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FEATURED TOPICS

This issue is being distributed in October, 2003.

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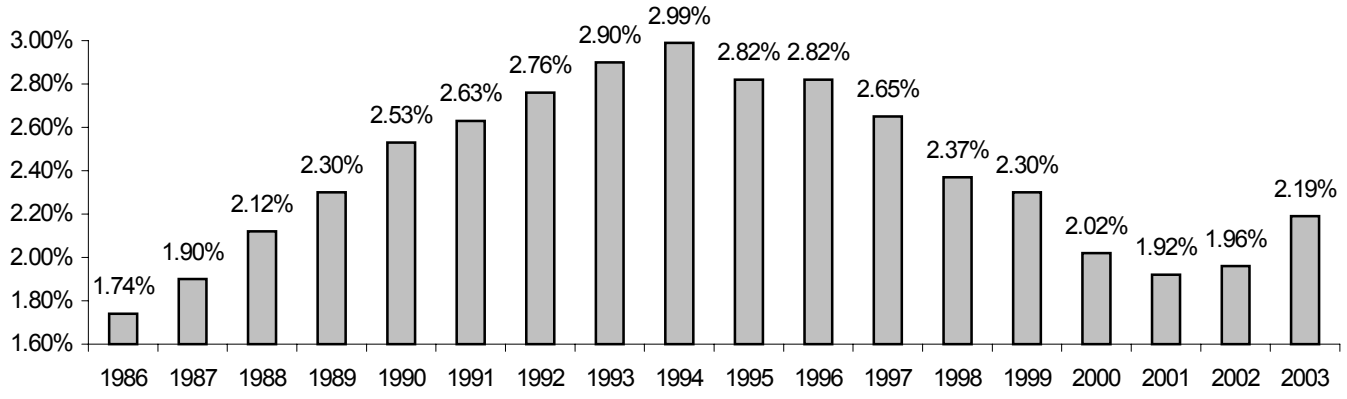
Underwriting results for the workers' compensation insurance industry improved in 2002, as discussed by Elizabeth Yates and John Burton. The overall operating ratio, which is the most comprehensive measure of underwriting experience because it considers investment income, dropped from 109.7 in 2001 to 100.4 in 2002, indicating that the industry was at almost a break-even point last year. While this is a significant improvement for the industry, the profitability of the late 1990s has not been achieved.

Workers' compensation is normally the exclusive remedy for an injured employee against the employer. Most states, however, allow the employee to bring a tort action against the employer when the injury is the result of an intentional act of the employer. The meaning of an intentional injury has received an expansive reading by New Mexico's Supreme Court. Robert Aurbach critiques this example of "judicial legislation."

John Burton reports the latest data on the employers' costs of workers' compensation as determined by the Bureau of Labor Statistics (BLS). As shown in Figure A, for private sector employees, the employers' costs as a percent of payroll dropped from a peak of 2.99 percent in 1994 to a low of 1.92 percent in 2001. Since then, costs have increased for two years, reaching 2.19 percent of payroll in March 2003. The BLS now publishes quarterly data, and the data through June 2003 indicate a continuing increase in costs to 2.23 percent of payroll.

The recent rate of increase of the cost of workers' compensation to employers is examined in the final article. A June 23 report in *The New York Times* indicated that the cost to employers increased by 50 percent in the last three years. Our contributor wonders whether the *Times* article truly included "All the News That's Fit to Print."

Figure A
Workers' Compensation Costs as a Percentage of Gross Earnings, Private Industry Employees, March 1986-2003



Workers' Compensation Underwriting Results Improve in 2002

By Elizabeth Yates and John F. Burton, Jr.

The underwriting results for the workers' compensation insurance industry improved in 2002, according to results recently released by A.M. Best. The overall operating ratio, which is the most comprehensive measure of underwriting experience for insurance carriers, dropped from 109.7 in 2001 to 100.4 in 2002, as shown in Figure A and Table 1 (column (8)).

The overall operating ratio is calculated as (1) the total of all carrier expenditures (2) minus investment income (3) as a percentage of premiums.[1] When the overall operating ratio is greater than 100, carriers lose money even when investment income is considered. Conversely, an operating ratio of less than 100 indicates that the industry is profitable when investment income is included.

Underwriting Results Vary Over Time

The overall operating ratio for the workers' compensation industry for 1976 to 2002 is shown in Figure A and Table 1, and the cyclical nature of profitability in the industry is evident. Two years of losses in 1976-1977 were followed by six years of profits through 1983. For example, the operating ratio was below 90 in 1981 and 1982, indicating that carriers had profits that exceeded $10 for every $100 of premiums in those years.

The workers' compensation insurance industry was then unprofitable in every year from 1984 to 1992. During this nine-year stretch of unfavorable results, carriers' losses ranged from $3.40 to $8.70 for every $100 of workers' compensation premiums. One result of this unfavorable experience is that the workers' compensation industry took the lead in "reform" efforts that reduced benefits and tightened eligibility standards in many states.[2] Also, because insurance regulators refused to allow insurance rates to increase as rapidly as losses in many jurisdictions, which resulted in underwriting losses in these states, workers' compensation carriers pursued and achieved deregulation of the workers' compensation insurance markets in most states.[3]

The results of deregulation and the various other reforms of workers' compensation in the early to mid-1990s are evident in the underwriting results for 1993 to 2000, when the overall operating ratio was less than 100 in every year. This was the longest string of profitable years for the workers' compensation insurance industry in the last half-century (and probably in the history of workers' compensation). The best years were 1995 to 1997, when on average carriers had profits of more than $19.00 per $100 of premium.

The underwriting experience of workers' compensation carriers steadily deteriorated after 1997. Indeed, between 1997 and 2001, the overall operating ratio jumped almost 30 points, which is the most rapid rate of deterioration during the period covered by the data in Figure A (namely 1976 to 2002). Moreover, the

