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Opinions on the Future of Workers' Compensation: A Point-Counterpoint Discussion

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Should There Be a 21st Century National Commission on State Workers' Compensation Laws?

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Workers' compensation laws were enacted by the states beginning in 1911.[1] One of the reasons the states assumed responsibility for the program rather than the Federal government was the Supreme Court's interpretation of the commerce clause at the time. However, even after the interpretation of the commerce clause was changed in the 1930s, states have maintained their dominance over workers' compensation despite various proposals over the years for an increased Federal involvement in the program. Section I reviews

[1] Burton and Mitchell (2003) examine the context in which workers' compensation programs emerged in the early 20th Century and trace the development of social insurance programs and employee benefits in the balance of the century.

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the proposal for Federal standards made in the 1970s by a national commission. Section II describes a 2009 proposal for a new national commission. I argue that the "traditional" national commission model is flawed for reasons provided in Sections III and IV. As an alternative I suggest that more narrowly focused examinations should be conducted by Study Panels hosted by existing organizations with record of success in dealing with important issues. Four possible topics for such examinations are introduced in Sections V to VIII.

The National Commission on State Workmen's Compensation Laws

The National Commission on State Workmen's Compensation Laws (1972 National Commission), created by Section 27 of the Occupational Safety and Health Act of 1970 (OSHAct), submitted its *Report* to the President and Congress in 1972.[2] The National Commission identified five major objectives for a modern workers' compensation: (1) broad coverage of employees and of work-related injuries and diseases; (2) substantial protection against interruption of income; (3) provision of sufficient medical care and rehabilitation services; (4) encouragement of safety; and (5) and an effective system for delivery of the benefits and services.

State workers' compensation laws were evaluated using the five major objectives. The National Commission concluded that "Our intensive evaluation of the evidence compels us to conclude that State workmen's compensation laws are in general neither adequate nor equitable." The National Commission then made 84 recommendations designed to translate the five basic objectives into specific guidance for legislators and others involved in improving state worker's compensation programs. Nineteen of the recommendations were designated as essential.

[2] Burton (2003) provides additional information on the National Commission on State Workmen's Compensation Laws.

The National Commission recommended "creative Federal assistance" to enhance the virtues of a decentralized, state administered program. A key element of the assistance was to be a 1975 review of the state's record of compliance with the 19 essential recommendations, which would culminate in Federal mandates enacted by Congress if necessary to guarantee state compliance with these essential recommendations. The National Commission members rejected federalization of state workers' compensation programs, such as the preemption of state safety programs contained in the OSHAct. Instead, the 18 members unanimously recommended the enactment of federal standards, if necessary, to achieve compliance with the 19 essential recommendations.

Federal standards were never enacted by Congress, in part because states improved their laws in the 1970s. However, the average compliance score among the states with the 19 essential recommendations never exceeded 12.9 from 1972 to 2004, when the Department of Labor stopped tracking the progress or lack thereof.

The National Commission on State Workers' Compensation Laws of 2009

The National Commission on State Workers' Compensation Laws Act of 2009 (2009 National Commission) was introduced in the House as HR 635 in the 111th Congress by Congressman Joe Baca. The bill was opposed by most employers and insurers, was not enacted, and Baca was not reelected in 2012. However, the bill could be revised and resubmitted with another sponsor and so deserves an analysis.

HR 635 was roughly based on Section 27 of the OSHAct, which created the 1972 National Commission. Both acts began with a set of Congressional findings, which included in HR 635 a finding that since 1972, "changes in [sic] reductions in State workers' compensation laws have increased the inadequacy and inequitable levels of workers' compensation benefits." Both specified the composition

of the members of the National Commission, which I will discuss in Section III. Both contained a list of subjects to be studied, which I will discuss in Section IV. The 1972 National Commission was authorized to hold hearings and to enter into contracts for the conduct of research, and each federal agency was directed to furnish information to the Commission. The 2009 National Commission *inter alia* was authorized to hold hearings, to secure information from federal agencies, to enter into contracts, and to issue subpoenas. The 1972 National Commission was directed to transmit its final report to the President and the Congress not later than July 1, 1972 and to cease to exist 90 days later. The 2009 National Commission was directed to submit its final report not later than 18 months after the enactment of the Act and to terminate 19 [sic] days later.

Who Should Examine Workers' Compensation?

The Membership and Selection Process for the 1972 National Commission

The OSHAct specified that the National Commission would have 18 members: three cabinet members and 15 members appointed by the President from among members of state workers' compensation boards, representatives of insurance carriers, business, labor, the medical profession, "educators with special expertise in the field of workmen's compensation," and the general public. An unwritten criteria used by the Nixon White House staff was that, to the extent possible, the appointees would be Republican.

How could a National Commission dominated by Republicans unanimously conclude that state laws were "in general neither adequate nor equitable" and that Congress should enact Federal standards for state workers' compensation programs if states did not significantly improve their laws?

First, most members were experts in workers' compensation and cared about the future of the program. The hearings and evidence

presented to the National Commission revealed a system in much worse shape than these experts had expected, and they were willing to open their minds to fundamental changes in order to preserve the state-run system.

Second, the 1970s were part of a by-gone era of technology. The Commission had 11 meetings that consumed 32 days. A pattern emerged: a tentative agreement was reached during a meeting on an important issue and then some members would meet with their constituents for lunch or dinner and be persuaded to change their minds, and so the next meeting we had to start over. The issue we all knew was critical to our report was determining the role for the federal government in workers' compensation. Most members had been shocked that Congress preempted state safety programs as the enforcement mechanism in the OSHAct and were dead set against a similar takeover of workers' compensation. In order to avoid the now-we-agree-before-lunch-but-now-we-don't-agree-after-lunch syndrome, we first discussed the idea of federal standards at a meeting on the boat provided by the Governor of Maryland, which stopped for lunch on the Eastern shore of Maryland, away from the constituents of the Commission members. And our critical final meeting where we agreed to unanimously support federal standards was held at Airlie House, a conference center 50 miles west of Washington, in which the only phone in the main building was up a long flight of stairs from the meeting room. The Vice-Chairman, who was the conduit of our deliberations to our "overseers" in the Nixon Administration, soon tired of trudging up and down the stairs and so we proceeded to agree on the content of the final report in relative isolation. All these machinations to isolate the deliberations of the National Commission from outside influence would be impossible today amidst instant monitoring from cell phones, texting, and Skype.

Third, the 1970s were part of a by-gone era of politics. The OSHAct was passed with support of the Republican Administration and with large majorities in the Senate and House. The primary authors were Senator Williams, a Democrat from New Jersey, and Congressman

Steiger, a Republican from Wisconsin. Today, such bi-partisan cooperation in Congress is rare, if not nonexistent. And a unanimous National Commission report involving members from both parties and representing a variety of interest groups is inconceivable today.

The Membership and Selection Process for the 2009 National Commission

HR 635 specified that the 2009 National Commission would have 14 members: four cabinet members and 10 appointed members: the chairman appointed by the President, the vice-chairman appointed by the majority leader of the Senate in consultation with the majority leader of the House; two each by the majority and minority leaders of the Senate; and two each by the majority and minority leaders of the House. No more than six of the appointed members could be from the same political party. At least three members must represent injured workers; three members must represent insurance carriers or employers; and at least one member must be from the general public. In addition, HR 635 specified that members should (1) have significant depth of experience as members of State workers' compensation boards; as representative of insurance carriers, employers, and injured workers; in the general fields of business and labor; or (2) be members of the medical profession with relevant experience; or (3) be educators having special expertise in workers' compensation.

There are three major flaws with this scheme for selecting members of the 2009 National Commission. The system is convoluted: the overlapping instructions remind me of three-dimensional chess. There may not be a combination of members that satisfy all the mandates.[3] The separation of authority to appoint the members of

[3] Seven of the appointed members must represent injured works or represent insurance carriers or be members of the general public. This leaves three appointed members to satisfy the remaining four categories: members of State workers' compensation boards; in the general fields of business and labor; members of the medical profession; and educators with special expertise in workers' compensation.

the 2009 National Commission among the President and leaders of four factions in Congress virtually guarantees that the deliberations of the Commission will be divisive and the report splintered. Three flaws and you are out.

