

# **National Developments in Workers' Compensation Relevant for Florida**

**A Presentation in Orlando at the  
71<sup>st</sup> Annual Workers' Compensation Educational Conference**

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**John F. Burton Jr.  
Professor Emeritus  
Rutgers University and Cornell University**

## **I. Introduction**

Thank you for the opportunity to make a presentation to the 71<sup>st</sup> Annual Workers' Compensation Educational Conference. I am not here to serve as an expert on the Florida workers' compensation program. Rather my role is to discuss both the origins of workers' compensation and recent national developments and their relevance for the future of workers' compensation in Florida and the nation.

## **II. Origins of Workers' Compensation in the U.S.**

Workers' compensation is the oldest social insurance program in the United States. Many of the program's current features reflect its historical origins. These features include the incorporation of the workers' compensation principle in all workers' compensation statutes and the dominant role of the states in determining the provision of the benefits provided to injured workers.

Prior to the enactment of workers' compensation statutes, a worker had to bring a negligence suit against the employer in order to receive payment for a work-related injury. A negligence suit is a form of tort or civil remedy, for which the legal doctrines developed over time in decisions made by judges under common law. Injured workers were often unsuccessful in tort suits, not only because the worker had to prove that the employer was negligent, but because the courts had established several legal defenses – known as the “unholy trinity” -- that a negligent employer could use to avoid liability. One such defense was the fellow servant rule, which precluded an injured worker from suing the employer when the worker was injured by the negligence of another worker. In contrast, an employer was liable for damage to a stranger (such as a customer) caused by the negligence of an employee.<sup>1</sup>

In many jurisdictions, the first effort to deal with the deficiencies of the common-law approach to workplace injuries was the enactment of statutes - known as employer liability acts – which removed or limited the employers' use of the defenses such as contributory negligence. However, the employee's success in a suit still required the demonstration that the injury resulted from the employer's negligence, which often was impossible. A study cited by Somers and Somers (1954, 24), indicated that in 32.5 percent of 604 cases the survivors or workers who died in workplace accidents before 1911 received no compensation under employers' liability laws in

New York, Pennsylvania, and Minnesota. In another 47.8 percent of the cases, the award was \$500 or less.

Despite this record of meagre recoveries under the common law or employer liability acts, a study by Posner (1972) found that between 1875 and 1905 there was a tremendous growth in litigation over workplace injuries and that employees were increasingly recovering damages in negligence suits. In essence, the negligence suit approach was like a lottery, where employees usually recovered minuscule or no awards – which workers did not like – but where employers were increasing losing and paying large awards - which employers did not like.

Workers' compensation was designed to overcome some of the deficiencies of the negligence suit approach and of employer liability acts. All workers' compensation statutes incorporate the "workers' compensation principle," which has two elements. (1) Workers' compensation is a no-fault system, which means that in order to receive benefits, a worker does not need to demonstrate the employer is negligent and the employer cannot use the special defenses, such as contributory negligence. The employee only has to prove the injury is "work-related" (although there are legal tests that are obstacles to meeting the work-related requirement in many cases). (2) The other side of the workers' compensation principle is that the statutory benefits provided by the program are the employer's only liability to the employee for the workplace injury. If an injured employee prevailed in a tort suit, the resultant award could be very costly for employers as their liabilities potentially included all lost wages, medical expenses, and non-pecuniary damages for pain and suffering. The exclusive remedy aspect of workers' compensation means that employees cannot bring tort suits against their employers (subject to some limited exceptions). The two elements of the workers' compensation principle – a no-fault system and exclusive remedy – are sometimes referred to as "The Grand Bargain."

Workers' compensation laws also prescribe cash benefits by formulas, including weekly benefits that are a specified percentage of pre-injury earnings and durations of benefits for permanent impairments that are specified in the statutes. The statutory specificity of benefits was intended to reduce the litigation, delays, and uncertainty associated with tort suits. In addition, workers' compensation statutes in most states removed workplace injuries from the general court system and established workers' compensation agencies and industrial commissions that were given the primary responsibility for resolving disputes between workers and employers. Reformers felt this delivery system would also reduce the delays, uncertainties, and inconsistencies of the court system (Berkowitz and Berkowitz 1985, 161-163).

For many members of the labor, employer, and insurer communities, workers' compensation rather than tort suits became the preferred remedy for work-related injuries or fatalities. The features of the statutes that were enacted in the early 20<sup>th</sup> Century are still basically present in current programs: a worker is eligible for benefits without having to prove that the employer is negligent; workers' compensation benefits are the exclusive remedy against the employer; benefits are largely prescribed by formulas and (for many serious injuries) by fixed durations; and workers' compensation agencies largely administer the program.

The legal context of the early 20<sup>th</sup> century also affected the level of government where workers' compensation programs were enacted. At that time, the U.S. Supreme Court interpreted the commerce clause of the Constitution in a narrow fashion, which limited the ability of Congress to regulate activities not directly involved in interstate commerce. The federal government was able to enact a workers' compensation program for its own employees.<sup>2</sup> However, most workers in the private sector as well as state and local government employees could not be regulated by the federal government, and therefore, of necessity, most of the initial workers' compensation laws were enacted by the states.

New York was the first state to enact a comprehensive workers' compensation statute in 1910. However, the act was held invalid in March 1911 by the New York Court of Appeals in *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271 (1911) because it conflicted with the due process provisions of the state constitution and of the Fourteenth Amendment. Subsequently, the New York state constitution was amended to allow a mandatory workers' compensation law and the state enacted a new workers' compensation law in 1913 that was found constitutional by the New York Court of Appeals and ultimately by the U.S. Supreme Court in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917). (The *New York Central Railroad Co.* decision is further discussed in Section VII.)

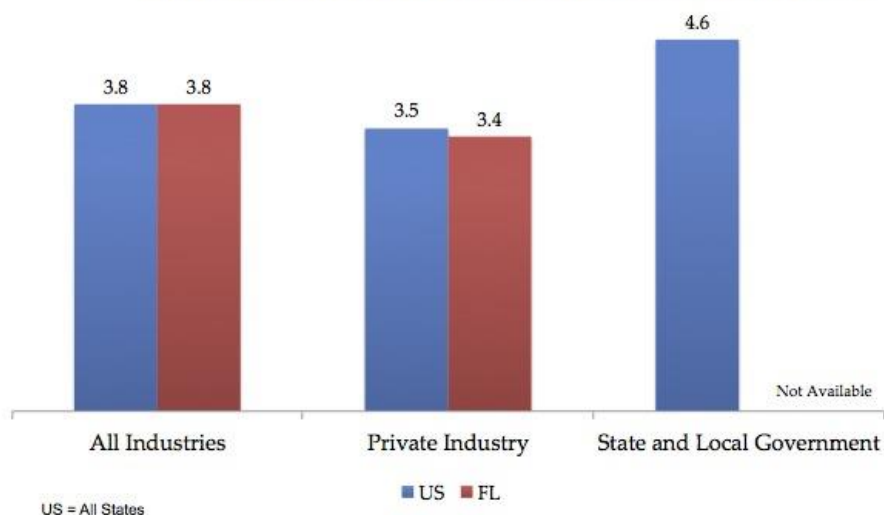
The first workers' compensation laws to withstand constitutional challenges were enacted in 1911, first by New Jersey and then Wisconsin.<sup>3</sup> By 1920, all but five states had enacted workers' compensation statutes. Many of these early laws were made elective for employers in order to avoid constitutional challenges. The first Florida workers' compensation law was enacted in 1935 (Harger 2003, 3).

### III. The Florida Workers' Compensation Program

#### A. Injuries, Benefits, and Costs

An examination of workers' compensation data in Florida needs first to consider the safety and health record in the state since a primary driver of benefits and costs is the number of workplace injuries and diseases. Figure 1, based on data from the U.S. Bureau of Labor Statistics (BLS), indicates that in 2010 the frequency of nonfatal occupational injuries and diseases in Florida was same as the national average for all industries and slightly above the national average for the private sector. There were no data available for the public sector in Florida in 2010. Nor are there any data available for Florida for more recent years, unlike most states, where data through 2014 are available from the BLS. Based on the fragmentary and outdated data available for Florida, the state appears to be comparable to national average in occupational safety and health.