Figure A
Overall Operating Ratio as a Percent of Premiums, 1976-2002

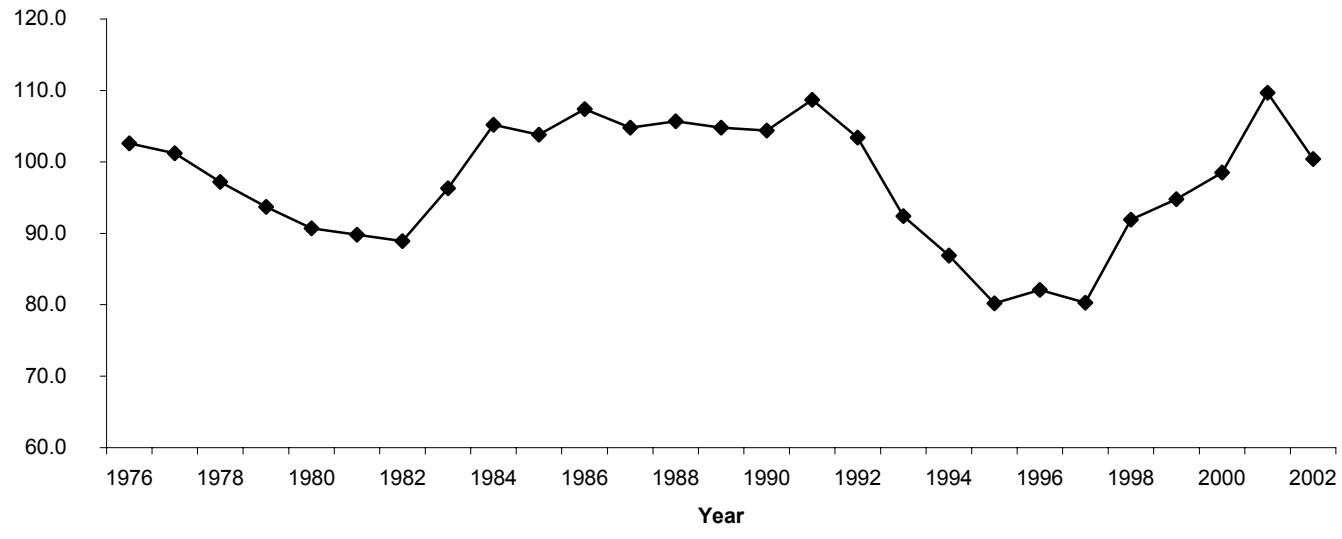


Table 1 Workers' Compensation Insurance Underwriting Experience, 1973-2002

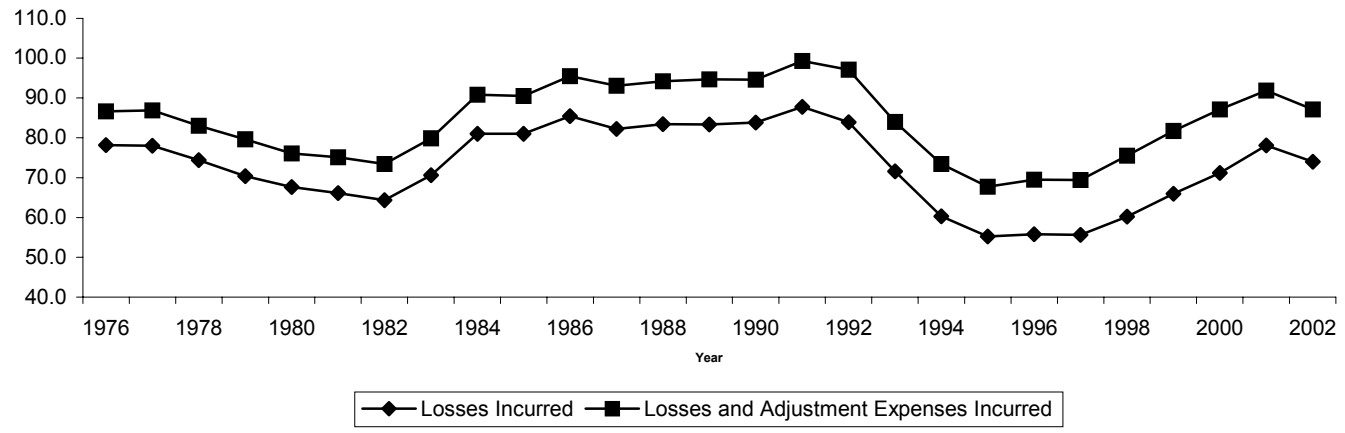
Year	Losses Incurred* (1)	Loss Adjustment Expenses* (2)	Losses and Adjustment Expenses Incurred* (3)	Underwriting Expenses Incurred** (4)	Dividends to Policyholders* (5)	Combined Ratio After Dividends (6)	Net inv. Gain/Loss and Other Income* (7)	Overall Operating Ratio (8)
1973	68.5	8.5	77.0	19.8				
1974	71.6	8.7	80.3	19.6				
1975	74.0	8.2	82.2	18.9	6.3	107.4		
1976	78.2	8.4	86.6	17.6	5.4	109.6	6.9	102.6
1977	78.0	8.9	86.9	16.7	5.1	108.6	7.4	101.2
1978	74.4	8.7	83.0	16.4	5.6	105.0	7.8	97.2
1979	70.4	9.2	79.6	16.8	6.5	103.0	9.2	93.7
1980	67.6	8.4	76.1	17.4	8.0	101.4	10.8	90.7
1981	66.1	9.0	75.1	19.0	8.7	102.8	13.0	89.8
1982	64.3	9.1	73.4	20.6	9.9	103.9	15.0	88.9
1983	70.6	9.2	79.9	22.0	10.6	112.5	16.2	96.3
1984	81.0	9.8	90.8	21.2	9.9	121.9	16.7	105.2
1985	81.0	9.5	90.5	19.0	9.3	118.8	15.0	103.8
1986	85.4	10.2	95.5	18.0	7.6	121.1	13.7	107.4
1987	82.2	10.9	93.1	18.0	6.4	117.6	12.8	104.8
1988	83.4	10.8	94.2	17.8	6.4	118.4	12.7	105.7
1989	83.3	11.4	94.7	17.4	6.1	118.2	13.4	104.8
1990	83.8	10.7	94.6	17.6	5.1	117.4	13.0	104.4
1991	87.8	11.5	99.3	18.5	4.9	122.6	14.0	108.7
1992	83.9	13.2	97.1	19.8	4.6	121.5	18.1	103.4
1993	71.6	12.4	84.0	20.4	4.7	109.1	16.7	92.4
1994	60.3	13.1	73.4	21.7	6.3	101.4	14.5	86.9
1995	55.2	12.5	67.7	23.3	6.0	97.0	16.8	80.2
1996	55.8	13.7	69.5	25.4	4.8	99.7	17.6	82.1
1997	55.6	13.8	69.4	25.9	5.4	100.7	20.4	80.3
1998	60.2	15.3	75.5	26.7	5.3	107.6	15.7	91.9
1999	65.9	15.8	81.7	28.0	5.6	115.3	20.5	94.8
2000	71.2	15.9	87.1	26.5	4.5	118.2	19.6	98.5
2001	78.1	13.8	91.9	26.2	3.6	121.7	12.0	109.7
2002	74.0	13.1	87.1	22.5	2.6	112.2	11.8	100.4

Source:
Cumulative By Underwriting Experience for Industry, 2002 Edition and prior Editions, © A.M. Best Company - used with permission.

Notes:
Losses Incurred (also termed the pure loss ratio) (1) plus Loss Adjustment Expenses (2) equals Losses and Adjustment Expenses Incurred (3). Losses and Adjustment Expenses Incurred (3) plus Total Underwriting Expenses Incurred (4) plus Dividends to Policy Holders (5) equals Combined Ratio after Dividends (6). Combined Ratio after Dividends (6) minus Net Investment Gain/Loss and Other Income (7) equals Overall Operating Ratio (8). As of 1992, the methodology for allocating investment income changed slightly; as a result, 1992-2002 numbers in the last two columns are not directly comparable to those for earlier years.

* Percentage of net premiums earned
** Percentage of net premiums written

Figure B
Losses Incurred and Losses and Adjustment Expenses Incurred as Percent of Premiums, 1976-2002



overall operating ratio of 109.7 in 2001 indicates the underwriting losses in that year were worse than in any other year for which data are available. The reduction in the overall operating ratio from 109.7 in 2001 to 100.4 in 2002 brought the industry to essentially a break-even point last year.

A full explanation of the deterioration in the underwriting experience between 1997 and 2001 is beyond the scope of this article.[4] However, there is one fundamental difference between the adverse experience of the late 1980s and early 1990s and the deteriorating profitability between 1997 and 2001. In the earlier period, benefits paid to workers were increasing rapidly, while that has not been true in recent years. In 1984, benefits paid to workers were 1.21 percent of payroll and continued to climb until 1992, when they peaked at 1.68 percent of payroll. Then benefits as a percent of payroll decreased every year through 2000, when they were 1.06 percent of payroll, before increasing slightly to 1.07 percent of payroll in 2001.[5]

Components of the Overall Operating Ratio

The loss ratio is incurred losses as a percentage of premiums.[6] When premiums drop more rapidly than losses (or when premiums increase less rapidly than losses), the loss ratio will increase. As shown in Figure B and Table 1 (column 1), the loss ratio increased rapidly from 55.6 percent in 1997 to 78.1 percent in 2001, and then dropped to 74.0 percent in 2002.

The total of incurred losses and incurred loss adjustment expenses is

Figure C
Underwriting Expenses Incurred as a Percent of Premiums, 1976-2002

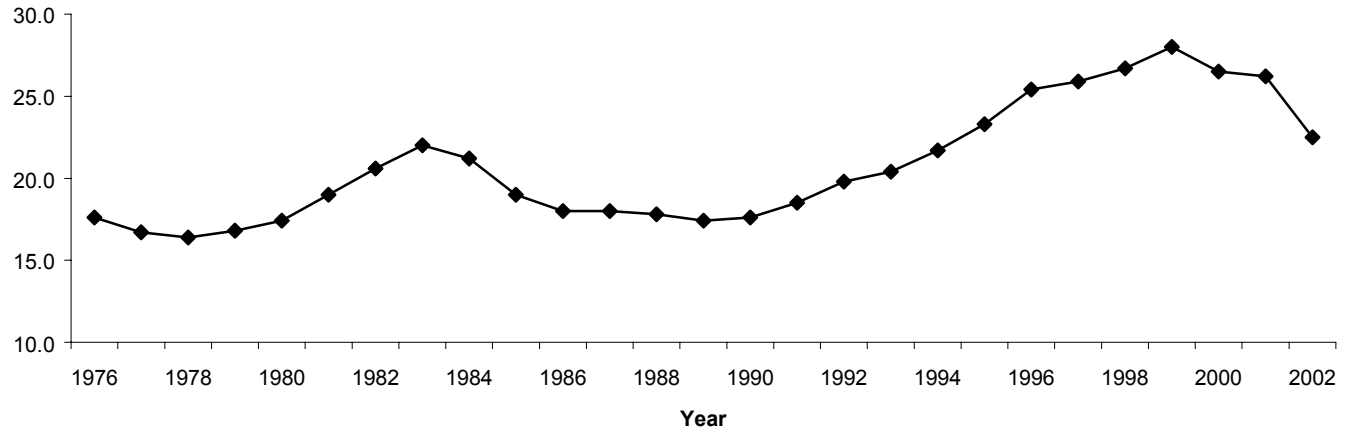
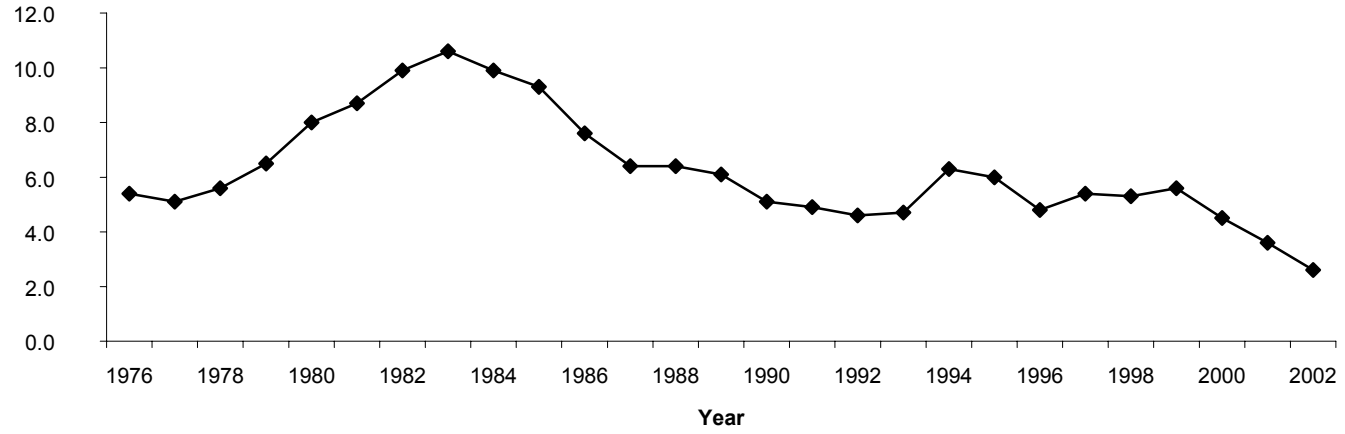


Figure D
Dividends to Policyholders as Percent of Premiums, 1976-2002



also shown in Figure B and in Table 1 (column 3). The difference between the two lines in Figure B is incurred loss adjustment expenses, which are also shown in Table 1 (column 2). Loss adjustment expenses include the cost of processing claims. From 1973 to 1985, loss adjustment expenses were always less than 10 percent of premium, but they have been at least 13 percent in every year but two since 1992. Loss adjustment expenses were over 15 percent in 1998 to 2000, before declining to 13.8 percent in 2001 and 13.1 percent in 2002. The higher loss adjustment expenses since the early 1990s compared to earlier years reflect in part the more intensive efforts to manage health care costs for disabled workers.