Appropriate Organizations to Examine Workers' Compensation

The 21st Century examinations of contentious issues in workers' compensation should rely on organizations with an established record of objective studies on the program or related fields, such as the Institute of Medicine, and the National Academy of Social Insurance. In later sections, I provide more information on these organizations and suggest specific topics for which they seem appropriate.

What Should be the Scope of the Examination?

The Scope of Issues Examined by the 1972 National Commission

Section 27 of the OSHAct directed the National Commission to "undertake a comprehensive study and evaluation of State workmen's compensation laws to determine if such laws provide an adequate, prompt, and equitable system of compensation. Such study and evaluation shall include, but not be limited to, the following subjects:" There followed a list of topics (subjects) from (A) the amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon, to (N) the extent to which private insurance carriers are excluded from supplying workers' compensation coverage and the desirability of any such exclusions, to (P) methods for implementing the recommendations of the Commission.

While most of the specified subjects to be examined resulted in evaluations by the National Commission that were critical of the

workers' compensation programs as of 1972, there were some subjects – such as topic (N) – that reflected concerns of particular interests in the field.

The Scope of Issues Assigned to the 2009 National Commission

HR 635 provided three general duties for the 2009 National Commission (1) to review the findings and recommendations of the 1972 National Commission; (2) to study and evaluate State workers' compensation laws to determine if they provided an adequate, prompt, and equitable system of compensation for work-related injury and death;[4] and (3) to study whether additional remedies should be recommended to ensure prompt and good faith payments of benefits.[5] There followed a list of specific topics (or matters) from (1) to (13) that roughly paralleled topics (A) to (P) assigned to the 1972 National Commission, with some exceptions. Topic (3) assigned to the 2009 National Commission added a requirement that a study should be made of remedies to discourage misclassification of workers as independent contractors or leased employees to avoid paying workers' compensation benefits, and topic (6) required an evaluation of "standards for determining assurance of benefits caused by aggravation or acceleration of preexisting injuries or diseases." These topics added pro-worker elements to the instructions to the 2009 National Commission. A final change, which is hard to understand, is that the 1972 National Commission topic (P) "methods of implementing the recommendations of the Commission" became topic (13) for the 2009 National Commission: "methods of communicating the recommendations of the Commission."

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[4] General duty (2) was repeated with minor variations in wording as specific matter (2) to be studied and evaluated by the 2009 National Commission.

[5] It is not clear to me what these additional remedies include: perhaps tort suits against carriers or employers?

Appropriate Scope for an Examination of Workers' Compensation

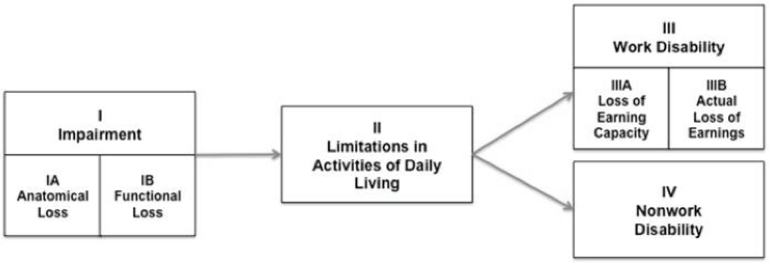
The scope of issues assigned to the 1972 National Commission, and especially to the 2009 National Commission, invites divisions among the participants in the examinations because the recommendations almost invariably result in "winners" and "losers." To the extent benefits are increased, or coverage of workers and employers is increased, or definitions of work-related injuries and diseases are expanded, workers are likely to be considered winners and employers and insurers are likely to be considered losers. A major achievement of the 1972 National Commission was the agreement among all the participants that the survival of the state-run programs depended on significant improvements in coverage and benefits. But agreement on such issues is less likely today given the change in the political environment. Moreover, the issues assigned to the 2009 National Commission are even more divisive because the changes generally suggest that solutions should redress problems faced by workers or their lawyers. It is not surprising that the employer and insurance communities generally reacted negatively to the introduction of HR 635.

The best way to improve workers' compensation in the 21st Century is to choose narrow topics for which solutions are not immediately obvious and for which the solutions have considerable potential to be beneficial to most if not all parties in the workers' compensation system. To use jargon: the issues to be examined should not be zero-sum games (where one party's gain is another party's loss) but should be issues where mutual gains are possible.

Topic One: *A Guide for the Determination of Permanent Disability*

The permanent consequences of a work-related injury or disease are shown in Figure 1, which are discussed in more detail in other articles.[6]

Figure 1
Permanent Consequences of an Injury or Disease



A *permanent impairment* is a persistent physical or mental consequence of an injury or disease. The impairment may involve an *anatomical loss*, such as an amputated leg, or may involve a *functional loss*, such as the shoulder motion deficits resulted from enervated muscles. As shown in Figure 1, the permanent impairment can also result in other permanent consequences of the injury or disease.

Limitations in Activities of Daily Living (ADLs) indicate that a person is limited in performing basic self-care activities, such as personal hygiene and grooming; dressing; eating; toileting; and ambulation (walking without an assistive device or wheelchair). *Work disability* means that a person experiences a loss of earning capacity or the actual loss of wages as a result of a permanent impairment. *Nonwork disability* indicates the impairment has resulted in the loss of capacities for life outside the workplace, such as recreation and the performance of household tasks.

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[6] Spieler and Burton (2012) and Burton (2008b).

There are several important scientific, empirical, and policy issues involved in the relationships shown in Figure 1, and there are different professions that are appropriate to examine the different issues.

First, the classification of injuries and diseases and the measurement of the extent of anatomic loss or functional loss (the severity of the injury or disease) for an individual patient is the province of physicians.

Second, the general relationship between particular injuries of a specified severity (e.g., amputation of the hand) and the resulting limitation in activities of daily living is an empirical question that physicians can examine if they use appropriate statistical methods, but often is studied by members of other disciplines, such as rehabilitation and nursing professionals. The empirical examinations need to control for a number of other factors that can affect the relationship between impairments and limitations in ADLS, such as the patient's age and the quality of the medical treatment and rehabilitation services provided to the patient.

Third, the general relationship between particular injuries of a specified severity and the extent of work disability is an empirical issue that is in the proper domain of economists.[7] Again, there are a number of factors that affect the general relationship between impairments and work disability that must be controlled for, such as the worker's age, previous work experience, education, and accommodations in the workplace.

Fourth, the general relationship between particular injuries of a specified severity and the degree of nonwork disability is an empirical issue that has been studied by members of several disciplines,

[7] Examinations of the relationship between permanent impairment ratings and subsequent loss of actual earnings are generally referred to as wage-loss studies. Examples include Boden, Reville, and Biddle (2005) and Reville et al. (2005).

including psychologists.[8] Again, there are a number of factors that affect the relationship between impairments and nonwork disability that must be controlled for, such as the worker's age, education, and accommodations at home.

Fifth, a determination of which of the permanent consequences shown in Figure 1 should be compensated by workers' compensation must be made. A distinction must be made between the *purpose* of the cash benefits and the *operational approaches* used to determine the amount of those benefits.[9] Most commentators argue that the primary if not sole purpose of workers' compensation cash benefits is work disability, and in particular, actual loss of earnings. However, the operational basis for the benefits often relies on ratings of the degree of permanent impairment or of the extent of loss of earning capacity, where these consequences are serving as proxies or predictors of the extent of actual loss of earnings. The resolution of the fifth issue is basically a policy decision.

Sixth, a determination of what constitutes an adequate amount of compensation for the permanent consequences shown in must be made. Assuming the purpose of the cash benefits is to compensate for work disability, a decision must be made about what proportion of lost wages should be replaced in order to be considered adequate.[10] The resolution of the sixth issue is also basically a policy decision.

Seventh, the rules (such as presumptions) for the process of developing and implementing disability guidelines must be

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[8] Nonwork disability is essentially the same as Noneconomic Loss or Quality of Life. An example of research in this area is Sinclair and Burton (1995), who examined the relationship between permanent impairment ratings using the *AMA Guides* and the extent of noneconomic Loss.

[9] Burton (2008b) discusses the difference in workers' compensation programs between the purpose of permanent disability benefits and the operational approach to determine the amounts of those benefits.