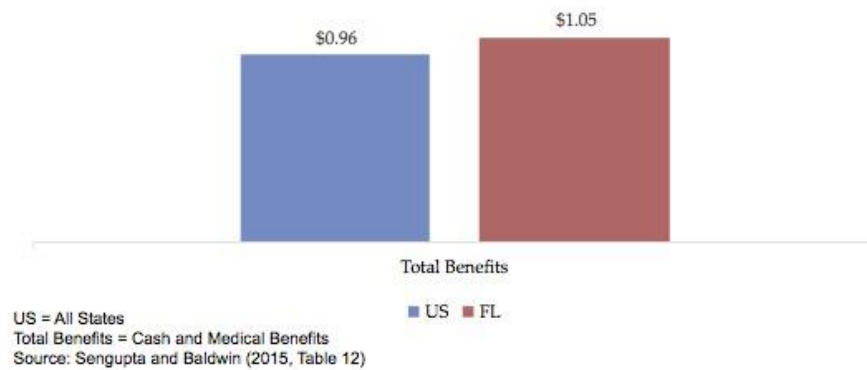
**Figure 1: Nonfatal Occupational Injuries and Illnesses Per 100 Full Time Workers in 2010 (Total Recordable Cases)**



The National Academy of Social Insurance (NASI) annual publishes the most comprehensive report on workers' compensation benefits, coverage, and costs. The most recent

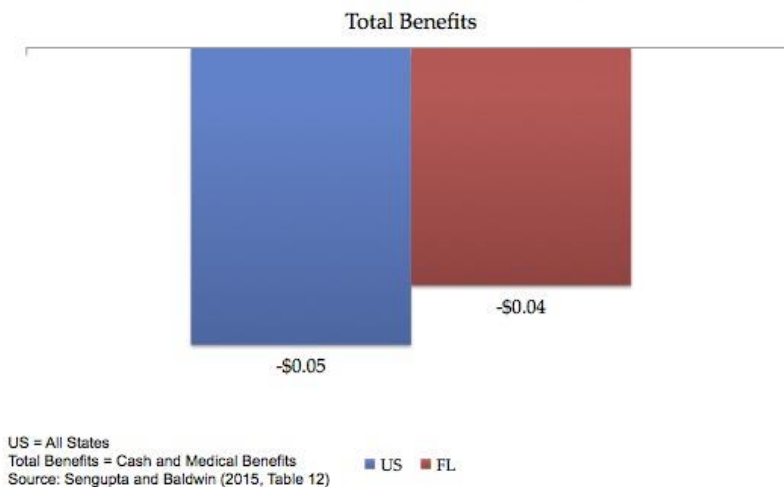
edition (Sengupta and Baldwin 2015) contains national and state data for 2013.<sup>4</sup> Figure 2 provides information on total paid benefits (cash plus medical) per \$100 of covered wages in 2013 for Florida and the US (which consists of the 50 states plus the District of Columbia, but not the federal workers' compensation programs). Florida's benefits of \$1.05 per \$100 of covered wages was 10 percent higher than the US average of \$0.96 per \$100 of covered wages.

**Figure 2: Workers' Compensation Total Benefits Per \$100 of Covered Wages, 2013**



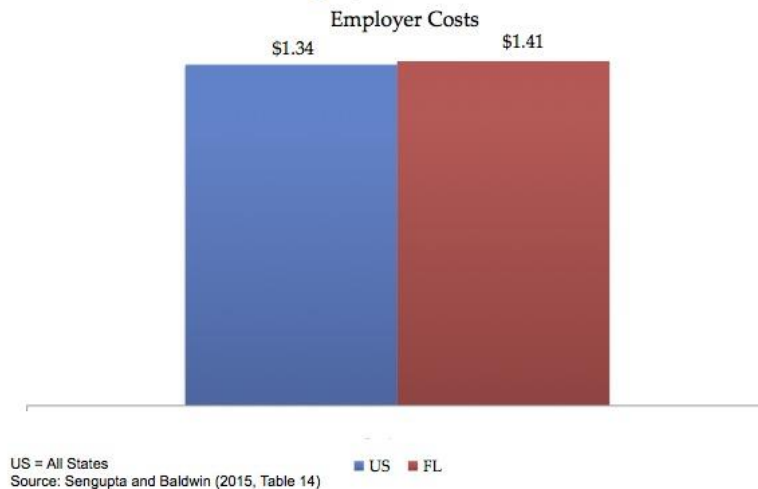
While workers' compensation benefits relative to payroll in Florida were somewhat above the US average in 2013, the benefits changed at a similar rate in recent years. Figure 3 indicates the decline in total benefits per \$100 of covered wages between 2009 and 2013 in Florida and the US. While all states on average experienced a decline of \$0.05 in total benefits per \$100 of covered payroll over the four years, the benefits in Florida dropped by \$0.04 per \$100 of payroll from 2009 to 2013.

**Figure 3: Workers' Compensation Total Benefits Per \$100 of Covered Wages, 2009-2013 Changes**



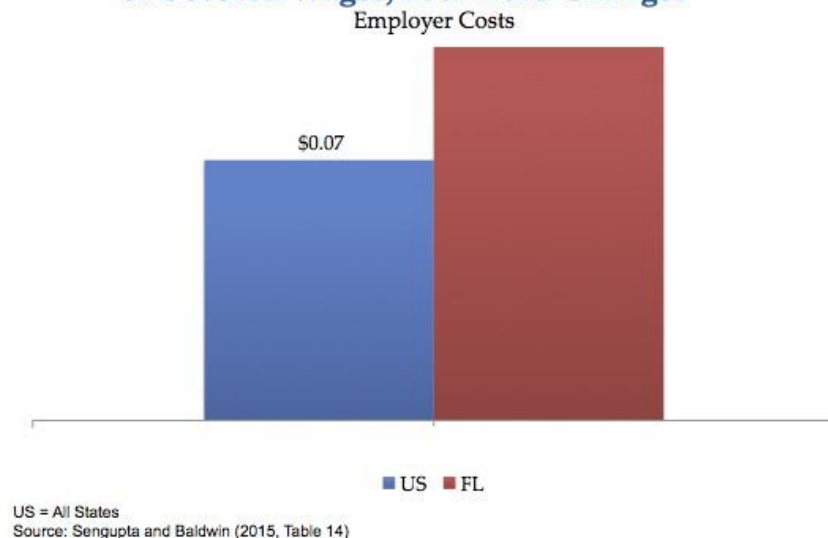
As can be expected, the employers' costs of workers' compensation in a state largely reflect the benefits paid to the workers in the jurisdiction. The data in Figure 4 indicate that the employers' costs of workers' compensation was \$1.41 per \$100 of covered wages in Florida in 2013, which was five percent above than the US average of \$1.34 per \$100 of covered payroll.

**Figure 4: Workers' Compensation Employer Costs per \$100 of Covered Wages, 2013**



When workers' compensation benefits paid to workers decline in a state, the costs to employers typically decline in the jurisdiction, but there are exceptions. The data in Figure 5 indicate that on average in the US, the costs to employers of workers' compensation increased by \$0.07, even though (as shown in Figure 3) benefits declined by \$0.05 per \$100 of covered wages. For Florida, the four-year decline in total benefits per \$100 of payroll (shown in Figure 3) was associated with an increase in the employers' costs of workers' compensation between 2009 and 2013 of \$0.11 per \$100 of covered wages, as shown in Figure 5.

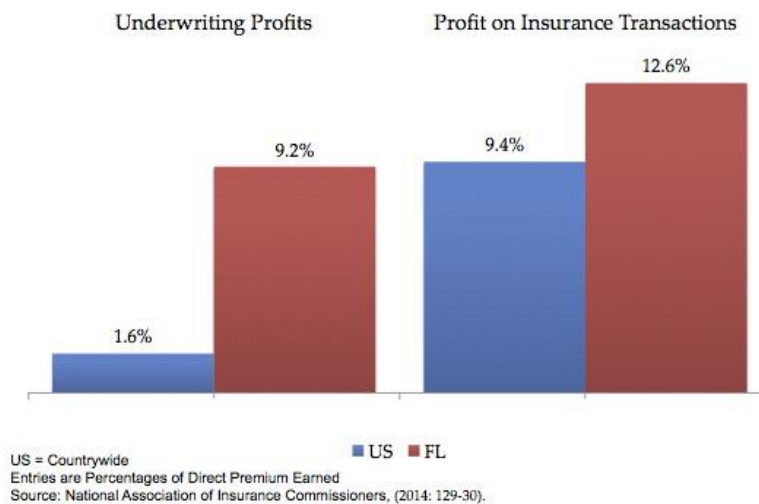
**Figure 5: Workers' Compensation Employer Costs per \$100 of Covered Wages, 2009-2013 Changes**



## B. Workers' Compensation Insurance

A final comparison of the workers' compensation program in Florida with the experience nationally involves the profitability of the workers' compensation insurance industry. Two measures of profitability are shown in Figure 6. For the US, underwriting profits were 1.6 percent of premium in 2013, compared to profits of 9.2 percent of premium in Florida. A more comprehensive measure of insurance industry performance is profit on insurance transactions, which includes investment gains and taxes, and by that measure, Florida's profit of 12.6 percent of premium was also higher than the US average of 9.4 percent.

