

Commentary

Reexamining Workers' Compensation: A Human Rights Perspective

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Injured workers, particularly those with more severe injuries, have long experienced workers' compensation systems as stressful and demeaning, have found it difficult to obtain benefits, and, when able to obtain benefits, have found them inadequate. Moreover, the last two decades have seen a substantial erosion of the protections offered by workers' compensation. State after state has erected additional barriers to benefit receipt, making the workers' compensation experience even more difficult and degrading. These changes have been facilitated by a framing of the political debate focused on the free market paradigm, employer costs, and worker fraud and malingering. The articles in this special issue propose an alternate framework and analysis, a human rights approach, that values the dignity and economic security of injured workers and their families. Am. J. Ind. Med. 55:483–486, 2012. © 2012 Wiley Periodicals, Inc.

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Last year, we celebrated the 100th anniversary of the first workers' compensation statute to survive court challenge. This centenary gave us the opportunity to reflect on the successes and failures of the first social insurance program to be enacted in the U.S. The articles in this special issue of the *American Journal of Industrial Medicine* (except Ehrlich [2012]) were initially written to provide background for a meeting of experts and injured workers organized by the National Economic and Social Rights Initiative, with funding from the Public Welfare Foundation. They were prepared largely in response to growing concerns that workers' compensation programs are failing to meet the needs of workers disabled by occupational injuries and diseases.

Workers' compensation was founded on a bargain between workers and employers. Workers were to receive speedy and sure (if modest) benefits. Employers, in turn, were shielded from lawsuits by injured workers. The articles in this special issue ask whether the terms of the bargain have changed and whether they are currently fair and just for both parties. These articles also raise, directly or indirectly, other fundamental questions. Can these systems be improved so they better serve the needs of injured workers and their families? If so, what steps should be taken? If not, what are the alternatives?

Over the past two decades, many states have rewritten their workers' compensation laws, making it more difficult for injured workers to receive compensation. There is substantial evidence of these growing barriers to compensation, as well as the more general failure of workers' compensation in the U.S. to provide prompt and adequate benefits to injured workers. Despite this, state legislatures continue to focus on reducing employer costs by further constraining worker access to benefits. Missouri's 2005 legislation was so draconian that the Missouri Supreme Court ruled that injured workers excluded by the new law from receiving benefits could sue their employers

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under the common law (*Missouri Alliance for Retired Americans v. Department of Labor Industrial Relations*, 277 S.W.3d 670 [Mo, 2009]).

Building on their pioneering work in this area [Spieler and Burton, 1998, Burton and Spieler, 2001], Spieler and Burton [2012] provide a compelling description of the degree to which workers disabled by occupational injuries and illnesses now fall through the workers' compensation safety net, and the ways in which the net has been shredded over the past two decades. They demonstrate that large and growing numbers of workers with occupational injuries and diseases—and resulting disability—are not receiving workers' compensation benefits under the current system.

For disabled workers who successfully navigate the workers' compensation maze, all recent research suggests that workers' compensation benefits cover only a small portion of their economic losses [Hunt, 2004]. Although there is variable adequacy of wage replacement depending on the type of injury and the jurisdiction, a study of five states' permanent partial disability systems found that wage replacement of pre-tax lost earnings for permanent partial disabilities varied between 29 and 46 percent for the ten years after the injury [Reville et al., 2001]. Because benefits generally end within 10 years, but economic losses continue, the true long-term replacement is likely to be below the reported numbers, perhaps substantially below.

Studies have also shown that non-economic losses are also substantial—and certainly not compensated. These include depression, limitations in doing household chores and child care, and interference with relationships with spouses and partners [Keogh et al., 2000; Strunin and Boden, 2004]. Further, experiences attempting to obtain workers' compensation benefits and the stigma attached to applying for them are often so negative that they are themselves barriers to filing. These issues are discussed in this issue by Lippel [2012] and Hilgert [2012].