[10] Hunt (2004) is an examination of the various meanings of adequacy of workers' compensation benefits.

determined. For example, is the disability rating used to convert the permanent impairment rating into a prescribed amount of disability benefits conclusive or is the rating only presumptive and can be modified on the facts in the case? The resolution of the sixth issue is basically a policy decision, although lawyers are necessary in order to ensure that any presumptions will survive legal challenges.

Issues Five to Seven are largely policy issues that should be excluded from the process I am recommending. My recommendation is that *A Guide for the Determination of Permanent Disability* be prepared by a Study Panel with the ability to examine issues One to Four in a scientific and objective manner. The Study Panel should include physicians, psychologists, and economists (and perhaps lawyers to help draft recommendations that will survive judicial scrutiny), with no discipline having more than 40 percent of the members. There are several organizations that are potential candidates to serve as host for the Study Panel.

The American Medical Association (AMA) seems like an obvious possible host. The AMA has published six editions of the *Guides to the Evaluation of Permanent Impairment* (*AMA Guides*), which are widely used in state workers' compensation programs. The *AMA Guides* (p. 5) indicate that:

> The whole person impairment percentages listed in the *Guides* estimate that the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work* . . . [emphasis in original]

The problem is that almost all states *de facto* use the impairment percentages listed in the *AMA Guides* to estimate the impact of the impairment on an individual's overall ability to perform work (work disability) and thus to determine the amount of permanent partial disability benefits paid to the worker. Not only are the *AMA Guides*' impairment ratings misused, the ratings are largely based on consensus among physicians, which are the antithesis of evidence-based medicine. I was a member of the AMA's steering committee for

the preparation of the fifth edition of the *AMA Guides*, which made several recommendations for the improvement of the publication. The AMA responded by disbanding the steering committee.[11] Although there have been some improvements in the sixth edition (for example, to allow some flexibility in permanent impairment ratings based on an individual's circumstances), the latest edition of the *AMA Guides* makes no effort to incorporate the significant amount of economic evidence relating impairment ratings to actual loss of earnings. Given this history, the AMA is not an appropriate host for the development of a Disability Guide relating impairment ratings to work disability.[12]

The Institute of Medicine (IOM) acts under the responsibility given to the National Academies of Sciences by its congressional charter to examine policy matters pertaining to the health of the public. The IOM conducted an evaluation of the Disability Compensation for Veterans[13] that serves as a model for the development of *A Guide for the Determination of Permanent Disability*. One reason is that Veterans Disability Benefits and workers' compensation are the only two major disability programs that provide benefits for permanent partial disability. The IOM study also provides a model of how such a study should be conducted. The Chair of the IOM Committee was a former President of the AMA and most of the committee members were physicians at academic institutions. There were also professors from other health-related disciplines, such as nursing and rehabilitation, and from psychology and economics. The IOM

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[11] Several of the members of the disbanded steering committee subsequently provided their suggestions for improving the *AMA Guides* in Spieler et al. (2000). Burton (2008a) provides an additional critique of the *AMA Guides.*

[12] The America Bar Association is also an inappropriate host for the development of *A Guide for the Determination of Permanent Disability* based on the failure of the American Bar Association Task Force on the American Medical Association *Guides to the Evaluation of Permanent Impairment* to produce a report.

[13] McGeary et. al. 2007.

provided several full-time staff members and hired consultants. The Committee had several hearings and meetings and produced a report that was very critical of the disability rating system used for Veterans and that provided a number of recommendations for improving the VA disability rating system. The IOM Committee rejected the *AMA Guides* as a possible use as a tool for evaluating ability to work among veterans.[14]

Topic Two: Medical Care for Work-Related Injuries and Diseases

The health care system for work-related and injuries has several issues worth examining. First, the relationship between the workers' compensation health care system and the Affordable Care Act[15] health care system for non-work-related injuries and diseases is murky at best. Second, there are separate health care systems for employees if their injuries or diseases are work-related or if their injuries or diseases are caused by other conditions. Is such a dual system of health care beneficial for workers, carriers, and employers? Carriers and employers expressed concerns about the unitary health care system included in the Clinton health care proposal because they feared that loss of control over health care would jeopardize their chances to quickly heal workers and return them to work, and the resulting lags would lead to higher payments of cash benefits. However, Ontario has a health care system that essentially uses the same health care delivery system to treat all sources of disability for workers and the costs of both the medical care and the overall costs

[14] The Rand Institute for Civil Justice is another possible source for the preparation of *A Guide to the Evaluation of Disability.* The RAND wage-loss studies, cited in footnote 7, provide a model for the guide.

[15] The Patient Protection and Affordable Care Act (PPACA) is commonly called the Affordable Care Act (ACA) or Obamacare.

of the workers' compensation program in Ontario appear to be lower than in most U.S. jurisdictions.[16]

Third, there are wide variations among states in how their workers' compensation heath care programs are designed and implemented. There are a multitude of variations among the states in whether the worker or the employer or carrier has the initial choice of the treating physician or the change of physicians. There are a variety of approaches to fee schedules: some states have none; others apply fee schedules only to physicians; others also include hospitals. There are variations among states in utilization review, in the use of managed care; in limits on duration of treatment for chiropractors and others. A few states limit the total amount of medical care and a few are requiring workers to share in the costs of medical care. A study of the myriad approaches used by different states may identify best practices to be emulated or flops to be avoided by other states.

Fourth, overuse and addiction to opioid pain medications has become a major problem in workers' compensation in the last decade, resulting in extended duration of claims, higher medical and cash benefits, and an increasing share of work-related fatalities. In only a handful of states, including Washington and California, have workers' compensation programs begun to deal with this problem. The problem is not confined to workers' compensation. Indeed, some workers were already dependent on opioids before they experienced their work injuries and applied for workers' compensation benefits.[17]

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[16] The experience of other jurisdictions, such as New Zealand, that have integrated their health care and/or disability benefits systems should be part of the examination of the possible integration of the health care systems in the U.S.

[17] Preliminary results from a Prescription Drug Monitoring Program in Washington State indicate that nearly two percent of new workers' compensation claimants were on opioids during the three months prior to their injuries. Dr. Gary M. Franklin, Medical Director of the Washington State Department of Labor and Industries, observed that "Given that some patients had been on opioids for at least 3 months prior to injury, it is highly likely they were dependent on opioids at the time of injury (Franklin 2014)."

An examination of these and other issues pertaining to the workers' compensation health care system should produce evidence and recommendations that are beneficial to most participants in the workers' compensation program. An organization that seems eminently qualified to conduct such a study is the Institute of Medicine, which recently issued a report on the use of opioids in the U.S. Armed Forces.[18]

Topic Three: The Use of the Work-Related Test

A fundamental feature of workers' compensation is that only injuries and diseases that satisfy the legal tests for work-related are entitled to benefits.[19] The determination of which injuries were work-related when New Jersey and other states enacted the first state laws in 1911 was relatively straight-forward in most cases because the source of the injury was typically an external traumatic event, such as a coal mine exploding or a train derailing.

The determination of which injuries and diseases are actually caused by work is more difficult now for several reasons, including the increasing proportion of disabilities caused by diseases, for which causation is often difficult to determine with reasonable certainty, and the increasing proportion of older workers, whose medical conditions are a result of the interaction of congenital, degenerative, and occupational factors.

The difficulties of determining which injuries and diseases are "actually" work-related in a scientific sense have resulted in several strategies in workers' compensation.[20] For some conditions, notably

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[18] Institute of Medicine (2012).

[19] The traditional tests for compensability in workers' compensation are (1) an injury (2) resulting from an accident that (3) arose out of employment, and (4) in the course of employment. See Willborn et al. (2012, 907-951)

[20] Spieler and Burton (2012)

back disorders, many workers' compensation programs have adopted legal tests for compensability that are based on outdated medical knowledge and that conclude that the condition is work-related for purpose of workers' compensation when there is no scientific basis for that conclusion. For many other conditions, workers' compensation laws in recent decades have been amended to exclude certain medical conditions often caused by work, such as stress-related disorders or carpal tunnel syndrome, to limit coverage of injuries that result from aggravation of preexisting conditions, and to require "objective medical evidence" to establish the existence of a medical condition. Many states have also added procedural requirements that make it more difficult to establish that an injury or diseases is work-related, such as shifting the burden of proof to claimants and increased the quantum of proof so that claimant must prove the case by "clear and convincing" evidence.