**Figure 6: Insurance Industry Profitability, 2013**



Three types of regulatory arrangements are used for workers' compensation insurance in the U.S. (Thomason, Schmidle, and Burton 2001a, 38-45).<sup>5</sup> The first category is *pure administered pricing*, in which a rating bureau develops manual rates for a detailed set of occupational and industrial insurance classifications. Manual rates are based on pure premiums (loss costs based largely on previous benefit payments), which are increased by a loading factor, which consists of an allowance for loss adjustment and other expenses and for profits. The manual rates are approved by the state regulatory agency and must be adhered to by all insurance carriers. Individual employers may receive premium discounts, depending on the amount of their premiums, and may have their premiums adjusted by experience rating modifications, depending on the firm's previous experience. These modifying factors are approved by the insurance commissioner and must be adhered to by all carriers. Most carriers can pay dividends, but only after the expiration of the policy. In short, there is virtually no chance for carriers to compete in terms of the price of the insurance at the beginning of the policy.

A second type of regulatory arrangement involves *partial deregulation*, although there are several variants of partial deregulation. For example, some states allow deviations, in which individual carriers can deviate from the published manual rates by a specified percentage, sometimes limited to employers in particular insurance classes. Deviations are generally subject to the approval of the state insurance commissioner. Some states allow schedule rating plans, in which a carrier can adjust the premium charged to an individual policyholder based on subjective factors

A third type of regulatory arrangement is *comprehensive deregulation*, in which rating bureaus only publish loss costs (not manual rates) and insurers are permitted to set their own rates without first seeking approval of state regulators.

Prior to the 1980s, all states with private carriers relied on pure administrative pricing to regulate workers' compensation premiums. The changes in the regulatory environment since then have been tracked by the NCCI (2016 and earlier editions, Exhibit 2) with the date for each state when the "Competitive Rating Law Effective," which is a term broad enough to include both comprehensive deregulation and partial deregulation. Arkansas adopted a competitive rating law in 1981, followed by 33 other jurisdictions by 1995. As of 2016, there are 38 jurisdictions (including the District of Columbia) in which a competitive rating law is effective, nine states with private carriers that still rely on administered pricing, and four states with exclusive state funds.

Thomason, Schmidle, and Burton (2001a and 2001b) examined the effects of deregulation relying on state-level data from 1975 to 1995 which is the period when most states deregulated their workers' compensation insurance markets. We found that most forms of partial deregulation were associated with higher costs for employers. However, we found that comprehensive deregulation – loss costs systems that do not require prior approval of each carrier's rates – was associated with about an 11 percent reduction in the employers' costs of workers' compensation insurance after controlling for other factors that affect the costs.

I have not paid much attention to the regulatory environment for workers' compensation insurance since our book was published. During the preparation of this manuscript, I reviewed recent developments in the NCCI *Annual Statistical Bulletin (2016)* and was surprised by two findings. Subsequent to the completion of the book, only one state – Nevada – has adopted a competitive rating law. Florida is one of the nine states nationally that still relies on administered pricing and is the only one of the Southeastern states that does not have a competitive rating law.<sup>6</sup> It is not entirely evident why Florida has overlooked this opportunity to reduce the employers' costs of workers' compensation.

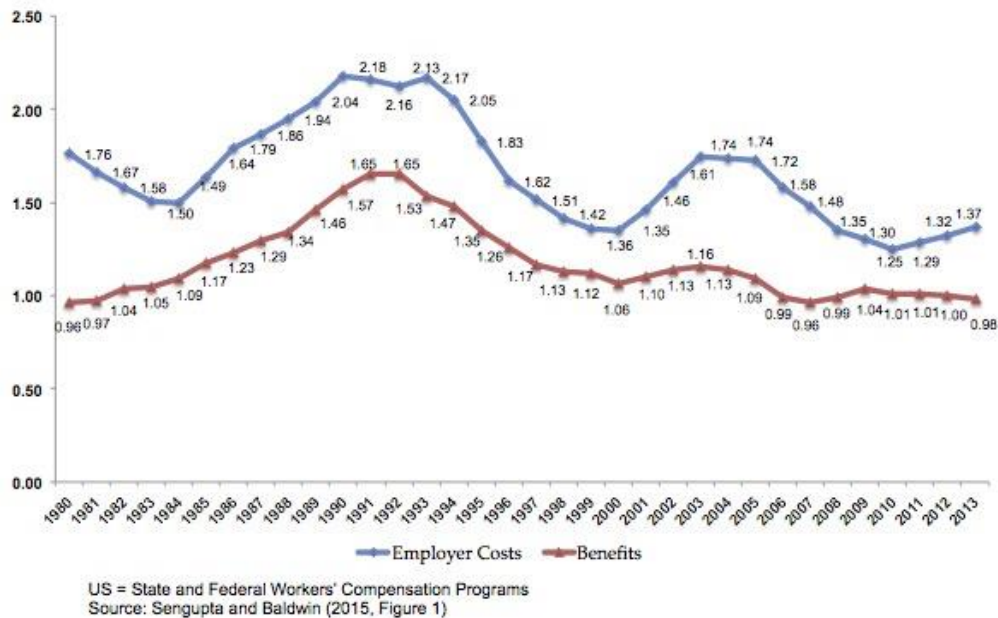
## **IV. Workers' Compensation National Developments in the last 50 Years**

### **A. Fluctuations in Benefits and Costs**

Workers' compensation programs have varied over time in the benefits paid to workers and the costs for employers. Figure 7 indicates that benefits per \$100 of covered wages increased from 1980 (the earliest year with comparable data) to the early 1990s, declined rapidly during the 1990s, and then generally declined slowly from 2000 until 2013. Costs fluctuated very roughly in tandem with benefits: costs declined from 1980 to the mid-1980s, then increased until the early 1990s, followed by steep declines in the balances of the 1990s, followed by increases for several years in the early 2000s, and then generally declining until 2012. In recent years, both benefits and costs as a percent of payroll have been near their low points for the period since 1980.



**Figure 7: Workers' Compensation Benefits and Costs Per \$100 of Covered Wages in the US, 1980-2013**



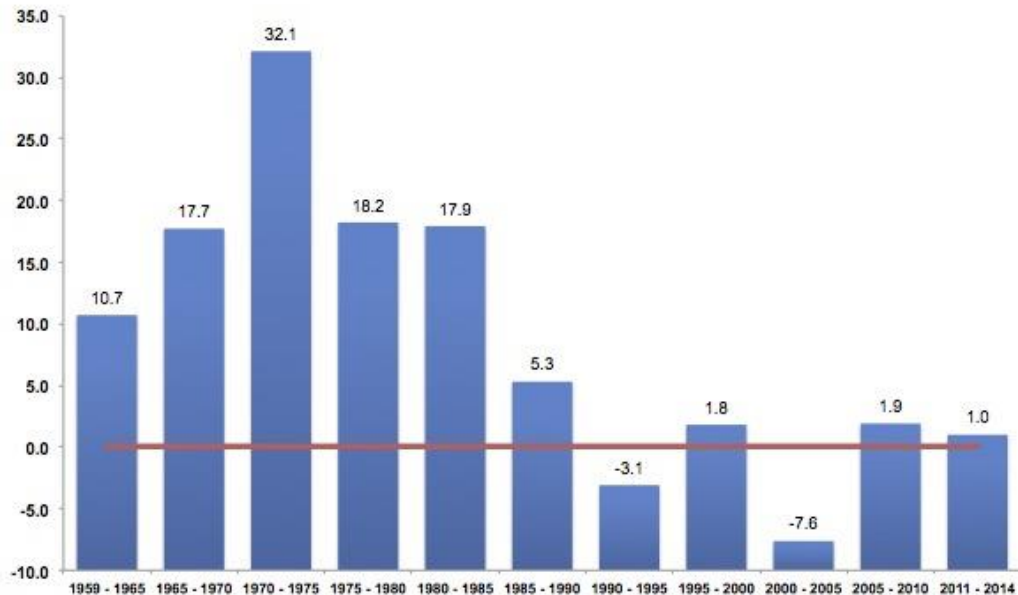
## B. Causes of the Changes in Benefits and Costs

