

What You Need to Know About

Workers' Compensation

Annual data compiled by the U.S. Department of Labor consistently reveal that for too many workers the result of their employment is a job-related injury, illness, and in a number of cases, death. These data¹ document the ongoing need and importance of workers' compensation. The purpose of this paper is to provide an overview on:

- workers' compensation, how it evolved in the U.S., and the impact of this history today;
- developments with Maine's law, and resources for accessing information on this statute; and
- the need to reform workers' compensation for Maine workers.

What Is Workers' Compensation?

Workers' compensation is a law designed to provide workers, who are injured on or as a result of their employment, with compensation regardless of who is at fault. At the same time, employees covered by workers' compensation cannot sue their employer. Each state has its own workers' compensation law and system, which establish provisions covering the rights, protections and responsibilities of both employees and employers. Maine's Workers' Compensation law was first enacted in 1915, and has since been amended numerous times by the Maine Legislature. Workers' compensation coverage is funded primarily through private insurance companies who contract with employers, or by employers who have their own self-insured plan, or are part of a group plan. Some states have their own state-funded workers' compensation programs. In addition, the federal government administers laws on workers' compensation for federal employees, and in some occupations not covered by state law, but rather by parallel federal laws.²

History of Workers' Compensation in the U.S., and its Impact Today

As the U.S. industrialized during the late 19th and early 20th centuries, workplace hazards and subsequent worker injuries and deaths increased dramatically. During this time, when a worker was injured or killed as a result of their employment, the only possible means of obtaining compensation was for the worker (or her/his dependents) to sue the employer through court action. In these cases the burden of proof was on the worker to prove that the employer was negligent.

There were three early common law doctrines which also provided further employer protections against lawsuits. The *Contributory Negligence* doctrine specified that even if an employer was guilty of negligence, they were not liable if the injury was due wholly or in part to the employees' own negligence. The doctrine involving *Assumption of Risk* stated that when a worker accepted a job, she or he assumed full responsibility for the "ordinary and daily" risks of that job.

¹ US Dept. of Labor, BLS, News Release (10/20/11), "Workplace Injuries and Illnesses – 2010," USDL-11-1502. (Non-fatal cases of injuries/illnesses: private industry–3.1 million, state/local government–820,300); p. 1-2. Separate US BLS/DOL study cites 4551 fatal injuries in 2009, and 4,547 in 2010.

² Examples include: Federal Employee Compensation Act (federal government employees), the Longshoreman & Harbor Workers' Compensation Act (some shipyard employees and longshore workers), and the Federal Employees Liability Act (railroad workers).

The *Negligent Acts of Fellow Servants* doctrine absolved the employer from liability if the employee was injured as a result of the negligence of another worker.³ However, as these doctrines were eroded by the Courts, the opportunities for employer liability increased. As a result, employers became proponents of so-called no-fault workers' compensation laws "as a way to limit their [legal] exposure and responsibility for the consequences" of job-related illnesses, injuries, deaths, and their resulting costs.⁴ For example, "in 1911 the National Association of Manufacturers (NAM) appointed a special committee to investigate the entire issue. After a study of 10,000 manufacturers, a report was issued at the annual convention of NAM which adopted a resolution favoring workers' compensation."⁵

Court decisions also played a significant role in the development of workers' compensation. For example, the U.S. Supreme Court's interpretation of the Commerce Clause of the United States Constitution prevented the enactment of one coordinated national law on workers' compensation "for most private industry."⁶ Thus, individual states passed their own statutes. From 1911 to 1920, all but six adopted a workers' compensation law, and by 1949, all states had finally enacted this legislation.⁷

Through this approach, the concept of *liability without fault* evolved through the development of a highly restricted and structured system of state workers' compensation laws. To this day, these laws are supposed to provide injured workers with prompt, pre-determined benefits, on a no-fault basis, for lost wages and medical expenses. However, along with these so-called prompt and guaranteed benefits, workers lost the right to sue their employer. Thus, with the passage of workers' compensation statutes, employers became the primary beneficiaries of a major protection against employee lawsuits. Even if an employer is highly negligent, and/or commits an illegal act, willful or otherwise, under workers' compensation law that employer is still immune from an employee lawsuit. Essentially, under workers' compensation, employers are relieved of liability for injury or illness that occurs on or as a result of employment. In addition, problems have continued to exist with the different state compensation laws in terms of disparities in employee rights, coverage, and benefits.