These efforts to expand workers' compensation coverage to conditions that are not actually work-related (such as back disorders) or, of greater importance in recent decades, to tighten the eligibility rules for many injuries and diseases have had deleterious consequences. Workers' compensation statutes are now riddled with arbitrary rules for determining which injuries and diseases meet the legal rules for compensability and the program devotes considerable resources (has high "transaction costs) to resolving the work-related issue. In addition, there is some evidence that the recent tightening of eligibility rules for workers' compensation has shifted some cases to the Social Security Disability Insurance (SSDI) program.[21]

Perhaps the work-related test is no longer the proper basis for a disability program. The increasing importance of disorders with multiple causes understandably makes employers and insurance carriers apprehensive about overloading the workers' compensation program with cases for which the workplace may not be entirely or largely responsible in a scientific sense. The widespread changes in

[21] Guo and Burton (2012)

state laws to limit compensability makes workers and applicants' attorneys apprehensive about excluding conditions that historically were covered by workers' compensation. And while the Affordable Care Act may mean that medical care for disabled workers will be provided even if they are excluded from workers' compensation, the excluded workers face a set of disability programs unlikely to provide cash benefits for their conditions.

There are several issues for a study panel to examine. Should workers' compensation as a program using the work-related test be retained? If so, should the work-related legal test be clarified to simplify its application? And if workers' compensation is retained with a work-related test, is it possible to improve the coordination with other public and private programs providing medical care and cash benefits? Should some or all injuries and diseases be moved to a new disability program that provides cash and/or medical benefits for disabilities regardless of the cause? If a new disability program is developed without a work-related test, how should it be financed: employer premiums, employee premiums, and/or other sources? Should a new disability program without a work-related test have benefits that are higher or lower than the workers' compensation program? And since one of the justifications for workers' compensation is that experience rating promotes work-place safety, how would safety be promoted in a program that provides benefits for non-work-related as well as work-related disabilities?

The National Academy of Social Insurance (NASI) is an appropriate organization to examine these issues. NASI is a nonprofit, nonpartisan organization whose members are leading experts on social insurance, health care, and employee benefits and who represent a range of academic disciplines and interest groups, including employers, unions, health care providers, insurance carriers, government agencies, and attorneys. Two examples of NASI studies are the Report of the Disability Policy Panel[22], which was a

[22] Mashaw and Reno (1996).

comprehensive study of the federal programs for disabled workers, and the Report on the Study Panel on Benefit Adequacy[23], which examined the adequacy of workers' compensation cash benefits. The Benefit Adequacy Study Panel included 13 members representing the research community, state workers' compensation administrators, lawyers, employers, actuaries, insurance carriers, and unions.

Topic Four: Enforcement of Federal Guidelines

The preceding three topics were chosen because the solutions to the issues are not inherently pro-worker or pro-employer/carrier. The final topic – enforcement of Federal Guidelines – almost invariably will result in labor/management conflicts and so it deserves assignment to a Study Panel that insulates this toxic topic from the other Study Panels.

The 1972 National Commission pointed out that good ideas to improve state workers' compensation programs had already been promulgated in standards recommended by national organizations, including the IAIABC, and in a Model Act drafted by the Council of State Governments.[24] But the National Commission concluded these previous efforts had been insufficient for a variety of reasons, including lack of understanding of workers' compensation by state legislatures and the veto power of interest groups in state reform efforts. But the primary obstacle to state reform was competition among states for employers and the fear that an adequate workers' compensation program in a state would drive employers to a less expensive jurisdiction. The National Commission asserted that many states had been dissuaded from reform of their workers' compensation by the specter of the vanishing employer, even if

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[23] Hunt (2004).

[24] The Model Act was revised to incorporate the recommendations of the 1972 National Commission on State Workmen's Compensation Laws in Council of State Governments (1974),

that apparition is a product of fancy not fact. The Commission therefore concluded that federal standards enacted by Congress may be necessary to overcome the fear by states that adequate benefits and the resulting higher premiums would result in an exodus of employers.

The notion that higher insurance premiums or taxes on employers in a jurisdiction may result in fewer jobs did not originate with the National Commission and the notion lives on.[25] Is there a "race to the bottom" among state workers' compensation programs that federal intervention can constrain? Is the National Commission's recommendation of minimum standards for state programs the best model of federal intervention for the 21st Century?

The National Council on Compensation Insurance (NCCI) provides advisory ratemaking and statistical services for workers' compensation programs in 35 jurisdictions and also compiles and publishes data from 11 states with independent rating organizations. The *Annual Statistical Bulletin* published by the NCCI contains information on countrywide changes in premium level, which are split into two primary components[26]: (1) experience change, which is largely based on analyses of state premium and benefit cost data, and (2) benefit change, which accounts for "benefit changes adopted by various state legislatures, as well as medical fee and hospital rate changes."

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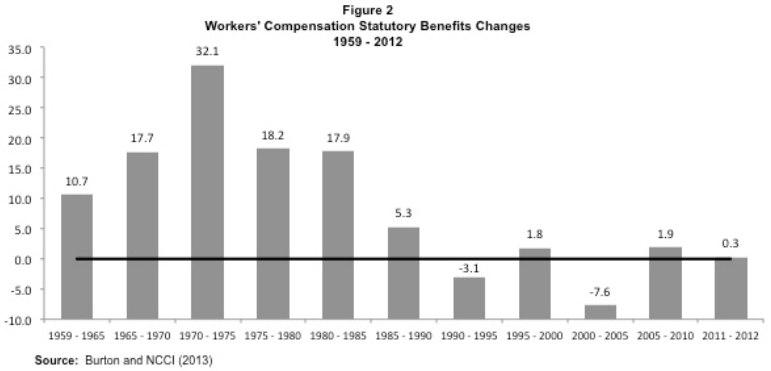
[25] Jolly (2012, B1) reports a recent example. "Responding to calls to make French industry more competitive by reducing labor costs, the Socialist government of President Francois Hollande said Tuesday that it would cut payroll taxes for businesses. . . . In theory, that would encourage new investment and reinvigorate exports. . . .The focus on cutting labor costs 'is an economic misdiagnosis, it's a social error,' Jean-Claude Mailly, secretary general of Force Ouvriere, a relatively militant union, told Europe 1 radio on Tuesday. It will lead to 'social dumping,' he said, because the Germans will feel obligated to cut their own labor costs. 'It will never end,' he added."

[26] NCCI (2013, Exhibit1).

Figure 2, constructed using data from the 2013 and earlier editions of the NCCI *Annual Statistical Bulletin*, shows the changes in statutory benefits for the five year intervals from 1959 to 2012. Workers' compensation benefits increased during the 1960s at significant rates. After the National Commission submitted its report in 1972, statutory benefits increased substantially between 1970 and 1985 and modestly between 1985 and 1990. Then statutory benefits declined in the decades of the 1990s and the 2000s.



I interpret Figure 2 as a validation of the theory that there is an inherent tendency of states to engage in a race to the bottom by undermining the adequacy of workers' compensation benefits in order to reduce workers' compensation costs unless there is a viable threat of federal intervention to counter the alms race. I do not support the notion of federalization of state workers' compensation programs. I do support federal standards to place a floor under state programs and allow states to innovate above that foundation. However, I do not expect federal standards to be enacted in the foreseeable future, and I do not want the enforcement issue to be intertwined with the development of guidelines for best practices for workers' compensation programs, which is why I designated enforcement as a separate topic.

Torrey[27] has discussed the enforcement issue in detail and so I only provide a few observations. The enforcement mechanism for federal standards for the unemployment insurance (UI) program is a tax on all employers in a non-complying state. All states adopted UI programs within a few years after the federal law was passed. Although there have been some subsequent problems with enforcing federal UI standards, this is still a preferred model. The 1972 National Commission did not recommend the UI model, however, for political reasons. Instead the Commission recommended two complementary methods to insure compliance with the 19 essential recommendations. First, employers without workers' compensation would be required to elect coverage in an appropriate state. Second, individual workers could file claims with state workers' compensation agencies, which would be authorized to make awards consistent with the federal standards even if these standards required benefits greater than the state's workers' compensation law. If the state agency refused to assist in the implementation of the federal standards, the employee could sue the employer for payment in state or federal courts. This combination of enforcement mechanism endorsed by the 1972 National Commission is surely cumbersome and possibly unconstitutional.