The changes in benefits and costs per \$100 of covered wages since 1980 are explained in part by the changes in state workers' compensation statutes. The National Council on Compensation Insurance (NCCI) provides advisory ratemaking and statistical services for the workers' compensation programs in 36 states (including the District of Columbia) (NCCI 2016, 7). The NCCI publishes an *Annual Statistical Bulletin* (ASB), which includes data on these 36 states plus data from all other states except those with exclusive state funds. The NCCI publishes state and countrywide data on adjustments in premium level due to several factors, including benefit change, which "refers to adjustments in premium level to account for benefit changes adopted by the various state legislatures, as well as medical fee and hospital rate changes (NCCI 2016, Exhibit 1)." Figure 8 shows the changes in statutory benefits for the five year intervals from 1959 (when the NCCI data series began) to 2014.<sup>7</sup>

- **The 1960s.** Statutory benefits increase by more than 28 percent.
- **The 1970s.** Statutory benefits increased by more than 50 percent.
- **The 1980s.** Statutory benefits increased varied over the decade: up 18 percent in the first five years but only 5 percent in the last five years. 1985.
- **The 1990s.** For the first time since at least the 1950s, statutory benefits declined during the decade, although the decline was only one percent.
- **The 2000s.** Statutory benefits declined over five percent during the decade.
- **The 2010s.** Statutory benefits have been essentially been flat.<sup>8</sup>



**Figure 8: Workers Compensation Statutory Benefits Changes Percentage Changes in Sub-periods, 1959 – 2014**



Source: Calculations by John Burton based on NCCI (2015 and earlier editions)

The declines since 1990 have been due to several factors. In some jurisdictions the weekly benefit amounts or the durations of some types of benefits have been reduced. While the reductions in the statutory amounts and duration of benefits explain some of the decline in benefits shown in Figures 7 and 8, a less obvious set of changes that limit access for disabled workers to the workers’ compensation programs may be more important (Guo and Burton 2010; Spieler and Burton 2012). These changes include limiting the compensability of claims involving particular medical diagnoses, such as stress claims; limits on coverage when the injury aggravates a pre-existing condition; and procedural and evidentiary changes, such as requiring “objective” medical evidence and imposing a stricter burden of proof on workers.

Although the decline in WC benefits shown in Figures 7 and 8 that were examined by Spieler and Burton (2012) and Guo and Burton (2010) began in the early 1990s, the rate of constriction in coverage and benefits may have accelerated in the last ten years. Grabell and Berkes (2015a) report that “Since 2003, legislators in 33 states have passed workers’ compensation laws that reduce benefits or make it more difficult for those with certain injuries and diseases to qualify for them.”

A recent example of effort to tighten compensability rules involves Illinois, where Governor Rauner made several proposals for changes in the Illinois workers’ compensation program so the state will “become more competitive in order to increase jobs and grow the economy” (Rauner 2015). The proposed changes include a reduction in the medical fee schedule, a narrowing of what constitutes travel for purposes of workers’ compensation coverage, change in the factors that can be used to determine the extent of permanent partial disability (PPD) to allow sole reliance on the *AMA Guides*, and a change in the causation standard. The proposed change in the causation standard is:

The causation standard should be raised from an “any cause” standard to a “major contributing cause” standard. The accident at work must be more than 50% responsible for the injury compared to all other causes.

The Governor’s discussion of this proposed standard indicates that Missouri, Kansas, Oklahoma, and Tennessee have recently passed laws requiring the workplace to be “the *primary* cause for workers’ compensation to be compensable,” and indicates that “Florida’s major contributing cause standard is identical to the one we are proposing.”<sup>9</sup>

In addition to reductions in the duration or weekly amounts of cash benefits and the constriction of compensability rules, there is a nascent movement to reduce the coverage of workers. The most significant recent development concerning legally required coverage was Oklahoma’s adoption of an opt-out provision in 2013, which applies to injuries sustained after January 1, 2014. Robinson (2013, 154-55) distinguishes the Oklahoma approach from the long-standing provision in Texas that allows employers to be “non-subscribers” to the workers’ compensation statute and thus subject themselves to tort suits. (Many Texas employers have voluntarily established disability plans that provide some protection to injured workers.) The Oklahoma law allows employers the choice of (1) remaining with the “traditional” workers’ compensation act or (2) opting out of the workers’ compensation plan and establishing a written benefit plan that provides “for payment of the same form of benefits” that are at least equal to or greater than the state’s workers’ compensation act. Unlike the Texas provision, the Oklahoma law protects the employer from tort suits for workplace injuries even when the employer opts out of the state workers’ compensation statute.

Several recent studies have criticized the Texas and Oklahoma provisions allowing employers to avoid workers’ compensation coverage. Grabell and Berkes (2015b) examined the injury benefit plans of 120 employers who have opted out in Texas or Oklahoma and found many contained provisions that were more restrictive than the states’ workers’ compensation plans. For example, some plans deny benefits unless the worker reports the injury by the end of the shift. Other plans exclude illness from mold exposure, bacterial infection, or asbestos exposure. Several commentators, including Pennsylvania Workers’ Compensation Judge David Torrey (2015b), have expressed serious reservations about the opt-out provisions. Legal challenges to the Oklahoma opt-out provision are discussed in Section VII.

### **C. Consequences of Changes**

An example of the effects of restricting eligibility on workers is provided by Oregon, where Thomason and Burton (2001) estimate that a series of legislative provisions resulted in benefits (and costs) being about 25 percent below the amounts they would have been in the absence of the more restrictive eligibility standards. The legislative provisions included a requirement that the work injury be the major contributing cause (MCC) of the worker’s disability in order for the worker to be eligible for any workers’ compensation benefits. This requirement contrasts with the traditional approach in workers’ compensation in which a worker is eligible for benefits so long as the work injury is a nontrivial source of his or her disability.

Another consequence of the reduction in permanent disability benefits and the tightening of eligibility standards in workers’ compensation is that some disabled workers are turning to the Social Security Disability Insurance (SSDI) program for financial support. Burton and Guo (2016) provide four sources of evidence documenting the shifting of the costs of workplace injuries and diseases from workers’ compensation to SSDI. For example, Guo and Burton (2012) examined the increase in SSDI applications between the 1980s and 1990s and found that, while most of the increase in applications was due to aging of the population and women’s increasing workforce participation, nonetheless changes in state workers’ compensation programs during the 1990s

resulted in a modest but statistically significant increase in SSDI applications during that period. Cost shifting from workers' compensation to SSDI is a significant issue because the SSDI Trust Fund would have exhausted its reserves in 2016 if Congress had not provided a temporary solution in 2015 allowing the SSDI Trust Fund to borrow money from the OA Trust Fund.

## V. The Fundamental Cause of Inadequate Workers' Compensation Benefits

Although WC statutory benefits were increasing in the 1960s (Figure 8), benefits and coverage were criticized in the period. One result is that when the Occupational Safety and Health Act (OSHAct) of 1970 was enacted, the National Commission on State Workmen's Compensation Laws (National Commission) was created and directed to determine if state workers' compensation laws "provide an adequate, prompt, and equitable system of compensation for injury of death arising out of in the course of employment."

The National Commission, whose 18 members included three representing Cabinet members and 15 appointed by the Nixon White House, issued a unanimous report in 1972. The *Report* of the National Commission documented serious deficiencies with state workers' compensation statutes: for example, "the *maximum* weekly benefit for temporary total benefits in more than half of the states" did not reach the 1971 national poverty level for a non-farm family of four (\$79.56 a week) (National Commission 1972, 61). The report also reported that in most states the maximum weekly benefits for temporary total disability benefits relative to the state's average weekly wage were lower in 1972 than they had been in 1940 (National Commission 1972, Table 3.6).