Underwriting expenses incurred as a percent of premiums are shown in Figure C and Table 1 (column 4). These expenses, which include commissions and broker fees, have also generally increased over time. Between 1973 and 1992, underwriting expenses were greater than 20 percent of premium only thrice; since 1993, underwriting expenses have been 20 percent or greater in every year. However, after averaging 27 percent of premium in 1998 to 2001, underwriting expenses dropped to 22.5 percent of premium in 2002.

Dividends as a percent of premiums are presented in Figure D and Table 1 (column 5). Prior to deregulation of the workers' compensation insurance markets in recent decades, carriers were limited in their ability to compete by lowering insurance rates at the beginning of the policy period. However, both mutual and stock companies could compete by offering policies that paid dividends

Figure E
Combined Ratio After Dividends as Percent of Premiums, 1976-2002

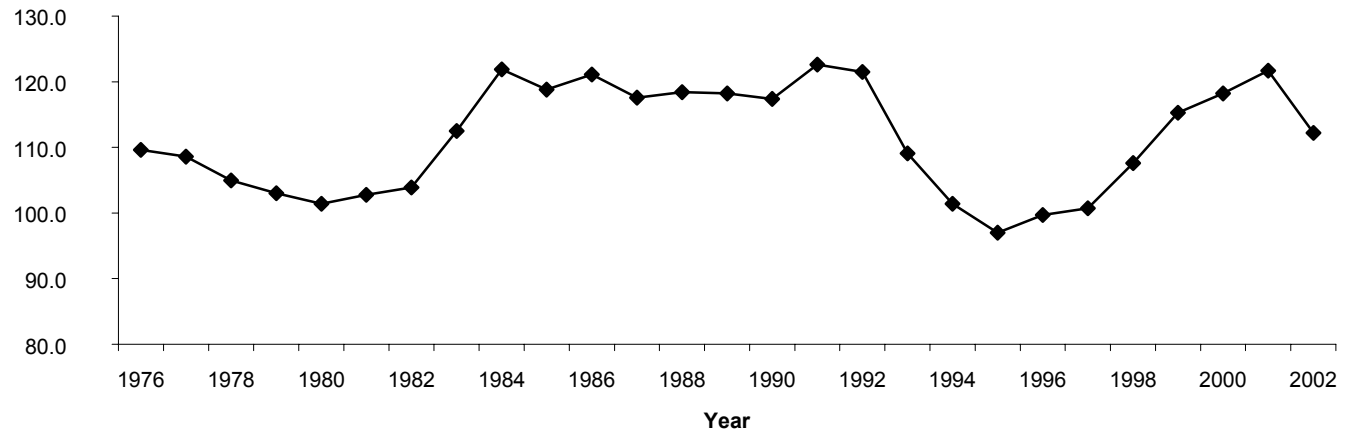
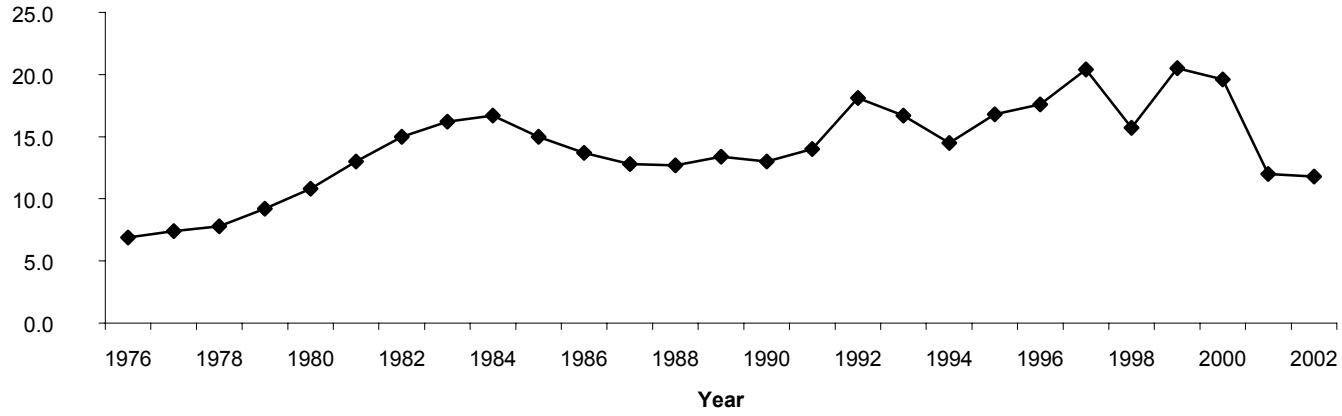


Figure F
Net Investment Gain/Loss and Other Income as Percent of Premiums, 1976-2002

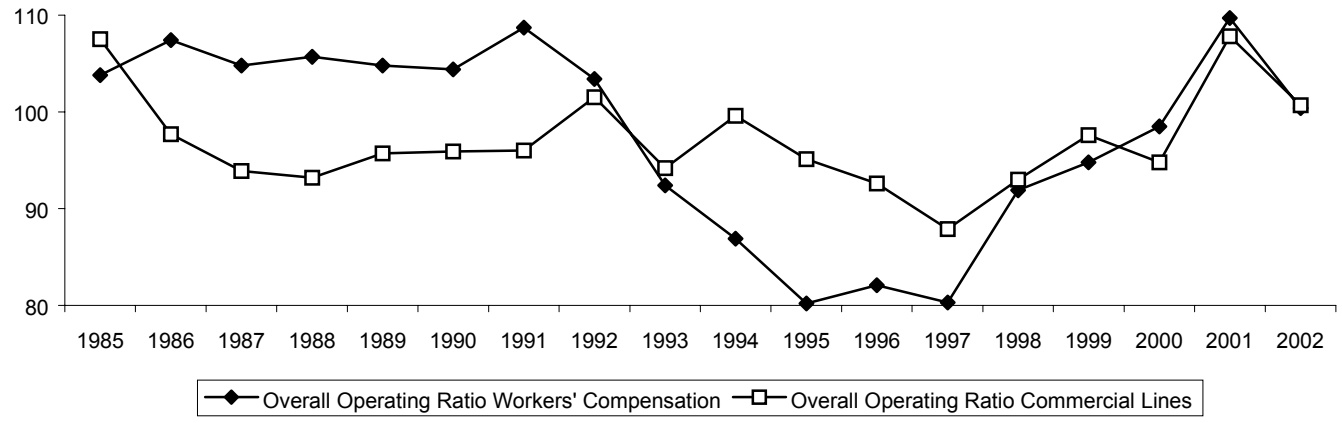


to policyholders after the policy period. In the early 1980s, dividends ranged from 8.0 to 10.6 percent of premiums. Since 1990, dividends have never exceeded 6.3 percent of premiums, and dividends averaged less than four percent of premiums in 2000 to 2002, reaching a record low of 2.6 percent in 2002.

The combined ratio after dividends is presented in Figure E and Table 1 (column 6). The combined ratio is the sum of the loss ratio (column 1), loss adjustment expenses (column 2), underwriting expenses (column 3), and dividends (column 4). When the combined ratio exceeds 100 percent, insurers lose money on their underwriting experience because premiums are not adequate to cover losses and expense. As shown in Figure E, the combined ratio exceeded 100 percent in every year between 1975 and 1994, and was greater than 110 percent in every year from 1983 to 1992. The combined ratio then dropped sharply after 1992 until reaching a low of 97.0 in 1995. The combined ratio deteriorated (increased) in every year between 1995 and 2001, reaching 121.7 percent in 2001 and averaging 118 percent in 1998 to 2001. Restated, for every $100 of premium received by workers' compensation carriers in 1998 to 2001, there was an average of $118 of losses, loss adjustment expenses, underwriting expenses, and dividends. The combined ratio then dropped sharply in 2002 to reach 112.2, the best result since 1998.

The combined ratio after dividends provides an incomplete report on the underwriting experience in the workers' compensation insurance market, however, because no account

Figure G
Overall Operating Ratio as Percent of Premiums, Workers' Compenstion and Commercial Lines, 1985-2002



is taken on investment gains (or losses) and other income received by workers' compensation carriers. Net investment gains (or losses) and other income as a percent of premium ("net investment income") are shown in Figure F and Table 1 (column 7). Since 1981, net investment income has been at least 12 percent of premium in every year but one. Of great concern to workers' compensation carriers is that 2002 was that one year when net investment income dropped to the lowest rate since 1980. The net investment income of 12.0 percent of premium in 2001 and 11.8 percent in 2002 represented a drop from an average of 20 percent in 1999 and 2000 and reflected the low interest rates and dismal stock market performance in recent years.

. . . 2002 was that one year when net investment income dropped to the lowest rate since 1980.