The Study Panel dealing with enforcement of federal guidelines will have a particularly interesting challenge because of the uncertainties resulting from the Supreme Court decision in NFIB v. Sebelius, 132 S. Ct, 2566 (U.S. 2012), which upheld the power of Congress to enact most provisions of the Affordable Care Act but also held that the individual mandate to purchase insurance could not be based on the Commerce Clause of the US Constitution. Because the examination of Topic Four involves complicated legal issues, the American Bar Association is a logical choice to serve as the host for the Study Panel. The panel could consist of lawyers, political scientists, and other scholars familiar with federal-state relations.

[27] Torrey (2013).

Conclusions

The 1972 National Commission issued a unanimous report and made a series of recommendations that had a positive impact on state workers' compensation. However, a commission with a similar mechanism for selecting members and a similar range of assigned topics would fail today. The proposed 2009 National Commission would only aggravate the problems because of the procedure used to select members and the topics assigned to the commission.

There are topics that could result in recommendations of value to all the major players in workers' compensation, including the development of *A Guide for Determination of Permanent Disability*, an examination of the system to deliver medical care for work-related injuries and diseases, and consideration of the continued use of the work-related test as the basis for a disability program. Issues of similar complexity have been examined by organizations such as the Institute of Medicine and the National Academy of Social Insurance, and the topics should be assigned to Study Panels hosted by these organizations.

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John Burton has conducted research, served as a consultant, and assisted with the formulation of public policy for many years. He was the Chairman of the National Commission on State Workmen's Compensation Laws, which submitted its report to the President and Congress in 1972. He has served as a consultant to a number of jurisdictions, including Florida, Michigan, Washington, Oregon, New York, Massachusetts, and Ontario. His book with Monroe Berkowitz, Permanent Disability Benefits in Workers' Compensation, received the Kulp Award from the American Risk and Insurance Association. Burton was President of the Industrial Relations Research Association (now the Labor and Employment Relations Association) in 2002. He also was the editor of John Burton's Workers' Compensation Monitor from 1988 to 1997 and the Workers' Compensation Policy Review from 2001 to 2008. (He has had no connection with Workers' Compensation Monitor subsequent to the July/August 1997 issue.)

Four Possible Rights Can Still Make a Potential Wrong

Some Observations by Robert Wilson on "Should There Be a 21st Century National Commission on State Workers' Compensation Laws?" by John Burton

There are several things that Dr. John Burton writes about in his article, "Should There be a 21st Century National Commission on State Workers' Compensation Laws?", that I find myself in general agreement with. His detailed description of the proposed 2009 Workers' Compensation Federal Commission, and his reasons it would not work, are quite cogent in my opinion. Additionally, he targets some very important areas for improvement in the current workers' compensation scheme.

I find myself in relative agreement that the four narrow topics he chooses to focus on are indeed in need of improvement. On the surface, his suggestion for the development of a *Guide for the Determination of Permanent Disability* is reflective of the increasing importance and influence that disability issues are having in the workers' compensation industry. The focus on "Medical

Care for Work-Related Injuries and Diseases," with its pointed acknowledgement of the detrimental trends in the utilization of opioids is likewise an important area requiring focus for the industry. Similarly, his discussion of the "Work Related Test" is an important one to have, while his views on using federal standards "to place a floor under state programs and allow states to innovate above that foundation" is worthy of further debate. From a higher level these appear to be important areas to tackle.

However, I do not believe it is enough. In my view, addressing these recommended areas with the suggested actions will not result in the needed improvement for the continuing success of the workers' compensation industry. In this case, four distinct "rights" would likely still result in an overall "wrong" direction for the industry.

The reason is fairly simple, and far from academic. The actions recommended by Dr. Burton address individual parts of a machine that is instead in need of a much more dramatic overhaul. They fail to consider or take into account changing societal views and expectations, and without such consideration, could wind up layering new levels of bureaucracy and process on an already bloated and procedurally intensive industry.

Workers' compensation today is facing a dramatic increase in entitlement expectations. The "disability mindset," where an injury that 20 years ago would have meant a temporary loss of work now is resulting in permanent disability status, has been widely discussed in the industry. As of 2011, the United States had more people on Federal means tested benefits programs than we had working full time in the workforce. When you factor in those receiving benefits from both "means tested" and "non-means tested" federal programs, the Census Bureau reports the total number of people receiving government benefits from one or more programs in the United States in 2011 was actually 151,014,000. That was 48% of our population.

While workers' compensation itself is not an entitlement program, as Dr. Burton points out we are, through SSDI, playing a key role

in feeding the entitlement system. This process is aided by the expectations of benefits and entitled support by those entering the system. We instead need to craft a system that resets those expectations, and guides a process to recovery. Simply reclassifying the deck chairs on the Titanic would not have saved the ship.

In the recommendation for the development of *A Guide for the Determination of Permanent Disability*"Dr. Burton is attempting to bring clarity to this growing problem. However, I take some exception to the concept of legitimacy this effort might bring. Impairment, such as that covered under the series of *AMA Guides on Impairment*, is a distinctly physical condition. Indeed, impairment is defined as "the state or fact of being impaired, esp. in a specified faculty." Disability, however, is far more nebulous, as its ultimate determination is often based on how the impaired person views their options and limitations.

Disability is distinctively subjective. I have met people with no legs that can climb the world's highest peaks, and met professional surfers who are missing limbs. These people are not disabled; they were challenged to adapt by their impairment. Impairment is the physical reality. Disability is the mental response to that physical reality. To codify or legitimize disability through a standardized guideline would be difficult at best and dangerous at worst. It could serve to classify impaired people as "disabled" when in fact their own views might have brought them back to functioning status. I am not convinced you can standardize the many physical and psychosocial elements that wind up determining what a true disability is.

Within his article, Dr. Burton seems to suggest the further institutionalization of disability when he asks, *"Should some or all injuries and diseases be moved to a new disability program that provides cash and/or medical benefits for disabilities regardless of the cause? If a new disability program is developed without a work-related test, how should it be financed: employer premiums, employee premiums, and/or other sources?"* The concept of yet another disability program – one potentially

funded by employers despite the absence of a work related standard, merely serves to "feed the beast," and would further the continued decline in disability avoidance for our population.

Our goal here should not be to find new avenues to encourage disability (not to be confused with impairment); the goal should be to steer people away from a dependency on disability enslavement.

Dr. Burton brings up some excellent points when discussing medical care and injury causation issues as they relate to workers' compensation. The Study Panels he recommends on those topics, lead by the organizations he suggests, the Institute of Medicine and the National Academy of Social Insurance, respectively, could likely review and recommend positive changes for the industry; provided they keep their efforts focused on the end goal of facilitating a return to function through outcome based medical standards.

As for implementation of federal standards, providing a common floor from which all states can build their program, I am not as optimistic. I personally view this effort best deployed as an enhanced function of organizations like the International Association of Industrial Accident Boards and Commissions (IAIABC). The regulators that comprise that group are much more aware of and are closer to the pulse of the industry. They more clearly understand the challenges and needs, and are in a better position to build a common consensus that works for all jurisdictions, removing some of the tendency, as Burton puts it, to "race to the bottom" for business competitive reasons.

Still, all of this is window dressing if we do not attack the core threat to our future success; the growing trend to disability. I remain an advocate of a complete industry overhaul that starts with a new name: Workers' Recovery. Dr. Burton himself indicates that previous reform efforts of the IAIABC and others failed in part due to a lack of understanding of workers' compensation by state legislatures and others. Part of that confusion lies directly in the industry name. It

is an entity developed to provide medical care and a financial safety net that does not clearly define an emphasis beyond "compensation".

"Recovery" does not suffer that issue. It is a word that everyone, including the least educated injured worker entering the system can understand. Certainly much work remains to be done beyond a simple name change, but that naming protocol is a defining one that can drive that effort. Dr. Burton does not make bad recommendations. It is just that they are geared to a failing and poorly defined end goal. If the academics, medical professionals and lawyers take up his call with a clear end game in mind, a focus on a Return to Function under Workers' Recovery, then I suspect the results will be far more positive for our industry's next 100 years.