The conclusion of the National Commission (1972, 25) was that "State workmen's compensation laws are in general neither adequate nor equitable." Of greater relevance to an understanding of current workers' compensation programs is the National Commission's analysis of a major source of the deficiencies of state programs (1972, 124-25):

**Competition among States.** The economic system of the United States encourages the forces of efficiency and mobility. These forces tend to drive employers to locate where the environment offers the best prospects for profit. At the same time, many of the programs which governments use to regulate industrialization are designed and applied by States rather than the Federal government. Any State which seeks to regulate the by-products of industrialization, such as work accidents, invariably must tax or charge employers to cover the expenses of such regulations. This combination of mobility and regulation poses a dilemma for policymakers in State governments. Each State is forced to consider carefully how it regulate its domestic enterprises because relative restrictive or costly regulation may precipitate the departure of the employers to be regulated or deter the entry of new enterprises.

Can a State have a modern workers' compensation program without driving employers away? Our analysis of the cost of workmen's compensation has convinced us that no State should hesitate to adopt a modern workmen's compensation program. . . .

While the facts dictate that no State should hesitate to improve its workmen's compensation program for fear of losing employers, unfortunately this appears to be an area where emotions too often triumph over facts. . . . whenever a State legislature contemplates an improvement in workers' compensation which will increase insurance costs, the legislators likely will hear claims from some employers that the increase in costs will force a business exodus. It will be virtually

impossible for the legislators to know how genuine are these claims. To add to the confusion, certain States have abetted the illusion of the runaway employer by advertising the low costs of workmen's compensation in their jurisdictions.

When the sum of these inhibiting factors is considered, it seems likely that many States have been dissuaded from reform of their workmen's compensation programs because of the specter of the vanishing employer, even if that apparition is a product of fancy not fact. A few states have achieved genuine reform, but most suffer with inadequate laws because of the drag of laws of competing States.

## **VI. The Current Challenge for Workers' Compensation: A Race to the Bottom**

The deterioration of state workers' compensation laws by the perceived threat of run-away employers is the major challenge for the program today in my opinion. There appears to be an accelerating movement to reduce benefits, tighten compensability rules, or allow employers to opt-out of the program.

## **VII. The Solutions to the Current Challenges to Workers' Compensation**

### **A. Federal Standards**

The National Commission made 84 recommendations for improving state WC programs. Of particular relevance to developing a strategy to deal with the deleterious effect of competition among states were the designation of 19 of these recommendations as essential and a recommendation (National Commission 1972, 127) that "compliance of the States should be evaluated on July 1, 1975, and, if necessary, Congress with no further delay in the effective date should guarantee compliance." There were no dissents to this recommendation for federal standards among the 18 members of the National Commission.

Federal standards for workers' compensation have not been enacted. The threat of federal intervention probably explains the surge in improvements in workers' compensation statutes in the 1970s shown in Figure 8. With the change in the national political environment since 1980, the threat of federal standards diminished as a threat in the 1980s and disappeared in subsequent decades.

Indeed, it is almost inconceivable that Congress would enact federal standards for the state workers' compensation program. Moreover, I do not think that federal standards are adequate to deal with the current threats to the state system (Burton 2015a).

### **B. A federal workers' compensation statute?**

A federal workers' compensation program to replace state programs (i.e. federalization of the workers' compensation program) is even more unlikely to be enacted than federal standards. To use the analytical term commonly used in New Jersey: fuhgettaboutit.

### **C. Absorption of Workers' Compensation into Existing Federal Programs**

#### **Workers' Compensation Cash Benefits Absorbed by Social Security Disability Insurance**

Another possible outcome for workers' compensation is that the responsibility for providing cash benefits to workers disabled by work-related injuries and diseases could be taken over by the SSDI programs, which already provides cash benefits to workers disabled from any cause. The SSDI program pays more than four times as much to disabled workers and their dependents as does the workers' compensation program and so the whale could probably swallow the

walrus.<sup>10</sup> One advantage of such a merger is the resources currently devoted by the workers' compensation program to deciding whether injuries or diseases are work-related could be reduced or perhaps even eliminated. However, the SSDI program currently only provides benefits for permanent and total disability, while 62.6 percent of all workers' compensation claims involve temporary disability and 61.8 percent of workers' compensation benefits are paid for permanent partial disability. Of particular concern are PPD benefits, which are even more complex and litigious than current DI benefits, and so an SSDI program that absorbed the workers' compensation program would have to develop a much more elaborate delivery system to provide both temporary and permanent as well as with total and partial disability benefits.

As a practical matter, the folding of workers' compensation cash benefits into the SSDI program seems highly unlikely – not only because of the issues raised above but because of political considerations. Workers' compensation benefits are largely provided by private insurance carriers and the program is largely administered by state employees whose replacement by federal employees would not be universally acclaimed. So unless the new SSDI program, which absorbed workers' compensation, had a major role for private carriers and was largely administered by the states, the notion of a grand disability program seems doomed.

Another potential drawback of an SSDI program that absorbed workers' compensation concerns the manner of financing the new program. The SSDI program is financed by a portion of the FICA tax that is paid by both workers and employers and that does not vary among these contributors, while the workers' compensation premium is paid solely by employers and is experience rated so that employers pay more or less depending on their industry and their own prior history of benefit payments. The historical rationale for experience rating is that the procedure promotes workplace safety and, although there is disagreement among scholars about whether experience rating actually improves workplace safety (Burton 2015c), nonetheless the absence of experience rating in the SSDI program will be of concern to some supporters of workers' compensation if the SSDI and workers' compensation programs are combined. Of course, the "obvious" solution is to experience rate the SSDI program, which has long been advocated by some (Burton and Berkowitz 1971, 351) and which has recently been proposed as a partial solution to the current SSDI financial problems (Burkhauser and Daly 2011, 110-13). Burton and Guo (2016) made three proposals for reform of the SSA program and in particular the relationship between workers' compensation and SSDI. Our most significant proposal is that the SSDI program should use experience rating to determine employer's contributions to the program. We think that experience rating – which has been used with general success in workers' compensation for over 100 years – would improve the outcomes for workers in the SSDI program and would decrease the incentives for employers to shift costs from workers' compensation to SSDI.

### **Workers' Compensation Medical Benefits Absorbed by the ACA**

The relationship between the workers' compensation health care system and the Affordable Care Act<sup>11</sup> (ACA) health care system for non-work-related injuries and diseases is murky at best. Gruber (2014) suggested that because more workers will have health insurance there will be less need for them to rely on workers' compensation if they are injured, which should lower the costs of workers' compensation. On the other hand, he recognized that effect could be offset by changes in the health care plans offered by employers for non-work-related medical conditions, such as high-deductible plans, provider networks with limited choices of providers, and caps on reimbursements for medical care providers. These changes could encourage workers and providers to shift marginal cases into the workers' compensation health care system unless workers' compensation quickly adjusts its own health care system. If these adjustments do not occur, then health care costs in workers' compensation could increase, which is reminiscent

of what happened to workers' compensation health care costs in the 1980s when managed care in other parts of the health care system preceded changes in the workers' compensation program.

This raises the question of whether there should be 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, as discussed by Mustard and Sinclair (2005), 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 of the workers' compensation program in Ontario appeared to be lower than in most U.S. jurisdictions.

#### **D. Court Challenges to Changes in State Workers' Compensation Laws**

##### **(1) Challenges in Other States to Laws Adopting the Dual Denial Doctrine**

Prior to the enactment of workers' compensation statutes, workers had the right to bring negligence (tort) suits against their employers for work-related injuries. Negligent employers had several special defenses (such as contributory negligence), but employees were increasingly successful in the negligence suits in the early 20<sup>th</sup> century. For this and other reasons, states began to pass workers' compensation laws around 1910. These laws had provisions of benefit to workers: they were no-fault laws (the employer is liable for workers' compensation benefits even if the employer is not negligent, and the employer can no longer use the special defenses). These laws also had features of benefit to employers: workers' compensation statutes provide cash benefits that are less than the potential recovery under tort suits. And workers' compensation is the exclusive remedy of the employee against the employer, which means that the employee cannot bring a tort suit against the employer (even if the employer is negligent). Needless to say, this is a short summary of a complicated topic, but I hope it is sufficient for this presentation.

Given this historical features of the workers compensation principle, a current issue is: Can a workers' compensation statute both (1) contain requirements that make it impossible for a worker to qualify for workers' compensation benefits and (2) contain provisions that preclude the worker from bringing a tort suit by stating that workers' compensation is the exclusive remedy for a workplace injury? In essence, can there be a dual denial doctrine that precludes both workers' compensation and tort remedies?

