraud would serve as an investment in future savings to the system.

BEST PRACTICES IN CARE AND PREVENTION

Repealing the limits on communication brought about by the *BiLo* case and the open ended treatment commitments fostered by the *Dodge* decision would help refocus workers compensation efforts on effective treatment and incident prevention. Comprehensive care and prevention promote the interests of both workers and employers.

Occupational management results in lower injury claim incidence, duration, and cost than even the most effective (post accident) early intervention and care options when they are used alone.^{xiv} Employers have a clear economic incentive to identify and mitigate occupational hazards as thoroughly as possible.

Integrating effective treatment options would also reduce costs and promote claimant well-being. Longitudinally, studies of injured workers show that managed care treatment can reduce costs by up to 50 percent without compromising quality of care, particularly when this approach incorporates safety efforts that identify and reduce work-place hazards.^{xv} Correcting the impact of *Dodge* would enable employers to pursue these proven strategies.

SECOND INJURY FUND

South Carolina's second injury fund was designed as a safeguard for disabled and permanently impaired job applicants. The founding premise was that employers might be reluctant to hire workers with pre-existing conditions, based on the fear that subsequent injuries would worsen the impairment and result in enormous medical costs. Federal legislation in the form of the Americans with Disability Act has since ensured that such discrimination will not occur, and the need for a dedicated fund to insure these workers has passed.^{xvi}

The fund itself requires an independent structure and premium system, with enormous jumps in costs in recent years. The fund exceeded \$4.5 million in 2005, including an administrative cost of \$1.6 million.^{xvii} The number of individuals receiving benefits through the fund has dropped from 1,636 in



1997 to 722 in 2005.^{xviii} While the number of individuals benefiting has dropped by more than half, the average amount paid per claim has risen from \$20,100 to \$36,900. This is a jump of 84 percent in average payment size in the last eight years. With federal laws now ensuring fairness in hiring practices, the fund should be devolved to only pay for existing commitments, as it has in seventeen other states.^{xix}

LAWYERS

Workers compensation statutes are designed to pay appropriate costs and damages to a worker without requiring the injured to demonstrate the heightened degree of employer liability that is required in tort cases. This provides insured employers with a swifter, more certain, and less litigious system of compensation than existed under common law.^{xx} With recent precedents like *BiLo* and *Dodge*, the system in South Carolina has become increasingly litigious and mirrors many of the negative aspects found in common law personal injury disputes. Allowing commissioners to arbitrarily determine what percentage of a settlement may be taken in attorney's fees is problematic and undermines the basic intent of the compensation statutes.^{xxi}

While the aim of this rule was to provide caps on fees, in practice there is a lack of uniformity. By legislatively codifying limits as a function of benefits secured, the perverse incentive to excessively litigate will be removed. Future benefits should not be calculated into the total used to determine these fees. No fees should be afforded for benefits provided relating to case work the attorney was not directly involved in. Furthermore, if an attorney and client choose not to accept a written pre-hearing settlement, the attorney should only be eligible for fees based on the amount awarded in the case above and beyond what was initially offered.

CONCLUSION

Workers compensation alters the naturally occurring trade off between occupational risks and worker earnings.^{xxii} It directly correlates with lower wages. Unfortunately, the impact of this wage-to-risk tradeoff is skewed when the system of workers compensation is inefficient and unnecessarily expensive. The total increase in insurance payments over the last five years exceed \$275 million.^{xxiii} Under a comprehensive statewide system such as South Carolina's, these inefficiencies mean lower wages for all workers.

Specific reforms that policy makers in South Carolina should examine include a phase out of the second injury fund, legislative repeal of the negative impact of recent court rulings, and adjustment to



the claims mechanisms for back injuries. Attorneys should be formally limited in their ability to draw fees from settlements, so as to ensure there is no perverse incentive for excessive litigation. Providing the Attorney General with more investigative resources, and attaching stricter penalties to fraud will also help to clean the system. Expansion of the commission and a streamlining of the appeals process promise major improvements as well. Standardization of awards, through a well defined and specific schedule of injuries, will stabilize the market and provide both workers and employers with a better sense of what to expect from the commission and appeals system.

Workplace safety in South Carolina is at an all time high, and well above the national average.^{xxiv} An effective Workers Compensation Commission should provide predictable and equitable settlements when mishaps do occur. In South Carolina fraud, excessive litigation, and inefficiency in the compensation process are leading to perpetually higher insurance premiums. The costs are borne by workers and consumers. Reforming the system will benefit all parties and will create a climate favorable for businesses and our citizens.

About the South Carolina Policy Council and the author:

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ⁱ "S.C. Gov. Sanford, PCI Emphasize Workers' Compensation Reform." *The Insurance Journal*, January 13, 2006.

ⁱⁱ Compare South Carolina's ranking of 49th in 2004, 38th in 2005 and 25th in 2006 in the Oregon's Workers Compensation Study, "Premium Rate Ranking." Department of Consumer and Business Services, State of Oregon.

ⁱⁱⁱ Virginia Economic Development Partnership. "Workers Compensation State Rankings: Manufacturing Industry Rates and Statutory Benefits Provisions." Actuarial & Technical Solutions Inc. 2005

^{iv} "Business Owners: Workers' Comp Rates Costing Jobs." WLTX, CBS television affiliate, Columbia, South Carolina. October 16, 2006. *see also* Hull, Peter. "McConnell, Harrel Pressed on Worker's Comp." *The Post and Courier*. October 12, 2006.

^v Keating, Raymond J. "Small Business Survival Index 2006: Ranking the Policy Environment for Entrepreneurship Across the Nation." Small Business & Entrepreneurship Council. October 2006. Compare to 2004 Index, same author.

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^{vii} Elizabeth H. Tiller v. National Health Care. South Carolina State Supreme Court, Opinion 24915, March 8, 1999.

^{viii} Governor's Task Force on Workers Compensation Reform. Report submitted January 2006.

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^{xv} Williams. "Comparison of Workers Compensation Costs for Two Cohorts of Injured Workers Before and After the Introduction of Managed Care." *Journal of Occupational and Environmental Medicine*. Volume 46, Number 6. June 1998.

^{xvi} "Business Owners: Workers' Comp Rates Costing Jobs." WLTX, CBS television affiliate, Columbia, South Carolina. October 16, 2006.

^{xvii} Governor's Task Force on Workers Compensation Reform. Report submitted January 2006.

^{xviii} "Second Injury Fund Accountability Report." Fiscal Year 1996-1997. and ""South Carolina Second Injury Fund: Annual report 2004-2005."

^{xix} "Business Owners: Workers' Comp Rates Costing Jobs." WLTX, CBS television affiliate, Columbia, South Carolina. October 16, 2006.

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^{xxiii} Citing the South Carolina Civil Justice Coalition; "Business Owners: Workers' Comp Rates Costing Jobs." WLTX, CBS television affiliate, Columbia, South Carolina. October 16, 2006.

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