The Case for Workers' Recovery

Robert Wilson*

Looking at the grand scale of the workers' compensation industry and its related history within the United States can be a humbling experience.

Described as "the great compromise", it is a simple idea wrapped within an enormously complex machine with thousands of moving parts. A machine, comprised of competing and divergent interests, regional and jurisdictional variations, and both local and national influences, that when viewed from a high level looks as if it should not work at all. But it has worked. And it will continue to work.

It is a system that, overall, competently manages the newly reported injuries and occupational illnesses of more than 14,000 Americans each and every day. It has never been perfect. It will never be

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> *perfect. Its very nature of compromise means that someone, somewhere, will always be displeased with the results. Over the years, and many legislative cycles across many jurisdictions, it has swayed to the left, and then swayed to the right, forever seeking a perfect equilibrium that it will never achieve. But it will continue to serve, to meet the overall goal that was intended with the great compromise reached 100 years ago.*

The above is an excerpt from a contribution I made in April of 2011 to the IAIABC's *100 Reflections* series, celebrating the 100 year anniversary of the first constitutionally upheld workers' compensation system in the United States. Much has changed for the industry over those 100 plus years. Societal norms and economic expectations are quite different today than they were when workers' compensation was first conceived. Industrial practices, safety regulations and medical technology have vastly transformed the landscape in which today's workers' compensation professional operates. And just as the demands on this industry have evolved, so has my outlook on the future of workers' compensation.

Make no mistake; the industry will continue to work. "Working," however, will simply not be adequate for the 21st Century and the challenges we face going forward. To be relevant; to be truly successful, the industry must change, just as the nation it serves has. Workers' compensation as we know it must evolve, and from that process, a new identity and focus should rise to meet the challenges of the next 100 years.

One of the largest challenges we currently face in this nation is the growing trend toward the "Disability Mindset," along with a social shift that is more accepting of the concept of dependency on others. Being "disabled" and not working simply does not carry the stigma it once did. We see the impact of this in the numbers themselves. Despite a dramatic decline in injury incidence rates and major advancements in medical care and technology over the last two decades, we are experiencing unprecedented increases in injury duration, days away from work and people being placed on

a permanent disability status. In 1992, 19.7 percent of the nonfatal occupational injuries and illnesses (Private industry, involving days away from work) had more than 31 days away from the job.[1] By 2012, that number had increased to 28.1 percent.[2] The same is reflected in our Social Security Disability program (SSDI). In 1999, the United States had fewer than 4.9 million disabled workers earning benefits in that scheme. There were 1.2 million initial applications for benefits that year. By the end of 2013, the total number of beneficiaries had increased 54.6%, to 8.9 million disabled workers. There were 2.6 million applications that year alone.[3] This, despite generally lower economic activity, reduced incident rates and record low employment participation from the general population.[4]

Studies based on social trends indicate a growing acceptance, even an expectation, of certain entitlements and other benefits. The generation commonly known as "Millennials," numbering 60 million strong, shows an amplified sense of entitlement as part of a trend that began back in the mid 1970s. In fact, one study found that "Millennials seem to bring with them a hedonism, narcissism, and cavalier work ethic previously unknown in the American workforce." It found the Millennial "mentality of entitlement to consist of short term financial goals, a sense of privilege, anticipation of long-

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[1] US Department of Labor, Bureau of Labor Statistics. *Number of nonfatal occupational injuries and illnesses involving days away from work (1) by selected worker and case characteristics and industry, All U.S., private industry, 1992.* Retrieved from http://www.bls.gov

[2] US Department of Labor, Bureau of Labor Statistics. *Number of nonfatal occupational injuries and illnesses involving days away from work (1) by selected worker and case characteristics and industry, All U.S., private industry, 2012.* Retrieved from http://www.bls.gov

[3] US Social Security Administration. *Selected data from Social Security's Disability Program 1999-2014.* Retrieved from http://www.ssa.gov

[4] US Department of Labor, Bureau of Labor Statistics. *Labor force statistics from the current population survey.* Retrieved from- http://data.bls.gov

term financial gains and an effort to command, not earn, respect."[5] Millennials are certainly not by any means the only generation to shift its focus towards a greater entitlement mentality. They merely amplify a trend that has been occurring for some time.

Certainly economic and demographic realities also play into the current trend to disability. The Workers' Compensation Research Institute indicates that "poor economic conditions have made it more difficult for some employers to offer light, transitional, or modified duty to assist their injured workers in returning to sustainable work or to provide permanent job accommodations for workers' with restrictions."[6] Technology and worksite automation are also presenting tremendous challenges, with estimates that robots will take one-half of US based jobs by 2025.[7] This will continue to exacerbate the ability for those with limited skill sets to return to work. Indeed, at the lower end of the economic spectrum, the workers' compensation system today encourages the tendency to disability for these reasons.

Furthermore, we cannot ignore health trends of our working population. Obesity is a ticking time bomb for workers' compensation. Over the past 3 decades, the United States has "experienced a doubling of the prevalence of obesity, which is defined as a body mass index (BMI) of greater than or equal to thirty, which corresponds to a weight of 221 pounds for someone six feet tall. As of 2009 to 2010, more than one-third of adult Americans are

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[5] Alexander, C.S., & Sysko, J.M. (2012, April 1). A study of the cognitive determinants of generation Y's entitlement mentality. *Academy of Educational Leadership Journal.*

[6] Workers' Compensation Research Institute, Annual Report and Research Review. Retrieved from http://www.wcrinet.org/studies/public/books/WCRI_2013_Annual_Report.pdf

[7] Robots on the Rise, http://visual.ly/automated-workplace-robots-rise, *World Robotics*, Retrieved from http://www.worldrobotics.org

obese."[8] The US is not alone in this. Obesity is increasing worldwide, and the World Health Organization estimates that 2.8 million people die each year as a result of excess weight.[9] According to the Centers for Disease Control; 25.8 million Americans are affected by diabetes. They project, as of 2008, "35% of U.S. adults aged 20 years or older have prediabetes (50% of adults aged 65 years or older). Applying this percentage to the entire U.S. population in 2010 yields an estimated 79 million American adults aged 20 years or older with prediabetes."[10] Decreased physical activity, sedentary lifestyles, weight gain and its related complications are all elements that are challenging injury management today. These forces are working against today's injured worker, particularly those with limited skill sets, and are facilitating the unrelenting drive to disability dependence.

Quite simply, this means workers' compensation cannot meet the demands of the future with the processes of the past.

To be able to meet the needs of the future, workers' compensation must change. It must be refocused to different priorities. It must streamline procedures and produce better medical outcomes. Communication between all stakeholders, but most critically employers and employees, must be improved. Better expectations must be established as well. It absolutely must place priority on the results, rather than the process.

That new start must include a new name. *Workers' Compensation* should be called *Workers' Recovery*. The concept is simple. Words mean things, and the use of them can help set general expectations. The website WorkersCompensation.com, while serving millions of visitors a year, is often mistaken by people as the overall "governing body" of workers' compensation. It receives traffic and questions

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[8] Cawley, J. (2013). The economics of obesity. *NBER Reporter,* Vol. 2013, No. 4

[9] Ibid

[10] Centers for Disease Control and Prevention, *2011 National Diabetes Fact Sheet*

from injured workers on a routine basis. Without fail, either in direct contact or in its discussion forums, an injured worker new to the system, as part of their overall injury description, will include the question, "How much will I be paid?" Rarely if ever does the question involve healing and returning to a normal life. It is always about remuneration. The word "compensation" puts the wrong emphasis on the process, while "recovery" clearly defines the ultimate outcome we should all aspire to. It is a word that everyone clearly understands, including an injured worker being introduced to the system. "Workers' Recovery" sets a clear expectation from the start.

That theme must be used consistently throughout the industry. Adjusters and claims professionals must be Recovery Specialists. Claims Departments would be Recovery Management Divisions. While this may conflict with other departments in the realm of insurance, these changes must be made. The folks in subrogation can find new titles. Recovery as a claims function is where the word can have the most impact.