Comparison to Other Insurance Lines

The overall operating ratio of workers' compensation is compared to all commercial lines of insurance for 1985 to 2002 in Figure G and Table 2. The comparison reinforces the impression of the volatility of the underwriting results in the workers' compensation insurance industry. The workers' compensation industry had smaller losses (a lower operating ratio) than other commercial lines in 1985; workers' compensation had losses (overall operating ratios were in excess of 100) while other commercial lines were profitable (overall operating ratios were less than 100) from 1986 until 1991; workers' compensation had greater losses than other commercial lines in 1992; workers' compensation was more profitable (a lower overall operating ratio) than other lines from 1993 to 1999; workers' compensation was profit-

Table 2
Underwriting Experience, Workers' Compensation and Commercial Lines, 1976-2002

Year	Overall Operating Ratio-Workers' Compensation	Overall Operating Ratio-Commercial Lines
1976	102.6	
1977	101.2	
1978	97.2	
1979	93.7	
1980	90.7	
1981	89.8	
1982	88.9	
1983	96.3	
1984	105.2	
1985	103.8	107.5
1986	107.4	97.7
1987	104.8	93.9
1988	105.7	93.2
1989	104.8	95.7
1990	104.4	95.9
1991	108.7	96.0
1992	103.4	101.5
1993	92.4	94.2
1994	86.9	99.6
1995	80.2	95.1
1996	82.1	92.6
1997	80.3	87.9
1998	91.9	93.0
1999	94.8	97.6
2000	98.5	94.8
2001	109.7	107.8
2002	100.4	100.7

Source:
Cumulative By Underwriting Experience for Industry, 2002 Edition and prior Editions, © A.M. Best Company - used with permission.

Notes:
The Overall Operating Ratio is the total of all underwriting expenses and income from investments as a percentage of premiums.
"Commercial Lines" includes all insurance lines except passenger auto and homeowner multiples peril insurance.

able but less so than other lines in 2000; workers' compensation had losses that exceeded those in other commercial lines in 2001; and workers' compensation had losses that were slightly lower then the losses in other commercial lines in 2002.

Analysis

The deterioration in the underwriting results in workers' compensation insurance since 1997 is obviously a great concern to workers' compensation insurance carriers. But not just workers' compensation carriers should be concerned, because the results already include higher premiums and increased difficulties in finding workers' compensation policies in the voluntary markers for employers. The losses also mean that carriers probably will be more resistant to paying marginal and even legitimate claims for employees. The worse case scenario is that the insurance industry will react to the deteriorating underwriting experience by attempting to launch a new wave of reforms reminiscent of those of the early and mid-1990s, when benefits were reduced in some states and eligibility rules to receive any workers' compensation benefits were tightened in many states.[7] Although it probably will be harder for carriers to enlist employers in a new reform effort since employers have experienced declining workers' compensation costs in most recent years,[8] the incentives for reform could rapidly strengthen if: 1) the underwriting losses translate into rapidly escalating premiums; 2) the slack economy leads to a significant increase in claims for cash benefits from injured workers who are unable to return to their jobs; and 3) the surge in medical costs in the general health care system spills over into rapid acceleration of health care costs in workers' compensation. We will monitor these possible developments in the *Workers' Compensation Policy Review*.

...it probably will be harder for carriers to enlist employers in a new reform effort since employers have experienced declining workers' compensation costs in most recent years...

REFERENCES

Burton, John F., Jr. 2001. "Workers' Compensation Developments Since 1960 and Prognostications for Benefits and Costs." *Workers' Compensation Policy Review* 1, no. 5 (September/October): 3-19.

Burton, John F., Jr. 2003. "Workers' Compensation Costs for Employers Increase in 2003." *Workers' Compensation Policy Review* 3, no. 3 (May/June): 13-24.

Spieler, Emily and John F. Burton, Jr. 1998. "Compensation for Disabled Workers: Workers' Compensation." In Terry Thomason, John F. Burton, Jr., and Douglas E. Hyatt, eds., *New Approaches to Disability in the Workplace*. Madison, WI: Industrial Relations Research Association.

Thomason, Terry, Timothy P. Schmidle, and John F. Burton, Jr. 2001a. *Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements*. Kalamazoo, MI: W. E. Upjohn Institute for Employment Research.

Thomason, Terry, Timothy P. Schmidle, and John F. Burton, Jr. 2001b. "The Employers' Costs of Workers' Compensation under Alternative Insurance Arrangements." *Workers' Compensation Policy Review* 1, no. 2 (March/April): 3-7.

Williams, Cecili Thompson, Virginia Reno, and John F. Burton, Jr. 2003. *Workers' Compensation: Benefits, Coverage, and Costs, 2001*. Washington, DC: National Academy of Social Insurance.

ENDNOTES

[1] More complete definitions of the overall operating ratio are provided subsequently in the text and the notes to Table 1.

[2] The reform efforts are examined in Spieler and Burton (1998).

[3] The deregulation of the workers' compensation insurance market is examined in Thomason, Schmidle, and Burton (2001a: 39-43).

[4] One possible explanation of the adverse underwriting results in the last five years is that the high profitability of the industry in the mid- and late- 1990s attracted more capital to the workers' compensation industry, which in turn led to increasing competition. As a result of deregulation, the competition was less constrained than in the period of administered pricing, which facilitated vigorous price competition in recent years. Thomason, Schmidle, and Burton (2001b: 5) report that the most comprehensive form of deregulation – lost cost systems that do not require prior approval by regulators of rates promulgated by carriers – is, on average, associated with about an 11 percent reduction in the employers' costs of workers' compensation insurance.

[5] The 1984 result for benefits paid to workers as a percent of payroll is from Thomason, Schmidle, and Burton (2001a: Table A.1). The 1992, 2000, and 2001 results are from Williams, Reno, and Burton (2003: Table 12).

[6] Incurred losses include paid losses plus reserves for future losses for injuries or diseases that have already occurred. An extended discussion of insurance terminology is included in Thomason, Schmidle, and Burton (2001a, Appendix B).

[7] The surge in workers' compensation costs and the unfavorable underwriting results from 1985 to 1991 and the resulting developments in the "neo-reform era" beginning in 1992 are discussed in Burton (2001).

[8] Private sector employers' expenditures on workers' compensation dropped from 2.99 percent of payroll in 1994 to 1.92 percent of payroll in 2001, and then increased to 1.96 percent of payroll in 2002 and 2.19 percent of payroll in 2003 (Burton 2003, Figure A). These figures all pertain to March of the specified years.

Delgado v. Phelps Dodge Chino. Inc.: A Case Study in Judicial Legislation

by Robert Aurbach

John Burton recently presented an analysis of the four positions adopted by the states on the issue of an exception to the exclusive remedy doctrine arising from the intentional injuring of workers by employers (Burton 2002). The article also traced the development of the intentional injury exception in Michigan and New Jersey. New Mexico's Supreme Court has abruptly departed from the analytical framework set forth by Burton, charting a unique course into unknown territory and endangering the exclusive remedy doctrine in New Mexico.

New Mexico Law

Prior to the N.M. Supreme Court's Opinion in *Delgado v. Phelps Dodge Chino, Inc.*, 131 N.M. 272, 34 P.3d 1148, (2001), New Mexico had been squarely positioned with the majority of jurisdictions in holding that the employer's actual intent to injure was the required standard for loss of the benefit of the exclusive remedy doctrine.[1] In *Johnson Controls World Services v. Barnes*, 115 N.M. 116 at 119, 847 P.2d 761 at 764 (Ct. App. 1993) the court described the law at that time: "in order to allege matters which will render an employer liable in tort outside the [Act], the plaintiff must allege matters indicating that the employer intended to injure the plaintiff."[2] But the court was confronted in the *Delgado* case with a truly chilling set of alleged facts, and felt the need to abandon precedent.

The facts alleged by the plaintiff were truly horrific.

The procedural stage was set when the plaintiff's estate brought a tort action outside the workers' compensation system for the wrongful death of the worker and other injuries. The trial court dismissed the case for failure to state a claim, finding that there was no allegation of actual intent to injure by the employer and that the exclusive remedy provision of the N.M. Workers' Compensation Act insulated the employer from tort liability. The intermediate appellate court affirmed the dismissal, with a slip opinion that was not published – a procedure reserved for cases involving settled issues of law. The Supreme Court accepted the case on *certiorari* and entertained *amicus* briefs from advocacy groups for the defense and plaintiff's bars, but did not solicit the input of the state workers' compensation administrative agency. The plaintiff urged the court to find that the alleged facts set forth a proper claim for intentional injury by the employer because of the employer's actual intent to injure the worker or, in the alternative, urged the court to overrule prior case law and adopt the substantial certainty test. The court did neither.

The facts alleged by the plaintiff were truly horrific.[3] The worker was a two-year employee at the employer's copper smelting facility. The plant

About the Author

Robert Aurbach is a 1979 graduate of Cornell Law School and has served as General Counsel for the N.M. Workers' Compensation Administration since 1990. He has prior experience in private practice and as a state prosecutor and state Prosecutor Coordinator.

He is a 1991 honors graduate of the International Association of Industrial Accident Boards and Commissions (IAIABC) Workers' Compensation College and has returned as a lecturer for the College on a variety of issues in 2002 and 2003. He has published articles on workers' compensation issues in the *IAIABC Journal*, *Larson's Workers' Compensation News* and the *Inside OSHA* website. He has served as chair of the IAIABC Standing Committee on Regulation and Enforcement, chair of the Task Force on Tribal Sovereignty and Co-chair of the Coverage and Compliance Committee and is the current Editor of the *IAIABC Journal*. He has served as one of three U.S. delegates to the Working Group on Cross-Border Workers' Compensation Issues formed by the Commission on Labor Cooperation, North American Agreement on Labor Cooperation. He has also consulted with the Virgin Islands Department of Labor (drafting of administrative rules for the Workers' Compensation Division) and Navajo Nation (rewrite of the Tribal workers' compensation code).