The Oregon legislature passed legislation in 1993 denying workers' compensation benefits unless the worker could prove that work exposure was the major contributing cause (MCC) of an occupational disease. A worker who experienced a work-related disease that did not meet the MCC requirement was denied workers' compensation benefits. The Oregon Supreme Court, in *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Or.1995), relying on a statutory interpretation of the Oregon workers' compensation law, held that exclusive remedy provision did not preclude the worker from bringing a tort suit against the employer. In response to *Errand*, the Oregon legislature amended the workers' compensation statute in 1995 to provide that workers' compensation was the exclusive remedy for work-related injuries and diseases, even if the condition was not compensable under workers' compensation because the work exposure was not the major contributing cause. In essence, the Oregon legislature said: when we say dual denial for diseases for which the workplace is not the MCC, we mean it. In *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (2001), the Oregon Supreme Court responded by holding that the

Oregon constitution did not allow the legislature to eliminate both the workers' compensation remedy and a tort remedy when the employment is not the major contributing cause of the condition.

The preceding paragraph was included in the May 2016 draft of this presentation. You can imagine my surprise and consternation when I subsequently learned the Supreme Court of Oregon had overruled *Smothers* in early May in *Horton v. Or. Health & Sci. Univ.*, 359 Ore. 128 (2016). The *Smothers* decision involved an interpretation of the remedy clause in the 1857 Oregon Constitution, which the Oregon Supreme Court has now reinterpreted.

The dual denial doctrine appears to be clearly unconstitutional in Montana. Based on an extended review of cases such as *Stratemeyer v. Lincoln County (Stratemeyer II)*, 276 Mont. 67, 915 P.2d 175 (1996), McClure (2000 at 13) concluded that "Montana allows an employee whose injury is not compensable under the worker's [sic] compensation laws to file a tort action for recovery." While *Stratemeyer* and other cases established a clear limitation on the exclusive remedy provision in Montana, similar constitutional challenges in other states have not all been successful.<sup>12</sup> Nonetheless, adoption of states incorporating the dual denial doctrine may lead to a challenge that such provision violates a state's constitution and arguably also the U.S. Constitution.<sup>13</sup>

The challenge to the dual denial of both workers' compensation and tort remedies does not depend on a constitutional issue. A Pennsylvania Supreme Court decision, *Tooev v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013), considered the statute of repose, which requires a disease to manifest within 300 weeks of the last exposure to the source of the disease.<sup>14</sup> Two workers, Tooev and Landis, were exposed to asbestos and developed mesothelioma, but their last exposures were 1,300 and 780 weeks before the manifestation of their diseases. Because the claims did not meet the 300 week manifestation rule, they did not qualify for workers' compensation benefits. As a result, the workers' brought tort actions against their employers, who invoked the exclusivity provision of the Pennsylvania workers' compensation act. The lower courts dismissed the cases, but the Supreme Court reversed the decision based on statutory construction:

It is inconceivable that the Legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who had suffered the most serious of work-related injuries without any redress under the Act or at common law.

By basing the decision on the statutory construction of the Pennsylvania workers' compensation law, the Supreme Court avoided having to deal with constitutional challenges to the dual denial doctrine that were raised in the case.

The essence of this discussion is that there is in my opinion a significant risk that the adoption of a workers' compensation statute relying on the dual denial doctrine will result in challenges to the exclusive remedy provision that will make employers susceptible to tort suits for work injuries that are no longer eligible for workers' compensation benefits.

## **(2) Additional Court Challenges to Laws in Other States**

In addition to challenges in other states to workers' compensation statutory provisions that adopted the dual denial doctrine, there are other cases involving additional matters that are worth noting. One of the most interesting challenge involves the Oklahoma law allowing employers to opt-out of the state's workers' compensation law and



One feature of the Oklahoma law is that the benefit plan adopted by the employer that opts-out of the workers' compensation program may qualify as an ERISA plan, which could mean that a dispute involving any provision of the benefit plan could only be resolved in Federal courts and could not be resolved by the Oklahoma Workers' Compensation Commission or Oklahoma state courts. Duff (2016, 23) provides a careful analysis of whether the alternative benefit plans are necessarily covered by ERISA and argues that the conclusion that the plans are necessarily covered by ERISA "though plausible, seems debatable given the significant impact that widespread employer opt-out could have on the national employer benefit landscape."

In addition to the issue of whether the alternative plans established the 2013 Oklahoma statute can preempt state oversight because of ERISA, the legislation faces other challenges. In February 2016, the Oklahoma Workers' Compensation Commission (CM-2014-11060L) held in *Vasquez v. Dillard's* that the provisions of the 2013 Oklahoma workers' compensation law establishing the requirements for a qualified benefit plan are unconstitutional because Section 203 deprives injured workers of equal protection and because the combination of Sections 203 and 209 deprive injured workers of access to the Court. The decision has been appealed to the Oklahoma Supreme Court.

### **(3) Challenges in Florida Courts to the Florida Workers' Compensation Law**

Florida workers' compensation aficionados have been blessed/cursed by recent decisions of the Supreme Court of Florida and are anticipating further decisions with eagerness/trepidation. Other members of the panel at the Florida Workers' Compensation Educational Conference are experts of these cases, and so I will only provide a brief synopsis.

*Castellanos v. Next Door Co.*, \_\_\_So. 3d.\_\_\_ 2016, was decided on April 28, 2016 by the Supreme Court of Florida. The court concluded "that the mandatory fee schedule in section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process." Section 440.34 of the Florida statutes was adopted in 2009 and included a fee schedule for applicants' attorneys that allowed Castellanos' attorney a fee of \$1.53 per hour for 107.2 hours of work that had been determined by the Judge of Compensation Claims to be "reasonable and necessary" in handling this complex case. The Court provided an extended discussion of the history of the regulation of the statutory regulation of applicants' attorneys' fees in Florida. The Court noted that 2003 legislation had amended the attorney's fee schedule to limit applicants' attorneys' fee, and that in *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008) the Court had upheld the 2003 legislation because it permitted a claimant to receive a reasonable attorney's fee even when that amount exceeded the statutory attorney's fee schedule. Following the *Murray* decision, in 2009 "the Legislature removed any ambiguity as to its intent " by removing the word "reasonable" in relation to applicants' attorneys' fees and thus removed any discretion "to award the fee award in cases where the sliding scale based on benefits obtained results in either a clearly inadequate or a clearly excessive fee." The Court found that such a restriction on determining attorneys' fees was a violation of due process. I consider the Court's remedy for the lack of due process in the 2009 legislation to be particularly interesting:

Accordingly, our holding that the conclusive fee schedule in section 440.34 is unconstitutional operates to revive the statute's immediate predecessor. This is the statute addresses by this court in *Murray*, where we construed the statute to provide for a "reasonable" award of attorney's fees.

*Westphal v. City of St. Petersburg*, \_\_\_So. 3d.\_\_\_ 2016 was decided on June 29, 2016 by the Supreme Court of Florida. The case involved a gap in the system of cash benefits for workers

with serious injuries. Section 440.15(2)(a), which was enacted in 2009, cut off disability benefits for a totally disabled worker after 104 weeks or sooner if the worker reaches the date of maximum medical improvement (MMI) before 104 weeks. The statute also provides that permanent total disability benefits cannot be awarded until the worker reaches the date of MMI. Westphal was still totally disabled after 104 weeks but had not yet reached the date of MMI and so the statute required all total disability benefits to cease. The Florida Supreme Court concluded “that the 104-week limitation on temporary total disability benefits results in a statutory gap in benefits in violation of the constitutional right of access to courts.”

Of particular interest, the Court found that Section 440.15(2)(a) was unconstitutional because it created “a system of redress that no longer functions as a reasonable alternative to tort litigation.” Arguably this would have led the Court to find that Westphal was entitled to bring a tort suit against the City of St. Petersburg. Instead, the Court provided an alternative remedy.

“Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor, then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too, would be unconstitutional.” *B.H. v. State*, 645 So. 987, 995 (Fla. 1994). We therefore conclude that the proper remedy is the revival of the pre-1994 statute that provided for a limitation of 260 weeks of temporary disability benefits. . . .The provision of 260 weeks of temporary total disability benefits amounts to two and a half times more benefits – five years of eligibility rather than only two – and thus avoids the constitutional infirmity created by the current statutory gap as applied to Westphal.