The cutbacks since 1990 described by Spieler and Burton [2012] have been fueled in part by charges of worker fraud and malingering that are advanced by insurers, employers, and the media and supported by the insurance and economics literature on “moral hazard.” These allegations have survived despite a lack of empirical evidence that worker fraud is present in more than a tiny fraction of claims. They also stigmatize injured workers, make them less likely to report injuries and file claims, and justify insurer behavior that demeans those who do file for benefits. The cutbacks have also been fueled by interstate competition for business location, based on the hope that reducing employer costs will attract new investment. Competition among states to decrease costs like workers' compensation often results in a “race to the bottom.” This is, at best, a zero-sum game among the

competing states, but a losing proposition for the rights of injured workers.

The failures of workers' compensation systems are even greater among immigrant workers in the U.S. As Smith [2012] clearly describes, many immigrant workers are in precarious employment, facing greater risk of job loss, poorer safety conditions, and more difficulty in accessing workers' compensation benefits. Undocumented workers face even more difficulties because of pressures that can be exerted by employers and insurers, who can also use the threat of deportation to deter filing. Even worse, if workers report injuries, their employers may actually contact Immigration and Customs Enforcement to initiate deportation proceedings. The only bright side to this picture is that, by and large, state courts have upheld the right of undocumented workers to receive workers' compensation benefits.

The sorry and declining state of workers' compensation in the U.S. is largely the consequence of the political power of employers and insurers, bolstered by their ability to frame the political debate. Employer costs per \$100 of covered wages declined from \$2.18 in 1989 to \$1.33 in 2009, reflecting both legal restrictions on workers' compensation and declining reported injury rates. Yet even today the debate in the states is about excessive employer costs and employers' threats to move to states (or countries) with lower workers' compensation costs. The simplest way to reduce costs is to reduce the amount of benefits paid to workers, through raising barriers to approval of claims or reducing the benefits in claims that are approved.

Hilgert [2012] sees the need to use a human rights framework to challenge the market-based framework that underlies the attacks on cash and medical benefits for injured workers. This may indeed hold promise as a countervailing framing of the political debate. Instead of the current system, the human rights framework supports one that provides for adequate health care and income, supports safety, and—perhaps most important—protects the dignity of all workers [Hilgert, 2012]. In this framing, “Injured workers are rights-holders and governments and employers are duty-bearers” [Hilgert, 2012]. Put another way, we need to take notice that the program is called “workers' compensation”—not “employers' compensation.”

In 46 states, all or most insurance is provided by private insurers, regulated by state insurance departments. State insurance regulators are supposed to ensure that insurers do not underprice their product and become insolvent, while also protecting employers from being charged excessive premiums. Regulators also provide a mechanism, the residual market, that guarantees insurance coverage to employers that private insurers do not voluntarily cover. McCluskey [2012] describes the regulation of

the insurance market and argues that states are in a position to play a more meaningful role through this regulatory function. She describes how the State of Maine created the Maine Employers' Mutual Insurance Fund (MEMIC), an innovative "anti-insurance insurance company" that would prioritize improved claims handling, safety, and rehabilitation and be accountable to both workers and employers. McCluskey believes that MEMIC has been a success and that its success suggests that restructuring how workers' compensation is financed may prove a useful tool in creating a more humane system.

Although McCluskey looks to the financing of insurance in the U.S. as a source of change, Lippel [2012] takes us abroad to examine how other countries handle compensation of occupational injuries and illnesses, with an eye toward the goals of equity and the dignity of injured workers. Lippel focuses on several dimensions that she sees as necessary to protect the human rights of injured workers. She begins by describing aspects of workers' compensation systems that undermine human rights, including adversarial processes that undermine goals of fairness and efficiency and the relative powerlessness of workers in the system. Within this framework, many of the themes discussed in other articles are reinforced. These include the stigmatization of injured workers, difficulties in obtaining compensation, the extra barriers to compensation faced by women and immigrant workers and, more generally, how the design of insurance can affect the human rights of injured workers. With these issues in mind, she describes the accident compensation system in New Zealand and the disability compensation system in the Netherlands. In both, work-relatedness is not a requirement for compensation. She also describes aspects of the Canadian and the Australian workers' compensation jurisdictions, assessing characteristics that may support equity and dignity.