Bob's recent research and writing has centered on the areas where workers' compensation and other programs interact, such as bankruptcy, tribal sovereignty, welfare to work, and PEO/leasing arrangements. He testified before OSHA and the U.S. Senate subcommittee on Employment, Safety and Training concerning conflicts between the OSHA Standard on Ergonomics and state workers' compensation programs.

extracts usable copper by superheating the copper ore, causing the copper and the rock in which it was present to separate into different layers of molten material. The "slag" was supposed to sink to the bottom of the furnace in which the ore was melted, where it flows into a fifteen-foot-tall "ladle." Ordinarily the filling of the ladle was stopped when the ladle was about three-quarters full to allow a specialized vehicle (a "kress-haul") to enter the smelter area, pick up the ladle of molten slag and remove it. On the night of the accident, the process used to stop the filling of the ladle failed, causing an out-of-control situation. Allegedly because of economic pressure from management to continue production at all costs, the worker was ordered to use the kress-haul and remove the overfilling ladle, despite the fact that he had never done it under these emergency conditions. The worker complied, despite protesting that he was unqualified to deal with the emergency. The worker's efforts failed catastrophically, resulting in severe burns over virtually his entire body, causing his death a few weeks later.

The court first rejected a recent expression of legislative intent as irrelevant to the case at hand. In 1999, the New Mexico Legislature had adopted Senate Joint Memorial 14[4] urging the judicial branch "to exercise careful judgment to maintain the balance between exclusive remedy and tort law" after a series of opinions, including two that refused to allow the exclusive remedy protection to extend to cases of workplace sexual harassment[5] and retaliatory discharge.[6] The court did not interpret the memorial as a legislative endorsement of the (then well-established) rule requiring actual intent to injure.

The court went on to criticize the actual intent to injure rule, saying that it unbalanced the Workers' Compensation Act in favor of employers. The court noted that statutory language denied compensation to workers when they were intoxicated, when they engaged in willful conduct resulting in their injury, and when they intentionally self-inflicted injury. The actual intent to injure standard absolved the employer of tort liability for "willful" behavior resulting in injury to the worker, while the worker was denied a workers' compensation remedy if they engaged in "willful" behavior resulting in their injury. The court stated:

> Under this test, employers who intentionally inflict injuries, like workers who do the same, are deprived of their respective benefits under the Act. Thus, the actual intent test treats a worker who suffers an intentionally self-inflicted injury the same as an employer who intentionally inflicts the injury. Assuming that there is no deliberate intent to inflict an injury, however, the actual intent test treats workers and employers differently. Under Section 52-1-11, a worker's willfulness will render a resulting injury non-accidental and non-compensable. Under Professor Larson's approach to exclusivity, however, an injury caused by the employer's willfulness is considered accidental, thereby preserving the employer's immunity from tort liability.[7]

No other state appears to have adopted a standard that contains these features.

Accordingly, the court determined that a "willfulness" standard must be applied to determine the limits of the employer's tort liability for on-the-job injury, despite the fact that none of the parties had argued for such a standard. The court looked to two cases for a definition of "willfulness," despite the fact that the worker had not been denied benefits on a theory of willful misconduct in either case.[8]

The court established a three-prong test for determination of "willful" conduct by the employer that would deprive him of exclusive remedy protection for injuries to a worker, holding that:

> ...willfulness renders a worker's injury non-accidental, and therefore outside the scope of the Act, when: (1) the worker or employer engages in an intentional act or omission, without just cause or excuse, that is reasonably expected to result in the injury suffered by the worker; (2) the worker or employer expects the intentional act or omission to result in the injury, or has utterly disregarded the consequences; and (3) the intentional act or omission proximately causes the injury.[9]

New Mexico Differs

The standard differs from the "substantial certainty test" described by Burton (2002: 23) in several ways, not the least of which is that that it only requires that the conduct be "reasonably expected" to result in injury. The court went on to explain that the "just cause or excuse" provision is intended to preserve the employer's exclusive remedy protection in the case of inherently dangerous occupations, such as firefighters.

No other state appears to have adopted a standard that contains these features. The court rejected or failed to consider the requested finding that the actual intent standard had been satisfied or to adopt the substantial certainty standard urged by plaintiffs and one of the *amicus*. In rejecting the actual intent test, the court ignored an opportunity to extend the actual intent test only slightly, by utilizing the opportunity presented in the fact pattern to find that reckless disregard for human life was a substitute for actual intent. The "reckless disregard" theory of actual intent has a venerable history of acceptance in the context of the criminal law of homicide in New Mexico and other American jurisdic-

tions, and carries with it considerable case law defining "reckless disregard" that could have reduced the uncertainty caused by the opinion.

Consequences for New Mexico

Uncertainty is clearly one of the consequences of the decision in the New Mexico workers' compensation environment. Insurance underwriters face a potential for unlimited tort liability under circumstances where the frequency and extent of liability cannot be known until cases go to final judgment and further appellate definition of the standard occurs. They show some signs of underwriting and rate setting for the worst-case scenario, potentially driving the cost of workers' compensation coverage upwards.[10] This phenomenon sets the stage for an even more interesting possible scenario, however. If the willful conduct of the employer takes the case entirely out of the Workers' Compensation Act, then a standard policy of workers' compensation insurance arguably will not cover the liability. The employer's insurer should immediately perceive a conflict of interest with the insured, since a finding of willfulness results in the insurer denying coverage under the policy.[11] Even the "employer's liability" ("Part B") coverage under a standard workers' compensation policy may not be applicable, since common policy language excludes the willful conduct of the employer from covered risks. Since standard general liability policies commonly exclude on-the-job injury from coverage, the risk created by the *Delgado* decision may be one that is presently not insurable.

Perhaps more certainty is available with respect to the erosion of the exclusive remedy doctrine. Under the *Delgado* formulation, a plaintiff may file their case in District Court and try the issue of liability to a jury.[12] As long as the verdict is bifurcated so that the issue of liability is tried and determined before the issue of damages, an adverse ruling on liability does not result in a "final judgment" that would establish an irrevocable election of remedies. The plaintiff who loses on the issue of willfulness can then dismiss the remainder of the tort claim, and if care has been taken to toll the workers' compensation statute of limitations, the case can be resurrected in the workers' compensation court for a second bite at the apple.[13] There is some evidence that workers are filing "placeholder" workers' compensation claims and proceeding directly to District Court to try their luck on a tort theory in cases where there is a colorable negligence claim, although too little time has passed to determine any trends in the outcomes of such cases. The effects on workers who are denied, or decline, indemnity and medical benefits to preserve their tort remedy have not yet been studied.

Conclusions

The *Delgado* opinion appears to cross the line between the judicial function of interpreting the law and the legislative function of deciding what the best social policy should be for workers and employers. The willingness of the court to engage in the legislative function of determining the need for, and implementing social policy change, was clearly disclosed by the court's final words:

> Finally, we seriously doubt that employers are willfully injuring their workers with such frequency that the consequence of our decision to expose such employers to tort liability will be to "wreak havoc" with the workers' compensation system. **The greater the impact this opinion has on the workers' compensation system, the more profound will have been its need** [Emphasis added].[14]

Claims have not yet matured to demonstrate the practical effects of the decision. However, in striking out on an entirely new path with respect to the intentional injury exception to the exclusive remedy doctrine, the court appears to have failed to credit, or perhaps consider, a series of potential unintended consequences, including:

- The need for additional litigation to give further definition to a unique and untried three-prong test.
- Increased litigation defense costs whenever a claim for tort liability is asserted, due to insurance company conflicts of interest.
- The potential for underwriting uncertainty to act as a workers' compensation insurance premium cost driver.
- The potential for the newly created liability to be regarded as an uninsurable risk, due to existing insurance policy limitations.
- The probability that some workers will suffer delays in the provision of benefits, unintended by the legislature, in hopes that they will gain a larger recovery at some point in the future.

ENDNOTES

[1] Some of the cases annunciating that standard, that were overruled by this opinion were: *Coleman v. Eddy Potash, Inc.*, 120 N.M. 645, 652-53, 905 P.2d 185, 192-93 (1995); *Flores v. Danfelser*, 1999-NMCA-091, ¶ ¶ 14-15, 127 N.M. 571, 985 P.2d 173; *Johnson Controls World Services, Inc. v. Barnes*, 115 N.M. at 119, 847 P.2d at 764; *Gallegos v. Chastain*, 95 N.M. 551, 553, 624 P.2d 60, 62 (Ct.App.1981); *Sanford v. Presto Mfg. Co.*, 92 N.M. 746, 748, 594 P.2d 1202, 1204 (Ct. App.1979).

[2] *Delgado, supra.*, at 34 P.3rd 1150.

[3] Since the case came forward on a Rule 12 motion, prior to the Defendant's answer, and was ultimately settled, the Defendant's position concerning the facts of the case is unknown.

[4] A non-binding expression of the will of the Legislature, usually directed to a state agency or a specific person.

[5] *Coates v. Wal-Mart Stores, Inc.*, 127 N.M. 47, 976 P.2d 999 (1999)

[6] *Michaels v. Anglo American Auto Auctions, Inc*, 117 N.M. 91, 869 P.2d 279 (1994)

[7] 34 P.3d 1154 –1155. While superficially appealing, a search of N.M. case law disclosed only three reported cases in the history of workers' compensation in New Mexico where the "willfulness" standard had successfully been invoked to deny benefits to a worker. All involved willful failure of the worker to obey safety-related policies or orders given by the employer to the worker. See *Lukesh v. Ortega*, 95 N.M. 444, 623 P.2d 564 (1980), *Gough v. Famariss Oil & Refining Co.*, 83 N.M. 71, 496 P.2d 1106 (Ct. App., 1972), *Walker v. Woldridge*, 58 N.M. 183, 268 P.2d 579 (1954).