*Miles v. City of Edgewater/PGCS*, \_\_ So. 3d \_\_ (Fla. 1<sup>st</sup> DCA 2016), decided by the First District Court of Appeals on April 20, 2016, was not appealed to the Supreme Court of Florida and will have retroactive application. Miles was a law enforcement officer whose attorney filed two claims in 2013 alleging a chemical exposure during an investigation that resulted in disability. The employer/carrier disputed occupational causation of the claimant’s condition. Because of the difficulties involved in establishing causation in this case, Miles was unable to obtain counsel who would accept the attorney’s fees prescribed by the fee schedule for applicants’ attorneys contained in Section 440.34 of the Florida statutes. Instead, two agreements concerning attorney’s fees were signed: one between the law firm representing Miles and the Fraternal Order of Police (FOP) in which the FOP agreed to a flat fee of \$1,500, and one between the law firm and Miles in which she agreed to pay an hourly fee for all attorney time expended beyond 15 hours. The Judge of Compensation Claims (JCC) denied the claimant’s motion to approve the two attorney’s fees agreements because they conflicted with the schedule of fees in Section 440.34. On appeal, the First District Court of Appeals held that both Section 440.34 and Section 440.105, which provides that an attorney who receives a fee commits a first-degree misdemeanor unless the fee is approved by a JCC, were unconstitutional because they violated the claimant’s First Amendment rights under the U.S. Constitution. The Court held that the two sections “are unconstitutional violations of a claimant’s rights to free speech, free association, and petition” and “those provisions also represent unconstitutional violations of a claimant’s right to form contracts.” The Court held “that the proper remedy is to allow an injured worker and an attorney to enter into a fee agreement approved by the JCC, notwithstanding the statutory restrictions.” The only limitation to applicant’s’ attorneys fee is that there is “a JCC’s finding that the fee is reasonable.”

#### **(4) Challenges in Federal Courts to the Florida Workers’ Compensation Law**

The dual denial cases discussed earlier in this section involved situations where the state workers’ compensation statute resulted in a total denial of workers’ compensation benefits. An interesting question is whether a state workers’ compensation law can be challenged in federal

courts when the worker obtains some benefits from a state workers' compensation program but those benefits are inadequate.

One part of the Supreme Court's opinion in the landmark case, *New York Central Railroad Co. v. White*, 243 U.S. 188, 205-06 (1917), which upheld the constitutionality of the 1913 New York workers' compensation law, is:

Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability to cases of negligence.

This, of course is not to say that any scale of compensation, however, insignificant on the one hand or onerous on the other, would be supportable.

Does this "ancient" pronouncement of a constitutional principle have any continuing validity as the basis for a challenge to a state workers' compensation statute when a state provides no remedy for a workplace injury or disease or provides a scale of compensation so meagre that arguably it is legally insignificant?

In *Stahl v. Hiialeah Hospital*, the claimant argued that 1994 changes in the Florida workers' compensation statute eliminated cash benefits for partial loss of earning capacity by basing permanent partial disability benefits solely on the extent of the worker's medical impairment and by eliminating full medical benefits by requiring the worker to pay a copayment for every visit to a medical provider. The Florida First District Court of Appeals, 160 S0. 3d 519 (Fla. 1 DCA 2015), held that these statutory changes were constitutional. The Florida Supreme Court ultimately declined to review the decision, and a Petition for Writ of Certiorari has been filed with the U.S. Supreme Court.

The Supreme Court rarely grants petitions for certiorari, and if the Court does accept the case, it is not clear what remedy would be granted. In the *New York Central Railroad* case, a decision that the New York workers' compensation statute did not meet the Constitutional due process requirements presumably would have voided the entire statute and returned the handling of workplace injuries to tort suits based on the common law. If the specific provisions of the Florida workers' compensation law challenged in *Stahl* were held to constitute an "insignificant" scale of compensation, it is not evident what remedy the Court would impose. It is doubtful that the entire Florida workers' compensation statute would be found unconstitutional because of deficiencies in two provisions. It also seems doubtful that the Supreme Court would impose its own view of what constitutes a supportable scale of compensation for these two provisions.

#### **(5) Speculation About Further Legal Challenges to the Florida Workers' Compensation Law**

Let me stipulate that this discussion is speculative and that I anticipate that the other members of the panel will undoubtedly be elated that I have provided such an easy target for critical comments.

The Supreme Court of Florida has issued two decisions – *Castellanos* and *Westphal* – that are landmarks for both the state and the nation. The Court is obviously willing to reject decisions made by the legislature on important components of the state's workers' compensation statute, namely the limits on duration of total disability benefits and the fee schedules for applicants' attorneys. On the other hand, *Stahl* suggests that there are limits to the Courts' appetite for intervention, perhaps because the introduction of a co-payment into medical benefits

is not fundamentally different than the co-payments already used for cash benefits (where only a portion of lost wages is replaced by the benefit formula). A good test of how deep into the workers' compensation pond the Supreme Court is willing to dive would have been provided by an appeal of *Miles*, which appears to significantly limit the legislature's ability to regulate attorneys' fees.

If the Florida Supreme Court is willing to override the legislature on fundamental components of the current Florida workers' compensation laws, there are other provisions that appear to be logical targets. The *Castellanos* decision (in footnote 3) contains a list of seven "ways in which the workers' compensation system has become increasingly complex and difficult, if not impossible, for an injured workers to successfully navigate without the assistance of an attorney." I would reword this by deleting "without the assistance of an attorney" so that these seven represent provisions that have made it much more difficult for workers (even with attorneys) to receive benefits in the Florida workers' compensation program.

One of the seven provisions cited by the Court is the heightened standard of "major contributing cause" compensability standard found in Section 440.09(1). As previously discussed (in Section V), Thomason and Burton (2001) estimated that a series of legislative provisions in Oregon resulted in benefits (and costs) being about 25 percent below the amounts they would have been in the absence of the more restrictive eligibility standards. The legislative provisions included a requirement that the work injury be the major contributing cause (MCC) of the worker's disability in order for the worker to be eligible for any workers' compensation benefits. While there were other restrictive provision that probably interacted with the MCC requirement in Oregon to produce a reduction in benefits of that magnitude, many of those features (such as a heightened burden of proof) were also introduced into the Florida workers' compensation statute. I do not see how the Supreme Court of Florida could find Section 440.09(1) to be constitutional using the standards articulated in *Castellanos* and *Westphal*.

### **E. Tort Suits in Federal Courts: A Phantasmic Exercise**

I am concerned about a number of recent developments in workers compensation, but let me focus on two "innovations": (1) the opt-out provision In Oklahoma, and (2) the adoption of the MCC causation standard, especially when the MCC provisions is linked with a prohibition on tort suits for workplace injuries and diseases that do not qualify for workers' compensation benefits – the dual denial doctrine (DDD).

Fortunately, the recent *Report of the National Commission on a Modern Employers' Liability Act* provides at least a partial antidote to the Dual Denial Doctrine. Here are the MELA Commission's key recommendations for the Modern Employers' Liability Act. (To reduce any confusion about the origins of the MELA, I would describe it as phantasmic. An alternative description provided by Professor Les Boden is phantasmagorical.)

(1) A worker who does not receive workers' compensation benefits from a state workers' compensation program for a work-related injury or diseases is entitled to bring a negligence suit in the federal courts.

(2) The causation standard in the negligence suit under the act is: "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about" (Prosser 1955, §44).

Prosser (1955, §44) describes another rule, commonly referred to as the "but for" rule," which is "The defendant's conduct is not a cause of the event, if the conduct would have occurred without it." However, Prosser states that the "substantial factor" test is "clearly an improvement over the "but for" test," although "in the great majority of cases, it amounts to the same thing."<sup>15</sup>

The MELA Commission interprets the causation standard endorsed by Prosser as equivalent to the causation standard that was traditionally used in workers' compensation, which is often described as "the employer takes the worker as it finds him or her." As such, the causation standard endorsed by the MELA Commission would find the employer negligent in many cases that no longer qualify for workers' compensation benefits in those states using the Major Contributing Cause standard of causation.

(3) The common law defenses available to negligent employers are abolished, including the fellow servant rule, the contributory negligence doctrine, and the assumption of risk doctrine.

(4) The injured worker has the burden of proof and must establish that it is more likely than not that the conduct of the employer was a substantial factor in causing the result of the injury.<sup>16</sup>

(5) The injured worker is entitled to the full range of damages available in negligence suits.