Effort for National Reform

An attempt to address this inequity among the states occurred at the national level. In 1970, Congress established the National Commission on State Workmen's Compensation Laws with its passage of the Occupational Safety and Health Act under President Nixon. This Commission, made

³ Bureau of Labor Education (BLE), *Does Workmen's Compensation Compensate? The Maine Case*, Univ. of Maine: BLE, 1973. p.4 **Common law** is "law developed by judges without any guiding statutes in the context of actual disputes brought to their attention. A statute is law made by a legislative body." - Source: Dr. Lee Balliet, *Survey of Labor Relations, Second ed.*, Washington D.C. BNA, 3rd printing 1992; p. 51

⁴ Jim Case, Attorney at Law, McTeague, Higbee, Case, Cohen, Whitney & Toker, "History of Workers' Compensation and the Potential Impact of L.D. 1571," Topsham, Maine, 2011; p. 3. Also, refer to: Maine Workers' Compensation Board, "Annual Report on the Status of the Maine Workers' Compensation System," Submitted to 125th Legislature (First Regular Session) Feb. 2011; p. A-5.

⁵ Dr. Charles Scontras, Research Associate, Bureau of Labor Education, University of Maine, based on research for work in progress, preliminary title, "Labor in Maine on the Eve of Deindustrialization."

⁶ National Commission on State Workmen's Compensation Laws, Report of National Commission on State Workmen's Compensation Laws, Washington, D.C. Library of Congress, 1972; p. 34.

⁷ *Ibid.* (Also, according to Jim Case, Mississippi was the last state to adopt this legislation in 1949).

up of officials from government, medicine, labor, business, insurance, academia, and the public, issued a 1972 report containing numerous recommendations and “essential elements” for improving state workers’ compensation programs. Over the next several years, the Commission’s recommendations played a significant role towards improving state workers’ compensation laws, as a number of states incorporated many recommendations into their statutes.⁸ However, this progression did not last.

Professor Emeritus John Burton, Chair of the National Commission and noted scholar on workers’ compensation, reported in a 2010 Congressional hearing that: “..in the aftermath of the National Commission’s report, there were substantial changes in a number of State laws improving these laws. But that improvement has come to a halt, and if anything a decline.”⁹ Each state continues to have its own workers’ compensation law and system. Additional testimony by Dr. Burton describes the reality of this ongoing approach: “There are no Federal standards for these State workers’ compensation programs, and as a result, there are substantial differences among jurisdictions in terms of level of benefits, coverage of employers and employees, and the rules used to determine which disabled workers are eligible for benefits.”¹⁰

Workers’ Compensation in Maine

Maine improved its law based on the National Commission’s recommendations. And, for a time, Maine’s law was “consistent with the recommendations of the Commission, and consistent with many other industrial states which had adopted substantially the recommendations of that Commission.”¹¹ However, starting in the 1980’s, so-called “reform” efforts were initiated in Maine to cut workers’ compensation costs. The following describes these efforts and the results:

“The workers’ compensation environment of the 1980’s and early 1990’s was an extraordinary time in Maine’s political history. Contentious legislative sessions regarding workers’ compensation occurred in 1982, 1985, 1987, 1991, and 1992. In 1991, then Governor John McKernan tied his veto of the State budget to changes in the workers’ compensation statute. State government was shut down for about three weeks.”¹²

In addition to the political environment, there were other reasons and factors for workers’ compensation becoming so contentious in Maine.¹³ Some of these arose from the changing nature, complexity, and frequency of occupational injuries and illnesses in the state. Examples included carpal tunnel syndrome, skeletal injuries, and other work related illnesses and injuries often caused by excessive and repetitive motion, trauma, and stress to the body. Relating to these developments, changes in the law, increased litigation, and insurance costs were contributing factors in the

⁸ Based on testimony of Prof. Emeritus John Burton at the Congressional hearing on “Developments in State Workers’ Compensation Systems,” US House of Representatives, 111th Congress, Subcommittee on Workforce Protections, Committee on Education and Labor, Nov. 17, 2010, p. 20

⁹ *Ibid.*, Burton testimony, p.18

¹⁰ *Ibid.*

¹¹ Case, p. 5

¹² Maine Workers’ Compensation Board, “Annual Report on the Status of the Maine Workers’ Compensation System,” Submitted to 125th Legislature (First Regular Session) Feb. 2011, p. A-6.