[8] *Tallman V. Arkansas Best Freight*, 108 N.M. 124, 767 P.2d 363 (Ct. App., 1988) and *Christensen v. Dysart, et. al.*, 42 N.M. 107, 76 P.2d 1 (1938).

[9] 34 P.3d 1156.

[10] A preliminary actuarial study was commissioned by the joint labor-management task force in New Mexico to estimate the potential cost to the system of the *Delgado* opinion. Widman and Cox (2002) conclude that the *Delgado* decision would likely result in an average increase in costs associated with on-the-job injuries of 8 percent to 12 percent, but warned that the costs would likely not be evenly distributed, and would fall with disproportionate weight on some employers.

[11] The insurer is then ethically required to appoint separate counsel to defend the employer's position, thereby doubling the cost of defense of the claim.

[12] Given the opinion's vagueness, and the lack of any other instructive cases from the appellate courts at this time, the probability that a trial judge will keep a case that is properly pled from a jury appears vanishingly small.

[13] This result is aided by *Eldridge v. Circle K Corp.*, 123 N.M. 145, 934 P.2d 1074 (Ct. App. 1997), which states that proceedings in the workers' compensation administration are to be stayed, pending a decision by the trial court of whether it has jurisdiction of the case on a theory that the employer committed an intentional tort.

[14] *Delgado, supra.*, at 34 P.3d 1157.

REFERENCES

Burton, John F. Jr. 2002. "The Intentional Injury Exception." *Workers' Compensation Policy Review* 2, no. 4 (July/August): 23-27.

Widman, J. and D. Cox. 2002. "A Study of the Effects of the *Delgado* Decision on the Exclusive Remedy Provisions of the Workers' Compensation Act" (unpublished).

Workers' Compensation Costs for Employers Increase in 2003

by John F. Burton, Jr.

The latest data from the Bureau of Labor Statistics (BLS) indicate an increase in the employers' costs of workers' compensation between March 2001 and June 2003 for employees in the private sector and between March 2002 and June 2003 for state and local government employees. These increases are reflected in two measures of the employers' costs of workers' compensation: in costs per hour worked (which is how the BLS reports the data) and in costs as a percentage of payroll (which are calculated for this article). Information on the BLS survey and the methodology used to prepare the information in this article are contained in Appendix A.

Workers' Compensation As A Percent of Payroll

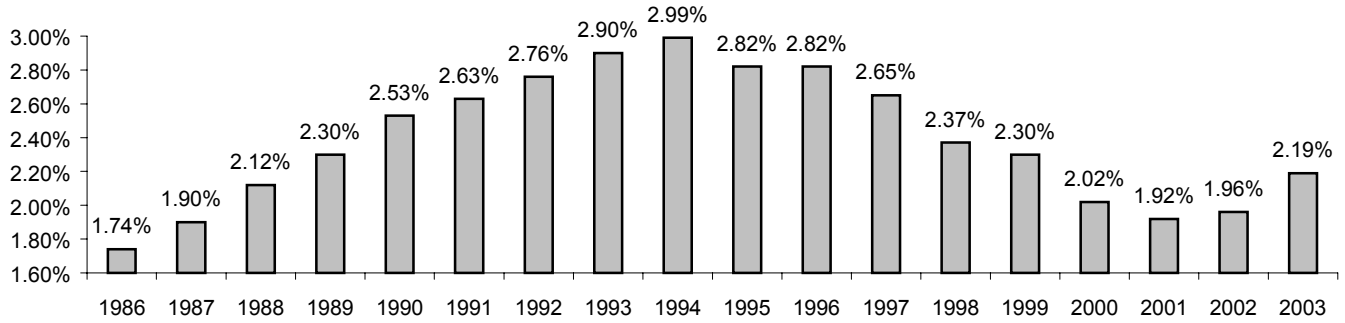
Private Sector Employees. The employers' costs of workers' compensation as a percent of gross earnings (payroll) for private sector employees from March 1986 to March 2003 are shown in Figure A and in Panel A of Tables 1 and 2. Employers' expenditures on workers' compensation in private industry represented 1.74 percent of payroll in 1986, increased in each of the next eight years until peaking at 2.99 percent of payroll in 1994, and then declined for seven years until reaching 1.92 percent of payroll in March 2001. Costs subsequently began to increase, reaching 1.96 percent of payroll in March 2002 and 2.19 percent of payroll in March 2003.

The trend towards higher workers' compensation costs in the private sector since March 2002 is further documented in Figure B and Panel A of Table 3, which present information on the six quarters of data available under the new BLS quarterly schedule of surveys. The employers' costs of 1.96 percent in March 2002 increased until September 2002, dropped slightly in December 2002, and subsequently resumed an increase in the first two quarters of 2003, reaching 2.23 percent of payroll in June 2003. Measured as a percent of payroll, employers' costs increased by 14 percent in the last six quarters (2.23%/1.96%). While this increase is noteworthy, the recent run-up in costs for private sector employers still leaves workers' compensation costs as a percent of payroll in mid-2003 at a lower rate than any year since between 1989 and 1999.

State and Local Government Employees. The employers' costs of workers' compensation as a percent of payroll for employees in the state and local government sector from March 1991 to March 2003 are shown in Figure C and Panel B of Tables 1 and 2.[1] This sector's workers' compensation costs started at 1.49 percent of payroll in 1991, peaked in 1995 at 1.59 percent of payroll, dropped to 1.34 percent of payroll in 2000, rebounded to 1.42 percent of payroll in 2001, declined in 2002 to 1.37 percent of payroll, and then increased again to 1.40 percent of payroll in March 2003.

The fluctuations in workers' compensation costs in the state and local sector in recent years are evident in the six quarters of data available included in Figure D and Panel B of Table 3. The employers' costs increased from 1.37 percent of payroll in March 2002 to a peak of 1.45 percent of payroll in December 2002, dropped to 1.40 percent of payroll in March 2003, and then increased to 1.43 percent of payroll in June of this year. Measured as a percent of payroll, state and local governments' workers' compensation costs have increased by four percent in the last six quarters (1.43%/1.37%).

Figure A
Workers' Compensation Costs as a Percentage of Gross Earnings, Private Industry Employees, March 1986-2003



Source: Tables 1 and 2.

Table 1 - Total Remuneration, Wages and Salaries, and Workers' Compensation, March 1986-1995
(In Dollars Per Hours Worked)

Panel A: Private Industry Employees		1986	1987	1988	1989	1990	1991	1992	1993	1994	1995
(1)	Total Remuneration	13.25	13.42	13.79	14.28	14.96	15.40	16.14	16.70	17.08	17.10
(2)	Gross Earnings	10.90	11.08	11.32	11.72	12.24	12.55	13.06	13.43	13.69	13.81
(3)	Wages and Salaries	9.67	9.83	10.02	10.38	10.84	11.14	11.58	11.90	12.14	12.25
(4)	Paid Leave	0.93	0.93	0.97	1.00	1.03	1.05	1.09	1.11	1.11	1.09
(5)	Supplemental Pay	0.30	0.32	0.33	0.34	0.37	0.36	0.39	0.42	0.44	0.47
(6)	Benefits Other Than Pay	2.36	2.35	2.47	2.56	2.72	2.85	3.07	3.26	3.39	3.29
(7)	Insurance	0.73	0.72	0.78	0.85	0.92	1.01	1.12	1.19	1.23	1.15
(8)	Retirement Benefits	0.50	0.48	0.45	0.42	0.45	0.44	0.46	0.48	0.52	0.52
(9)	Legally Required Benefits	1.11	1.13	1.22	1.27	1.35	1.40	1.47	1.55	1.60	1.59
(9A)	Workers' Compensation	(0.19)	(0.21)	(0.24)	(0.27)	(0.31)	(0.33)	(0.36)	(0.39)	(0.41)	(0.39)
(10)	Other Benefits	0.02	0.02	0.02	0.02	*	*	0.02	0.04	0.04	0.03
(11)	Workers' Compensation as Percent of Remuneration	1.43%	1.56%	1.74%	1.89%	2.07%	2.14%	2.23%	2.34%	2.40%	2.28%
(12)	Workers' Compensation as Percent of Gross Earnings	1.74%	1.90%	2.12%	2.30%	2.53%	2.63%	2.76%	2.90%	2.99%	2.82%

Panel B: State and Local Employees		1991	1992	1993	1994	1995
(1)	Total Remuneration	22.31	23.49	24.44	25.27	24.86
(2)	Gross Earnings	17.48	18.40	19.07	19.71	19.48
(3)	Wages and Salaries	15.52	16.39	17.00	17.57	17.31
(4)	Paid Leave	1.75	1.80	1.86	1.94	1.95
(5)	Supplemental Pay	0.21	0.21	0.21	0.20	0.22
(6)	Benefits Other Than Pay	4.84	5.08	5.36	5.57	5.38
(7)	Insurance	1.63	1.84	2.02	2.15	2.03
(8)	Retirement Benefits	1.85	1.82	1.87	1.90	1.78
(9)	Legally Required Benefits	1.34	1.40	1.44	1.49	1.55
(9A)	Workers' Compensation	(0.26)	(0.28)	(0.30)	(0.31)	(0.31)
(10)	Other Benefits	0.02	0.02	0.03	0.03	0.02
(11)	Workers' Compensation as Percent of Remuneration	1.17%	1.19%	1.23%	1.23%	1.25%
(12)	Workers' Compensation as Percent of Gross Earnings	1.49%	1.52%	1.57%	1.57%	1.59%

Panel C: All Non-Federal Employees		1991	1992	1993	1994	1995
(1)	Total Remuneration	16.45	17.27	17.88	18.30	18.21
(2)	Gross Earnings	13.30	13.89	14.29	14.58	14.62
(3)	Wages and Salaries	11.81	12.33	12.68	12.95	12.98
(4)	Paid Leave	1.16	1.20	1.22	1.23	1.21
(5)	Supplemental Pay	0.33	0.36	0.39	0.40	0.43
(6)	Benefits Other Than Pay	3.16	3.38	3.59	3.72	3.59
(7)	Insurance	1.10	1.23	1.32	1.37	1.28
(8)	Retirement Benefits	0.65	0.67	0.70	0.73	0.70
(9)	Legally Required Benefits	1.39	1.46	1.53	1.58	1.58
(9A)	Workers' Compensation	(0.32)	(0.35)	(0.38)	(0.39)	(0.38)
(10)	Other Benefits	0.02	0.02	0.04	0.04	0.03
(11)	Workers' Compensation as Percent of Remuneration	1.95%	2.03%	2.13%	2.13%	2.09%
(12)	Workers' Compensation as Percent of Gross Earnings	2.41%	2.52%	2.66%	2.67%	2.60%

Notes: See table on page 17.