(6) The MELA Commission is still wrestling with the issue of whether negligence suits can be brought under the MELA when the worker obtains some benefits from a state workers' compensation program but those benefits are inadequate.

(7) The MELA Commission debated whether there was a need for a federal tort remedy instead of relying on remedies in state courts. The Oregon Supreme Court did an admirable job of striking down the dual denial doctrine as unconstitutional in 2001, the Pennsylvania Supreme Court implicitly repudiated the dual denial doctrine as inconsistent with the workers' compensation statute, and the recent Florida Supreme Court decisions all suggest that states can solve the problem without federal intervention. However, the MELA Commission decided to endorse a federal solution for three reasons. First, some states have upheld the dual denial doctrine in response to constitutional challenges but the successful challenge in Oregon has now been reversed. Second, even if a state holds the dual denial doctrine unconstitutional, the state may not allow tort suits that meet the recommendations of the MELA Commission.<sup>17</sup> Third, the opt-out provision as adopted in Oklahoma may allow employers to rely on ERISA preemption to fend off tort suits in state courts.

(8) The *Report of the National Commission on a Modern Employers' Liability Act* is an unpolished and incomplete document. The staff only had access to Wikipedia and an ancient edition of Prosser's *Handbook of The Law of Torts* during the drafting frenzy. The MELA Commission looks forward to constructive suggestions from legal scholars to provide assistance during the preparation of the next version of the MELA Report.

(9) The ultimate purpose of the enactment or threat of enactment of the Modern Employers' Liability Act is to persuade policymakers that expanding the coverage of state workers' compensation laws is a better strategy than shrinking the coverage.

## **VIII. The Future of Workers' Compensation**

I suggested earlier that the current threat to the state workers' compensation system is a race to the bottom among states. Unfortunately, I do not think that any of the solutions to this threat I just discussed – such as Federal standards or a Modern Employers' Liability Act – will be enacted.

Does this mean the entire state workers' compensation system will eventually collapse into a black hole? Or will the state system survive largely in its current constellation, with some states maintaining adequate benefits, broad coverage of workers, and expansive compensability rules, while other states plunge into the abyss? One problem is that states that try to maintain

decent programs will increasingly find their workers' compensation costs under attack as other states pass them by on the way to the bottom.

In my view, the state workers' compensation system is in its most dire situation in at least the last half-century.

But lest you take my prediction too seriously, allow me to close with two examples of bad prognostications. In 1986, I co-authored a chapter on the recent moderation in workers' compensation costs in which we predicted that the decline in workers' compensation costs in the early 1980s was likely to persist for many years (Burton, Hunt, and Kruger 1986). Alas, by the time the chapter was published, workers' compensation costs had already started a rapid increase in costs that persisted for the rest of the decade. I tried to retract our chapter, but it was too late to head off the dissemination of the unduly optimistic forecast.

And for those who are disturbed by my doleful assessment about the future of workers' compensation, it is worth remembering that the premier study of workers' compensation published more than a half-century ago (Somers and Somers 1954) concluded with a chapter entitled "Workmen's Compensation at the Crossroads." The thrust of the chapter was that the problems of the program threatened its future unless fundamental changes were made. The program's name may have changed and the problems are different from those of concern in 1954. But the experience of the intervening years suggests that the fundamental attributes of workers' compensation – a system confined to work-related injuries that provides limited benefits on a no-fault basis – are hard to successfully challenge and may be immutable.

And so let us not be too pessimistic about the future of workers' compensation. Indeed, I look forward to joining you for the 100<sup>th</sup> Anniversary of the Florida Workers' Compensation Law.

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## Endnotes

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<sup>1</sup> The other common law doctrines, which were part of the “unholy trinity” that severely limited the ability of workers to recover from their employers for workplace injuries in tort suits, were the contributory negligent doctrine and the assumption of risk doctrine (Willborn et al. 2012: 859-63). The contributory negligence doctrine precluded the employee from any recovery if he or she were negligent, even if the employer was the primary negligent party. The assumption of risk doctrine barred recovery for the worker who was injured by the ordinary risks of employment as well as the extraordinary risks of employment if the worker knew of them or might reasonably have been expected to know of them.

<sup>2</sup> The federal government was also able to enact an employers’ liability act for railroad workers, since railroads were directly engaged in interstate commerce.

<sup>3</sup> As noted by Sengupta and Baldwin (2015, note 1): “The New Jersey law was enacted on April 3, 1911, signed by Governor Woodrow Wilson on April 4, and took effect on July 4, 1911 (Calderone 2011). The Wisconsin law was enacted and took effect on May 3, 1911 (Krohm 2011).”

<sup>4</sup> The next edition of the National Academy of Social Insurance publication with data through 2014 should be available in October 2016, and can be downloaded without charge from [www.NASI.org](http://www.NASI.org).

<sup>5</sup> A brief article summarizing the book is Thomason, Schmidle, and Burton (2001b), which can be downloaded without charge from [www.workerscompresources.com](http://www.workerscompresources.com).

<sup>6</sup> The NCCI compared eight southeastern states in the August 2016 rate filing (NCCI 2016), including Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

<sup>7</sup> Recent data from the NCCI (2016, Exhibit 2) indicate that statutory benefits increased by 1.2 percent from 2011 to 2015.

<sup>8</sup> The relative stability of statutory benefits in the national data shown in Figure 7 masks the significant changes in some jurisdictions. In 2014, for example, there was a 24.1% decline in cash benefits in Oklahoma and a 16.6% decline in cash benefits in Tennessee (NCCI 2016, Exhibit 3).]

<sup>9</sup> The major contributing cause (MCC) causation standard varies among states. For example, the MCC requirement proposed by Illinois Governor Rauner has several significant differences than the MCC requirement contained in §39-71-407 of the Montana workers’ compensation statute. The MCC requirement adopted in most states applies both to injuries and diseases, while the Montana provision applies only to occupational diseases. The MCC requirement in other states requires the workplace to be more than 50 percent responsible for the injury compared to all other causes, while the Montana MCC statute only requires the workplace to be “the leading cause contributing to the result when compared to all other contributing causes.” My understanding of *Montana State Fund v. Clarence Grande*, 2012 MT 67, is that the MCC requirement in Montana does not require the work-related cause to be more than 50 percent responsible for the injury compared to all other causes, but rather only requires the work-related cause to be more important than any other cause. Moreover, in most states the MCC requirement has been designed both to deny the worker access to workers’ compensation benefits and to deny the worker the right to bring a tort suit for claims that are precluded by the MCC requirement. This “dual denial doctrine” (DDD) is discussed later in this presentation.

<sup>10</sup> The figures included in this paragraph are from Sengupta, Baldwin, and Reno (2014).

<sup>11</sup> The Patient Protection and Affordable Care Act (PPACA) is commonly called the Affordable Care Act (ACA) or Obamacare.

<sup>12</sup> A successful challenge was *Automated Conveyor Sys. V. Hill*, 362 Ark. 215 (2005), in which the Arkansas Supreme Court stated that disallowing a tort suit for injuries not expressly covered by the workers’ compensation act “is not in line with its stated purpose and, in addition, would contravene . . . the Arkansas Constitution.” An unsuccessful constitutional challenge to the dual denial doctrine in Kentucky is discussed in Willborn et al. (2012, 901.)

<sup>13</sup> The basis for a challenge to the dual denial doctrine under the U.S. Constitution is provided in Willborn et al. (2012, 901-902).

<sup>14</sup> This discussion of *Tooley* is largely based on Torrey (2014).

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<sup>15</sup> Prosser (1955, § 44) also states that “If the defendant’s conduct was a substantial factor in causing the plaintiff’s injury, it follows that he will not be absolved from responsibility merely because other causes have contributed to the result.”

<sup>16</sup> Prosser (1955, §44): “On the issue of the fact of causation, as on other issues essential to the case, the plaintiff has the burden of proof. He must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in the result.”

<sup>17</sup> Pennsylvania is an example of a jurisdiction where the tort remedy may be deficient. The Casey Act, Pennsylvania’s variant of an employers’ liability act, was interpreted narrowly to allow the fellow servant rule to be used as a defense by a negligent employer (McIntyre 2015, 55-61). Moreover, the Casey Act was repealed in 1983 (McIntyre 2015, 59), which presumably means that the full set of employer defenses used by negligent employers to avoid liability in tort suits, including contributory negligence, are available in Pennsylvania.

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