¹³ *Ibid.*, p. A-6, Subsection, “Transition to the Modern Era,” provides an overview on these developments.

workers' compensation controversy.¹⁴

1992 saw the culmination of this controversy with the recommendations of the "Blue Ribbon Commission" which were adopted into law by the Maine legislature. Through these legal changes: "inflation adjustments for both partial and total benefits were eliminated; the maximum benefit was set at 90% of the state average weekly wage; [and] a limit of 260 weeks of benefits was established for partial disability. These changes represented substantial reductions in benefits for injured workers, particularly those with long term disabilities."¹⁵ Examples of other significant changes involved:

¹⁴ *Ibid.*,

¹⁵ *Ibid.*, p. A-6 – A-7

- establishing a Workers' Compensation Board, comprised of labor and management representatives, to administer and enforce the law;
- increasing the benefits allowance "from a base of six years to a base of ten years of disability benefits, with further benefits being available if the permanent medical injury (permanent impairment) was sufficiently high;"¹⁶
- creating a Maine Employers' Mutual Insurance Company (MEMIC), to provide a stable and reliable source of workers' compensation insurance coverage for Maine employers;
- requiring employees with injury dates after 12/31/92 to pay for their attorney fees;¹⁷
- changing the calculation of cash benefits to be 80 percent of the total after-tax weekly wage of the injured worker, with a cap of 90% of the state average weekly wage, whichever is less.¹⁸

Additional examples to changes in Maine's law after 1992 included: the enactment of restrictions on the criteria utilized to determine partial and total disability, particularly involving the determination of permanent impairment; and the establishment of an employee advocate system.¹⁹ Through this system, a worker advocate employed by the Workers' Compensation Board assists injured workers in preparing for the mediation and the formal hearing stages under the law, and attending these processes with the worker.²⁰ All of the changes just cited have continued as part of Maine's Workers' Compensation law to the present time. Further details of this law are available at: <http://www.maine.gov/wcb/facts.htm> - (facts about Maine's Workers' Compensation Laws).

Another important change occurred when the Maine Legislature and then Governor Angus King, established the Office of Monitoring, Audit, and Enforcement (MAE) for the purpose of:

"(1) providing timely and reliable data to policymakers; (2) monitoring and auditing payments and filings; (3) identifying those insurers, self-administered employers, and third-party administrators (collectively 'insurers') not complying with minimum standards."²¹

The Need to Reform Workers' Compensation for Workers

From a worker perspective, the original promise of Workers' Compensation has largely been broken and unfulfilled. Since the passage of these laws, employer immunity from worker lawsuits has continued to be protected by both statute and court case law. In stark contrast, the history of injured workers being provided with prompt compensation, on a no-fault basis, has been inconsistent

¹⁶ Case, p. 7

¹⁷ U.M. Bureau of Labor Education, *Maine Guide to Employment Law*, 2nd ed. Orono, Me: BLE, 2008, p. 42

¹⁸ *Ibid.*, p.34-35

¹⁹ Case, p. 8, and Workers' Compensation Board, 2011 Annual Report, lists all revisions since 1993 on p. A-4

²⁰ Maine Workers' Compensation Board, *Facts About Maine's Workers' Compensation Laws*, p. 4

²¹ Maine Workers' Compensation Board, "Annual Report on the Status of the Maine Workers' Compensation System," Feb. 2011, p. A-13

at best, and all too frequently a record of injustice and failure.²² Through Congressional testimony, Representative Lynn C. Woolsey describes the continued efforts to undermine state workers' compensation:

“Beginning in the 1990s, changes in State Workers’ Compensation laws brought about by the lobbying efforts of employers and insurance companies have resulted in stricter eligibility requirements and the reduction in both the amount and duration of benefits, particularly for those workers with permanent partial disabilities. Unfortunately, this grand bargain of the 20th century is not so grand anymore, especially for injured workers.”²³