Sources Data in rows (1), (3) to (5), and (7) to (10) of Panels A, B, and C:
1986-1990: U.S. Department of Labor, 2000a, Tables 140, 150, 158, 165, 169
1991-1995: U.S. Department of Labor, 2000a, Tables 1, 3, 5, 17, 19, 21, 33, 35, 37, 49, 51, 53, 65, 67, 69, 81, 83, 85, 97, 99, 101, 112, 114, 116, 126, 128, 130

Table 2 - Total Remuneration, Wages and Salaries, and Workers' Compensation, March 1996-2003
(In Dollars Per Hours Worked)

	Panel A: Private Industry Employees	1996	1997	1998	1999	2000	2001	2002	2003
(1)	Total Remuneration	17.49	17.97	18.50	19.00	19.85	20.81	21.71	22.37
(2)	Gross Earnings	14.19	14.69	15.19	15.62	16.37	17.16	17.86	18.26
(3)	Wages and Salaries	12.58	13.04	13.47	13.87	14.49	15.18	15.80	16.15
(4)	Paid Leave	1.12	1.14	1.16	1.20	1.28	1.37	1.44	1.47
(5)	Supplemental Pay	0.49	0.51	0.56	0.55	0.60	0.61	0.62	0.64
(6)	Benefits Other Than Pay	3.31	3.29	3.31	3.38	3.48	3.65	3.86	4.11
(7)	Insurance	1.14	1.09	1.10	1.13	1.19	1.28	1.40	1.52
(8)	Retirement Benefits	0.55	0.55	0.55	0.57	0.59	0.62	0.63	0.67
(9)	Legally Required Benefits	1.59	1.62	1.63	1.65	1.67	1.73	1.80	1.89
(9A)	Workers' Compensation	(0.40)	(0.39)	(0.36)	(0.36)	(0.33)	(0.33)	(0.35)	(0.40)
(10)	Other Benefits	0.03	0.03	0.03	0.03	0.03	0.02	0.03	0.03
(11)	Workers' Compensation as Percent of Remuneration	2.29%	2.17%	1.95%	1.89%	1.66%	1.59%	1.61%	1.79%
(12)	Workers' Compensation as Percent of Gross Earnings	2.82%	2.65%	2.37%	2.30%	2.02%	1.92%	1.96%	2.19%

	Panel B: State and Local Employees	1996	1997	1998	1999	2000	2001	2002	2003
(1)	Total Remuneration	25.73	26.58	27.28	28.00	29.05	30.06	31.29	32.62
(2)	Gross Earnings	20.16	20.90	21.53	22.19	23.08	23.94	24.83	25.66
(3)	Wages and Salaries	17.95	18.61	19.19	19.78	20.57	21.34	22.14	22.85
(4)	Paid Leave	1.99	2.06	2.11	2.17	2.26	2.34	2.43	2.51
(5)	Supplemental Pay	0.22	0.23	0.23	0.24	0.25	0.26	0.26	0.30
(6)	Benefits Other Than Pay	5.56	5.69	5.76	5.81	5.97	6.13	6.46	6.96
(7)	Insurance	2.07	2.09	2.15	2.22	2.38	2.56	2.82	3.12
(8)	Retirement Benefits	1.90	1.95	1.94	1.91	1.84	1.73	1.74	1.85
(9)	Legally Required Benefits	1.56	1.61	1.63	1.64	1.70	1.78	1.84	1.93
(9A)	Workers' Compensation	(0.31)	(0.30)	(0.30)	(0.30)	(0.31)	(0.34)	(0.34)	(0.36)
(10)	Other Benefits	0.03	0.04	0.04	0.04	0.05	0.06	0.06	0.06
(11)	Workers' Compensation as Percent of Remuneration	1.20%	1.13%	1.10%	1.07%	1.07%	1.13%	1.09%	1.10%
(12)	Workers' Compensation as Percent of Gross Earnings	1.54%	1.44%	1.39%	1.35%	1.34%	1.42%	1.37%	1.40%

	Panel C: All Non-Federal Employees	1996	1997	1998	1999	2000	2001	2002	2003
(1)	Total Remuneration	18.68	19.22	19.76	20.29	21.16	22.15	23.15	23.93
(2)	Gross Earnings	15.05	15.59	16.11	16.57	17.33	18.14	18.91	19.39
(3)	Wages and Salaries	13.36	13.85	14.30	14.72	15.36	16.07	16.76	17.17
(4)	Paid Leave	1.24	1.27	1.30	1.34	1.42	1.51	1.59	1.63
(5)	Supplemental Pay	0.45	0.47	0.51	0.51	0.55	0.56	0.56	0.59
(6)	Benefits Other Than Pay	3.64	3.63	3.66	3.73	3.83	4.00	4.24	4.54
(7)	Insurance	1.27	1.23	1.25	1.29	1.36	1.46	1.61	1.77
(8)	Retirement Benefits	0.75	0.75	0.75	0.76	0.77	0.78	0.80	0.85
(9)	Legally Required Benefits	1.59	1.62	1.63	1.65	1.67	1.73	1.80	1.89
(9A)	Workers' Compensation	(0.38)	(0.38)	(0.35)	(0.35)	(0.33)	(0.34)	(0.35)	(0.39)
(10)	Other Benefits	0.03	0.03	0.03	0.03	0.03	0.03	0.03	0.03
(11)	Workers' Compensation as Percent of Remuneration	2.03%	1.98%	1.77%	1.72%	1.56%	1.53%	1.51%	1.63%
(12)	Workers' Compensation as Percent of Gross Earnings	2.52%	2.44%	2.17%	2.11%	1.90%	1.87%	1.85%	2.01%

Notes: See table on page 17.

Sources: Data in rows (1), (3) to (5), and (7) to (10) of Panels A, B, and C:
1996-1999: U.S. Department of Labor, 2000a, Tables 1, 3, 5, 17, 19, 21, 33, 35, 37, 49, 51, 53, 65, 67, 69, 81, 83, 85, 97, 99, 101, 112, 114, 116, 126, 128, 130
2000: U.S. Department of Labor, 2000b, Tables 1, 3, and 5.
2001: U.S. Department of Labor, 2001, Tables 1, 3, and 5.
2002: U.S. Department of Labor, 2002a, Tables 1, 3, and 5.
2003: U.S. Department of Labor, 2003b, Tables 1, 3, and 5.

Table 3 - Total Remuneration, Wages and Salaries, and Workers' Compensation, Quarterly Since March 2002
(In Dollars Per Hours Worked)

Panel A: Private Industry Employees		March 2002	June 2002	Sept. 2002	Dec. 2002	2002 Average	March 2003	June 2003
(1)	Total Remuneration	21.71	21.83	22.01	22.14	21.92	22.37	22.61
(2)	Gross Earnings	17.86	17.94	18.05	18.16	18.00	18.26	18.41
(3)	Wages and Salaries	15.80	15.90	16.00	16.08	15.95	16.15	16.31
(4)	Paid Leave	1.44	1.44	1.45	1.47	1.45	1.47	1.46
(5)	Supplemental Pay	0.62	0.60	0.60	0.61	0.61	0.64	0.64
(6)	Benefits Other Than Pay	3.86	3.89	3.95	3.98	3.92	4.11	4.20
(7)	Insurance	1.40	1.42	1.45	1.46	1.43	1.52	1.57
(8)	Retirement Benefits	0.63	0.62	0.63	0.64	0.63	0.67	0.67
(9)	Legally Required Benefits	1.80	1.82	1.84	1.85	1.83	1.89	1.93
(9A)	Workers' Compensation	(0.35)	(0.37)	(0.38)	(0.38)	(0.37)	(0.40)	(0.41)
(10)	Other Benefits	0.03	0.03	0.03	0.03	0.03	0.03	0.03
(11)	Workers' Compensation as Percent of Remuneration	1.61%	1.69%	1.73%	1.72%	1.69%	1.79%	1.81%
(12)	Workers' Compensation as Percent of Gross Earnings	1.96%	2.06%	2.11%	2.09%	2.05%	2.19%	2.23%