Ehrlich [2012] takes us to a workers' compensation system in South Africa, a country with much lower living standards and a quite different economy from the U.S. Ehrlich describes the history and current status of compensation for miners' lung disease. Of course, South Africa's circumstances are specific, and it thus faces its own unique set of challenges in developing a system that upholds the dignity of miners with lung diseases. Still, despite the differences in circumstance, some of the problems are surprisingly similar. Benefits are inadequate; the system is complex and difficult to understand, both for workers and for health professionals; many workers are unaware of benefit eligibility; and employers form a powerful lobby against bearing the costs of adequate compensation.

Taken as a whole, the articles in this special issue on workers' compensation and human rights paint a

disquieting picture of the current status of workers' compensation systems. They raise serious questions about the compatibility of workers' compensation and the human rights of injured workers. These critiques suggest that we should take a fresh look at workers' compensation—a look that questions all aspects of the current systems. For example: Should we continue to have a system that treats work-related disabilities differently from other disabilities? Should disability compensation be funded by the at-injury employer? Should payment for health care for occupational injuries and illnesses be covered by general health insurance?

Nobody has definitive answers to these questions, but they are certainly worthy of discussion and debate. This is especially the case because their genesis derives from concerns about the human rights of injured workers, not about the costs of employers. The human rights framing attempts to modify the terms of the debate, to move them away from a focus on the market paradigm, employer costs, and the "race to the bottom." Although political power rests at the moment in the hands of those who would undermine basic protections, it is worth building the arguments for these protections, as we attempt to change the political dynamic. It is incumbent on the public health community to maintain our focus on the health and well-being of workers.

REFERENCES

- Burton JF, Spieler EA. 2001. Workers' compensation and older workers. In: Allan Hunt H, editor. *Ensuring health and income security for an aging workforce*. Washington, DC: National Academy of Social Insurance. p 41–84.
- Ehrlich R. 2012. A century of miners' compensation in South Africa. *Am J Ind Med* 55(6):560–569.
- Hilgert JA. 2012. Building a human rights framework for workers' compensation in the United States: Opening the debate on first principles. *Am J Ind Med* 55(6):506–518.
- Hunt HA, editor. 2004. *Adequacy of Earnings Replacement in Workers' Compensation Programs: A Report of the Study Panel on Benefit Adequacy of the Workers' Compensation Steering Committee*, National Academy of Social Insurance. Kalamazoo, MI: W.E. Upjohn Institute.
- Keogh JP, Nuwayhid I, Gordon JL, Gucer PW. 2000. The impact of occupational injury on injured worker and family: Outcomes of upper extremity cumulative trauma disorders in Maryland workers. *Am J Ind Med* 38(5):498–506.
- Lippel K. 2012. Preserving workers' dignity in workers' compensation systems: An international perspective. *Am J Ind Med* 55(6): 519–536.
- McCluskey MT. 2012. Reforming insurance to support workers' benefits. *Am J Ind Med* 55(6):545–559.
- Reville RT, Boden LI, Biddle J, Mardesich C. 2001. *New Mexico workers' compensation permanent partial disability and return-to-work: An evaluation*. Santa Monica: RAND.

Smith R. 2012. Immigrant workers and worker's compensation: The need for reform. *Am J Ind Med* 55(6):537–544.

Spieler EA, Burton JF, Jr. 1998. Compensation for disabled workers: Workers' compensation. In: Thomason T, Burton JF, Jr., Hyatt DE, editors, *New approaches to disability in the workplace*. Madison, WI: Industrial Relations Research Association. p 205–244.

Spieler EA, Burton JF, Jr. 2012. The lack of correspondence between work-related disability and receipt of workers' compensation benefits. *Am J Ind Med* 55(6):487–505.

Strunin L, Boden LI. 2004. Family consequences of chronic back pain. *Soc Sci Med* 58:1385–1393.