Reforming Workers’ Compensation for Workers in Maine: Possible Actions

Work for the Adoption of National Standards: There is a strong need to adopt enforceable national standards for state workers’ compensation legislation. The continuing existence of fifty different laws perpetuates a harmful race to the bottom, as each state enacts further cuts in worker rights and benefits, in a never-ending quest to achieve the so-called “right” regulatory environment for attracting and retaining employers.²⁴ Furthermore, in terms of the adoption of needed changes, while “a few states have achieved genuine reform, most suffer with inadequate laws because of the drag of laws of competing states.”²⁵ Congressional testimony and supporting studies portray the very important role national standards can play in helping to achieve needed equity and consistency in state workers’ compensation laws.²⁶

However, the states need not wait for the Federal government to take the initiative in establishing standards. Rather, like other areas of legislation, the states often can be leading innovators. For example, before the federal Hazard Communication Standard was enacted as part of the Occupational Safety and Health Act (OSHA), Maine was the first state in the nation to adopt hazard recognition legislation dealing with the identification and abatement of workplace chemicals. The federal government and other states followed Maine’s lead. In the area of workers compensation, Maine also could take the lead by working with other states to establish recommended standards. This approach could serve as a catalyst and precedent for other states to adopt, as well as induce federal action.

Practicing Occupational Health and Safety: There is a strong basis for reducing and controlling Workers’ Compensation costs through health and safety. “In theory, firms have incentives to improve safety in order to reduce premiums, and to remain competitive.”²⁷ In practice, labor and management working together can institute effective programs on hazard recognition and abatement, safety and

²² Testimony & studies - US House Subcommittee on Workforce Protections, Hearing on 11/17/10.

²³ Prepared opening statement of Representative Lynn C. Woolsey, Chairwoman, Subcommittee on Workforce Protections, (previously cited Congressional hearing, p. 2-3).

²⁴ Documented at hearing, Burton testimony, Subcommittee on Workforce Protections, 11/17/10, p. 24.

²⁵ *Ibid.*

²⁶ *Ibid.*, entire report.

²⁷ *Ibid.*, p. 23.

health training, joint committee activities, OSHA compliance, and dealing with other health and safety challenges. All of these actions help reduce job related injuries and illnesses, thereby reducing workers' compensation costs by lowering premiums. A viable and effective Workers' Compensation law is an important motivator for employers to provide healthful and safe working environments.

Restoring the Promise to Workers: It is both ironic and prophetic that forty years ago, the final statement of the National Commission created to help reform state workers' compensation laws is as relevant and needed today as it was then:

“...the time has now come to reform workers' compensation substantially in order to bring the reality of the program closer to its promise.”²⁸

As a matter of public policy, this promise cannot be fulfilled through continued cuts in worker rights and benefits under this legislation. A constructive alternative would be the adoption of the following essential elements and recommendation of the National Commission, into state workers' compensation laws:

- 1) “compulsory coverage with no occupational or numerical exemptions to coverage;
- 2) full coverage of work-related diseases;
- 3) full medical and physical rehabilitation services without arbitrary limits;
- 4) employee choice of jurisdiction for filing interstate claims;
- 5) adequate weekly cash benefits for temporary total, permanent total, and death cases;
- 6) no arbitrary limits on duration or sum of benefits;”²⁹
- 7) “progressive increases in the maximum weekly wage benefit.....so that ... each State would be at least 200 percent of the State's average weekly wage.”³⁰

In order to fulfill the promise and commitment of workers' compensation for Maine's workers, all of these essential elements and recommendation need to be included as part of Maine's law, as was once the case. Another needed reform involves re-establishing a workers' right to have the fees of their attorney paid for by the employer and/or insurance company, providing the claim is made in good faith. This right also had been part of Maine's law, and was important for providing workers with needed legal representation and counsel. Particularly in the case of contested claims, its restoration would enable injured workers to achieve a greater level of equity and fairness in exercising their rights under this very important legislation.

²⁸ National Commission, p. 130. Also cited by Dr. Burton, in previous Congressional testimony; p. 24.

²⁹ Essential elements of National Commission, p. 26.

³⁰ *Ibid.*, p. 19. A total of 84 recommendations were made. Many are still useful for state policy makers to consider for future revisions of Maine's law.

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(207) 581-4124 web: <http://dll.umaine.edu/ble/>

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