Naysayers may scoff at the perceived simplicity of this concept, but it is scientifically proven that words and phrasing can have positive effects on human interaction. What we say and how we say it matters in guiding preferred reactions and responses. A study conducted in 2010 on the impact of pain question modifiers showed that a "wide variation in the reported pain can be achieved simply by modifying specific pain questions to patients."[11] Research conducted this year has shown that a person can change his or her explanatory style to

[11] Kholsa, A, Turner, J.A, Jarvik, J.G., Gray, L.A., & Kallmes, D.F. (2010, August 31). Impact of pain question modifiers on spine augmentation outcome, *Radiology, 257*(2): 477-82.

be happier and more optimistic.[12, 13] This is not just an emotional or mental phenomenon. There are physical ramifications as well. Studies have shown "a single word has the power to influence the expression of genes that regulate physical and emotional stress."[14]

Once again, words mean things, and properly utilized words will set expectations and guide proper actions. To that end, a final word on this new naming convention; we would no longer have injured workers. Workers' Recovery would manage and serve recovering workers.

Other substantive changes would need to be made to support this newly themed industry.

Better Training and Lower Case Loads for Recovery Specialists - The trend to consolidation and increased workloads for today's claims professionals is not suited to proper outcomes. While there are several factors that determine acceptable caseloads[15], Adjusters with caseloads of 200, 250 or even 300 cannot in any way maintain effective communication or management required to drive positive results. The state of training for these professionals today is abysmal. A 2013 industry study strongly indicated this. When asked, "Does your organization have a formal training program for new hire claims staff with little or no experience?", 42% of respondents answered

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[12] Bergland, C. (2013, August 27). Scientists find that a single word can alter perceptions [blog post], The athlete's way - Sweat and the biology of bliss, *Psychology Today*. Retrieved from http://www.psychologytoday.com/blog/the-athletes-way

[13] Lupyan, G., & Ward, E. (2013, February 20). Language can boost otherwise unseen objects into visual awareness. *Proceedings of the National Academy of Sciences of the United States of America*. Retrieved from http://www.pnas.org

[14] Newberg, A., & Waldman, M. (2012). *Words Can Change Your Brain*. New York, NY: Penguin Group (USA), Inc.

[15] Quinley, K. (2013, May 28). 6 factors impacting the claims caseload - The ideal range and the adjuster. Retrieved from http://www.propertycasualty360.com

yes, while 37% answered no. However, factoring out the 19% of respondents who indicated this question was not applicable to them, the percentage of applicable respondents who answered "no" jumps to an astonishing 47%.[16] That is not an acceptable standard. Better training and licensing standards should be adopted for the industry. The core result of these efforts would be improved communications with both the worker and employer. Today we do not have this in a reasonable fashion, and where critical information is lacking, negative and damaging thoughts and ideas will fill the void. Improved training and staffing standards for the people on the front lines of claims will make a large and immediate impact on results.

Improved Outreach to Recovering Workers' Support Network - Completely ignored by industry standards today, a recovering worker's social network is a critical influence on their thoughts and impressions. The traditional "3 points of contact" should be modified to become the "4 Points of Communication." Leaving a message on someone's answering machine should never be considered "contact," but by default has become the industry minimum standard for the 3 point method today. The 4 point method would require actual two-way communication, and include a worker's spouse or partner wherever applicable as the additional point of communication. Employers should be educated to avoid the stigma of workplace injury for their employees, with supervisors required to reach out and maintain communications with their recovering workers. Co-workers should be encouraged to do the same. Identifying and fostering positive input and response to a worker's social network can aid in the achievement of a positive outcome for all involved.

A well trained Recovery Specialist with an adequate workload could facilitate this activity.

Selecting Physicians on Outcome over Cost - The push for discounts in medical networks and the focus on fee for services is resulting in a

[16] Gillen-Algire, D.Z. (2013). *2013 Workers' Compensation Benchmarking Guide*, Rising Medical Solutions.

counterintuitive reality in comp today. Injured workers may not be getting the best care, and the cheapest care may not be so inexpensive over the long haul. I attended a conference last year where a Johns Hopkins physician cited research done by a US workers' comp carrier that found 80% of their medical spend was being generated by 7% of the doctors in their network.

While this is indicative of a greater problem in health care where we need to find an effective means to migrate to a fee for outcome model, the Workers' Recovery industry can still improve over current methods. Physicians should be selected on the merits of their performance, and paid on the basis of their outcomes. This can be accomplished by paying attention to injury and treatment durations of the attending physicians. Doctors who can return an employee to work quickly without re-injury, even at a higher per visit cost, will still reduce costs versus the physician who continues treatment without positive results.

Emphasize Return to Function in the Return to Work Process - There is a great deal of mistrust of Return to Work (RTW) efforts from certain quarters in workers' comp. It is perceived by some as a backhanded attempt to avoid indemnity obligations and save costs overall. This view is not entirely without merit, as there are employers who believe counting paper clips is a viable job for someone who is returning with restrictions. Every person needs to have value; a useful contributory role in society. That should be obvious to all, but it is unfortunately not the case. While the improved education and communication I suggest would also extend to employers regarding the importance of RTW, the true key to a successful effort here lies in the concept of "Return to Function."

An emphasis on Return to Function (RTF) allows medical professionals and others working with the recovering worker to concentrate on restoring, to whatever extent possible, those functions that will aid in the return of quality of life. Every worker in this situation wants to once again lift their child or grandchild. They want to be able to again walk the dog. They literally want to be

able to bend down and smell the roses. Concentration on restoring or teaching accommodation for those movements and functions that return normalcy will induce buy in from the place it is most essential; the recovering worker. From that point, RTW is a natural extension of this process. I cannot understate the importance of this course of action. Successful RTW is good for the employer and society; but with evidence that activity and work can actually lessen perceived pain, it is good for the recovering worker as well.[17]

The world of RTF/RTW under Workers' Recovery must also contain a training and educational component. People left with permanent impairments after an injury may not be able to return to the position they once held, and lack the skills for other available positions. We as an industry must be better at providing assistance to accommodate both an impairment and the development of new skill sets.

Legislate for Outcome, not Process - State legislators and regulators must work together to determine and define clear, understandable end goals, and craft legislation to those goals. All too often, today's reforms concentrate on process instead of those targets, and the result is additional layers of bureaucratic procedure, confusion and delay. Recently this was discussed at an IAIABC Disability Management and Return to Work Committee meeting. A representative of a carrier lamented that she sometimes felt that "the claimant is no longer relevant to the process."

A truly sad statement, indeed; but not one soul in the room openly disagreed with her assessment.

Workers' Recovery must not exist for the bureaucrats. It must not exist for the carriers, lawyers or the multitude of vendors that serve it. It must exist for the two constituencies its predecessor was formed to serve over 100 years ago: employers and their workers injured on

[17] Bingel, U., Büchel, C., Eippert, F., Finsterbusch, J., Rose, M., Sprenger, C. (2012, June 5). Attention modulates spinal cord responses to pain, *Current Biology*, Volume 22, Issue 11. Retrieved from www.sciencedirect.com

the job. Legislation must reflect the core values of desired outcome, and support the tenets laid before you: education, social outreach, training, quality care, communication and return to function. If the industry can clearly work toward a commonly understood end game and the rules are clearly defined, the importance of the process between the beginning and the end is less significant. Legislators and regulatory agencies must understand that concept.

Workers' compensation has largely served the country well over the previous century, and it has made prior adaptations acknowledging changing social mores and traditions. Originally called "Workmen's Compensation," the name was altered 40 years ago to reflect the vast influx of women into the modern workplace. There have been numerous reviews and changes to the system over that time, both at a state and national level. One of the most comprehensive and best known efforts, the National Commission on State Workmen's Compensation Laws, commonly referred to today as the Burton Commission, expertly summarized the challenges and complexities of these efforts in the conclusion to their 1972 report. While acknowledging differences of opinion and the challenges of limited time and extreme complexity, they unequivocally stated, "We are without exception supporters of the basic principles of workmen's compensation."[18]

I wholeheartedly agree with their sentiments. I, along with thousands of others in the industry we serve, are committed to the tenets and mission of workers' compensation. We believe in its potential and original purpose. We do not clamor for a change to the underlying conceptual foundation that is workers' compensation; we merely suggest a new way to accomplish those ideals within the social and economic confines of today. Workers' Recovery is not a repudiation of workers' compensation; no, it is better defined as workers' compensation version 2.0.

[18] Williams, C.A. & Barth, P.S. (1973). *National Commission on State Workmen's Compensation Laws, The Compendium on Workmen's Compensation,* Chapter 7, Page 129.

Improving communication, obtaining better outcomes, and working with a philosophical belief in the value of function and economic contribution is what Workers' Recovery is designed to do. Recognizing that the impairment of a recovering worker is a physical condition, but disability is merely a product of how that worker chooses to deal with their situation, Workers' Recovery can help break the cycle of entitlement and dependency that we see as a growing threat today. We can make this change, and it starts with one simple word.

Workers' Recovery. For the next 100 years, and beyond.

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With an extensive business management and human resource background, Bob brings a strong employer and corporate voice to the workers' compensation arena. Known for an extraordinary sense of humor, his presentations reflect both entertaining and practical advice for both people managing claims and the people "picking up the tab".

He was raised in Durango, Colorado and is a graduate of Fort Lewis College. He resides with his wife in Sarasota.

Some Observations by John Burton on "The Case for Workers' Recovery" by Robert Wilson

I applaud Robert Wilson on his proposal to refocus the priorities of workers' compensation in order to meet the needs of the future, and I agree with many of his specific recommendations to improve the program. However, in my ideal program, I would place the emphasis on a different outcome, and I would rely on a different implementation strategy.

The differences in our views can be illustrated in part by use of Figure 1 from my article, *Should There be a 21st Century National Commission on State Workers' Compensation Laws?*, in this issue of the *IAIABC Journal*.

The emphasis in Wilson's proposal appears to be on improving the outcomes for Impairments and Limitations in Activities of Daily Living (which appear to correspond to his "better medical

outcomes") and Nonwork Disability (which appears to correspond to his "'Return to Function" for which he places primary emphasis on "those functions that will aid in the return of quality if life"). And he argues that a new name for the program – Workers' Recovery – is an essential part of his reform because "words mean things", and use of the new name will help change priorities and result in better outcomes.

My ideal program would place the primary emphasis on minimizing the Actual Loss of Earnings and is entitled the *Workers' Compensation and Return to Work Act (WC&RTWA)*. And, I believe the key to success in promoting return-to-work (RTW) is to rely on economic incentives.[1]

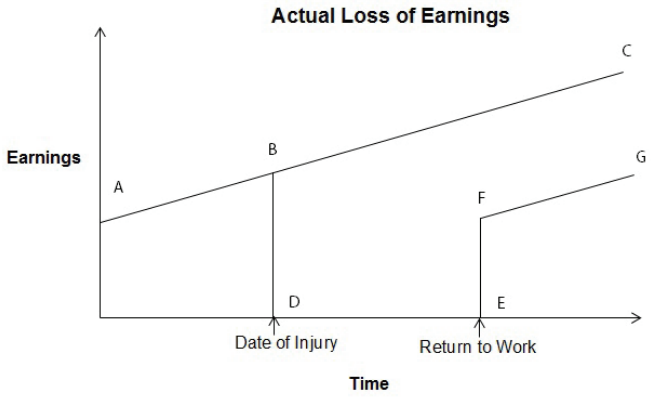
What are the consequences of redesigning the workers' compensation program to place primary emphasis of reducing the *actual loss of earnings* by promoting return to work through the use of economic incentives?

The first consequence is that *actual loss of earnings* will have to be measured for each worker who receives workers' compensation benefits using the methodology illustrated by Figure 1.

Prior to the workplace injury, wages increase through time from A to B, reflecting the worker's increasing productivity as well as general inflation. At point B, the worker experiences a work-related injury that reduces her earnings. Had she not been injured, her earnings would have continued to grow along the line BC. Although these *potential earnings* cannot be observed for the injured worker, they can be estimated from information on what happened after point B to earnings of similar workers who were not injured. The injured

[1] I realize that Wilson also discusses return to work as part of the goals of his program and I do not want to suggest that I am not interested in ameliorating the permanent consequences of workplace injuries other than reducing the actual loss of earnings. But I think it is fair to say that we emphasize different outcomes in our programs.

Figure 1
Based on Burton (2005, Figure 4.9)



worker's *actual earnings* in this example dropped from B to D and continued at this zero earnings level until point E, when the worker returns to work at wage level F. Thereafter, actual earnings grow along the line FG. *The worker's actual loss of earnings due to the workplace injury is equal to the worker's potential earnings after the date of injury (BC) minus the worker's actual earnings after the date of injury (BDEFG).*

The previous paragraph oversimplifies the methodology used to estimate actual loss of earnings due to a workplace injury. But implementation of the methodology does not require rocket scientists. Indeed, mere economists have conducted wage-loss studies involving workers who received permanent disability benefits in workers' compensation programs for decades. Examples include Berkowitz and Burton (1987), who conducted wage-loss studies of benefit recipients in California, Florida, and Wisconsin, and more recent studies of California, New Mexico, Oregon, Washington, and Wisconsin, which are described in Boden, Reville, and Biddle (2005) and Reville et al. (2005).

While wage-loss studies are thus demonstrably feasible, making their results the foundation of the *WC&RTWA* will require

significant changes in the operation of workers' compensation programs. I am unaware of any workers' compensation agency that on its own has conducted a wage-loss study. Nor has the National Council on Compensation Insurance (NCCI), which provides rate-making assistance to most states. And the Workers Compensation Research Institute (WCRI), the dominant research organization for the program, has rarely produced wage-loss studies. But times may change if the other consequences of my proposal are implemented.

The second consequence of my proposal is that workers' compensation premiums will be experience rated, but not on the basis of the firm's prior benefit payments, but on the basis of the actual wage-losses experienced by the firm's injured workers over an extended period (five or more years) after the date of injury. Of course, there will have to be formulas that consider credibility – so that a small firm with an employee who experiences a catastrophic injury does not have its premium become unbearable – but this is similar to the issues that the current experience rating formulas deal with and I have confidence that the NCCI can solve his challenge in a flash.[2]

A third consequence of the adoption of the *WC&RTWA* is that incentives and performance awards will change dramatically for employers and insurers. Wilson's *Workers' Recovery* approach relies to a large extent on admonitions to decision makers to do the right thing. I may have spent too much time as an economist, but I confess my reaction to the likely beneficial effects of such pleas is skepticism. However, if carriers and employers understand that there are strong financial incentives to get injured workers reemployed, I am pretty sure that performance protocols will quickly be adjusted to the new régime.

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[2] There will need to be a procedure that allows employers to not be charged for wage-losses resulting from injured workers who refuse to actively search for work or to accept reasonable job offers. The solution to this issue in the unemployment insurance program is discussed by Willborn et al. (2012, 654-58)

A fourth consequence is that the arguments involving compromise and release (C&R) agreements will become moot. Some proponents of C&R agreements assert that workers' are more likely to go back to work or find other types of employment if they sign such agreements. While I am skeptical of this assertion, the new program provides a fair test. C&R agreements will be permissible, but the experience rating formula I have proposed is not affected. If the worker who signs a C&R agreement does not find alternative employment, the employer is still charged with the continuing actual wage loss. My guess is that this will be the end of C&R agreements.[3]

A fifth consequence of the adoption of the *WC&RTWA* is that if C&Rs are seldom used because employers and carriers recognize their disutility in the new program, the basis for attorneys' fees will need to be revamped in many states. One obvious change would be to reward attorneys for reemployment of their clients. This might help align the incentives for employers, carriers, and applicants' attorneys.

I realize the prospects for the enactment of the *WC&RTWA* are similar to likelihood of the enactment of federal standards for state workers' compensation laws. But these comments will be a success if they encourage reformers to consider how economic incentives can be used in workers' compensation programs to achieve deserving objectives, such the reemployment of injured workers.

[3] In some states, settlements typically require the employee to forego reemployment with the employer where the injury occurred. These agreements will continue to be legal, but since the employer will be experience rated on the worker's actual loss of earnings even if such agreements are signed, they will probably become rare.

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