Panel B: State and Local Employees		March 2002	June 2002	Sept. 2002	Dec. 2002	2002 Average	March 2003	June 2003
(1)	Total Remuneration	31.29	31.20	31.89	32.32	31.68	32.62	32.99
(2)	Gross Earnings	24.83	24.72	25.17	25.46	25.05	25.66	25.96
(3)	Wages and Salaries	22.14	22.00	22.40	22.68	22.31	22.85	23.14
(4)	Paid Leave	2.43	2.45	2.49	2.49	2.47	2.51	2.52
(5)	Supplemental Pay	0.26	0.27	0.28	0.29	0.28	0.30	0.30
(6)	Benefits Other Than Pay	6.46	6.47	6.72	6.85	6.63	6.96	7.02
(7)	Insurance	2.82	2.85	2.96	3.02	2.91	3.12	3.16
(8)	Retirement Benefits	1.74	1.72	1.81	1.84	1.78	1.85	1.86
(9)	Legally Required Benefits	1.84	1.84	1.89	1.92	1.87	1.93	1.94
(9A)	Workers' Compensation	(0.34)	(0.35)	(0.36)	(0.37)	(0.36)	(0.36)	(0.37)
(10)	Other Benefits	0.06	0.06	0.06	0.07	0.06	0.06	0.06
(11)	Workers' Compensation as Percent of Remuneration	1.09%	1.12%	1.13%	1.14%	1.12%	1.10%	1.12%
(12)	Workers' Compensation as Percent of Gross Earnings	1.37%	1.42%	1.43%	1.45%	1.42%	1.40%	1.43%

Panel C: All Non-Federal Employees		March 2002	June 2002	Sept. 2002	Dec. 2002	2002 Average	March 2003	June 2003
(1)	Total Remuneration	23.15	23.20	23.44	23.66	23.36	23.93	24.19
(2)	Gross Earnings	18.91	18.92	19.09	19.24	19.04	19.39	19.57
(3)	Wages and Salaries	16.76	16.78	16.93	17.06	16.88	17.17	17.35
(4)	Paid Leave	1.59	1.59	1.60	1.62	1.60	1.63	1.63
(5)	Supplemental Pay	0.56	0.55	0.56	0.56	0.56	0.59	0.59
(6)	Benefits Other Than Pay	4.24	4.26	4.35	4.41	4.32	4.54	4.64
(7)	Insurance	1.61	1.63	1.67	1.69	1.65	1.77	1.81
(8)	Retirement Benefits	0.80	0.78	0.80	0.82	0.80	0.85	0.86
(9)	Legally Required Benefits	1.80	1.82	1.85	1.86	1.83	1.89	1.93
(9A)	Workers' Compensation	(0.35)	(0.36)	(0.38)	(0.38)	(0.37)	(0.39)	(0.41)
(10)	Other Benefits	0.03	0.03	0.03	0.04	0.03	0.03	0.04
(11)	Workers' Compensation as Percent of Remuneration	1.51%	1.55%	1.62%	1.61%	1.57%	1.63%	1.69%
(12)	Workers' Compensation as Percent of Gross Earnings	1.85%	1.90%	1.99%	1.98%	1.93%	2.01%	2.10%

Notes: See table on page 17.

Sources: Data in rows (1), (3) to (5), and (7) to (10) of Panels A, B, and C:
March 2002: U.S. Department of Labor, 2002a, Tables 1, 3, and 5.
June 2002: U.S. Department of Labor, 2002b, Tables 1, 3, and 5.
September 2002: U.S. Department of Labor, 2002c, Tables 1, 3, and 5.
December 2002: U.S. Department of Labor, 2003a, Tables 1, 3, and 5.
March 2003: U.S. Department of Labor, 2003b, Tables 1, 3, and 5.
June 2003: U.S. Department of Labor, 2003c, Tables 1, 3, and 5.

Notes for Tables 1, 2, and 3

Notes: * = $0.01 or less

(1) Table 1 and the text of this article use the term "remuneration" in place of the term "compensation" that is used in the BLS publications, and use the term "All non-federal Employees" in place of the term "Civilian workers'" that is used in the BLS publications.
(2) Total remuneration (row 1) = gross earnings (row 2) + benefits other than pay (row 6).
(3) Gross earnings (row 2) = wages and salaries (row 3) + paid leave (row 4) + supplemental pay (row 5).
(4) Benefits other than pay (row 6) = insurance (row 7) + retirement benefits (row 8) + legally required benefits (row 9) + other benefits (row 10).
(5) Workers' compensation (row 9A) is one of the legally required benefits (row 9).
(6) Workers' compensation as percent of remuneration (row 11) = workers' compensation (row 9A)/total remuneration (row 1).
(7) Workers' compensation as percent of gross earnings (row 12) = workers' compensation (row 9A)/gross earnings (row 12).
(8) Results in rows (2), (6), (11), and (12) were calculated by Florence Blum and John F. Burton, Jr.

All Non-Federal Employees. Workers' compensation costs for all non-federal employees, a category that includes private industry employees along with state and local government employees, for March 1991 to March 2003 are presented in Figure E and in Panel C of Tables 1 and 2.[2] Workers' compensation costs for employers of all non-federal employees represented 2.41 percent of payroll in 1991, increased to a peak of 2.67 percent in 1994, declined from 1994 to 2002, when it was 1.85 percent of payroll, and then increased to 2.01 percent of payroll in March 2003.

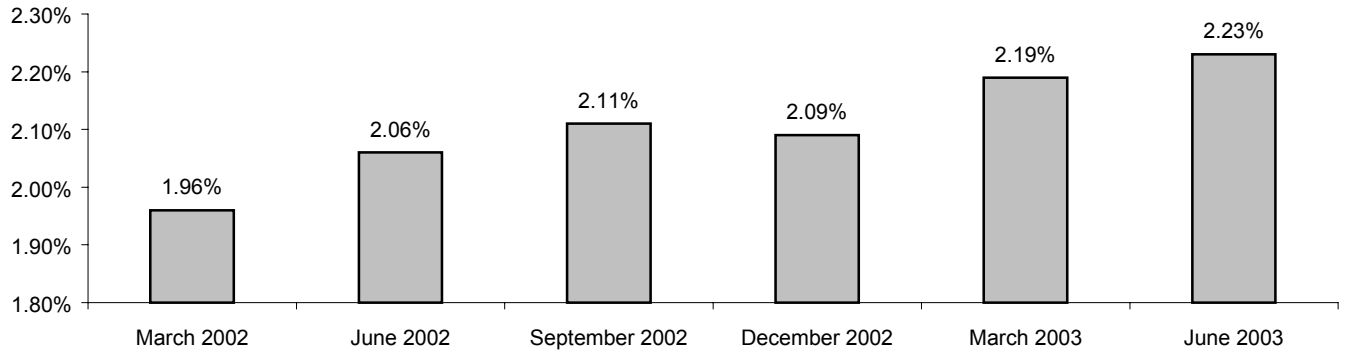
The trend towards higher workers' compensation costs for all non-federal employers since 2002 is also shown in the six quarters of data in Figure F and Panel C of Table 3. The employers' costs of 1.85 percent of payroll in March 2002, increased to 1.99 percent of payroll in September 2002, dropped slightly to 1.98 percent of payroll in December 2002, and then increased during the first two quarters of 2003, reaching 2.10 percent of payroll in June 2003. Measured as a percent of payroll, the employers' costs of workers' compensation for all non-federal employees increased 14 percent in the last six quarters (2.10%/1.85%).

Workers' Compensation Costs Per Hour Worked

An alternative measure of the employers' costs of workers' compensation is expenditures on the program in dollars per hour worked.

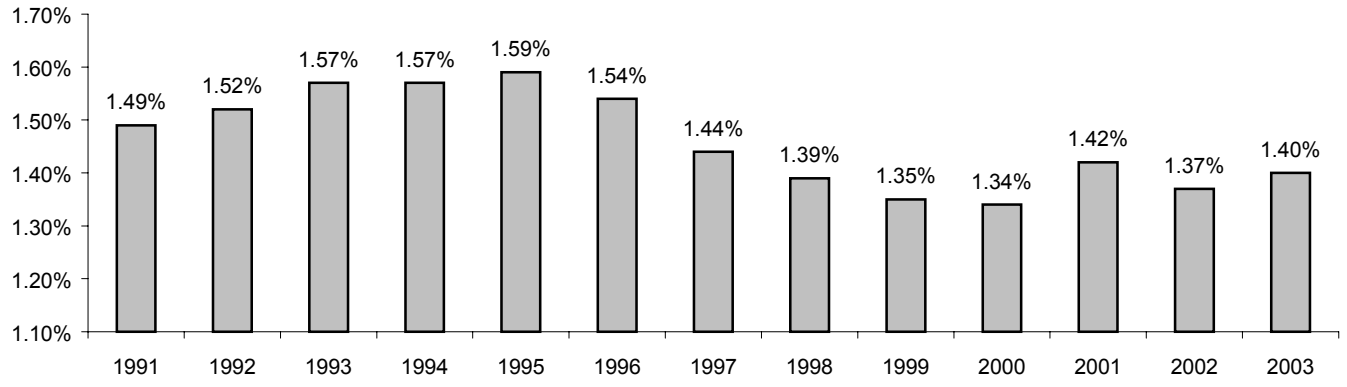
Private Sector Employees. The employers' costs of workers' compensation in dollars per hour worked for private sector workers from March 1986 to June 2003 are shown in Figures G and H and Panel A of Tables 1, 2, and 3. Using this measure of employers' costs, the costs in the private sector began at $0.19 per hour in March of 1986, increased to $0.41 per hour in 1994, declined in most years

Figure B
Workers' Compensation Costs as a Percentage of Gross Earnings, Private Industry Employees, March 2002 - June 2003



Source: Table 3

Figure C
Workers' Compensation Costs as a Percentage of Gross Earnings, State and Local Government Employees, March 1991-2003



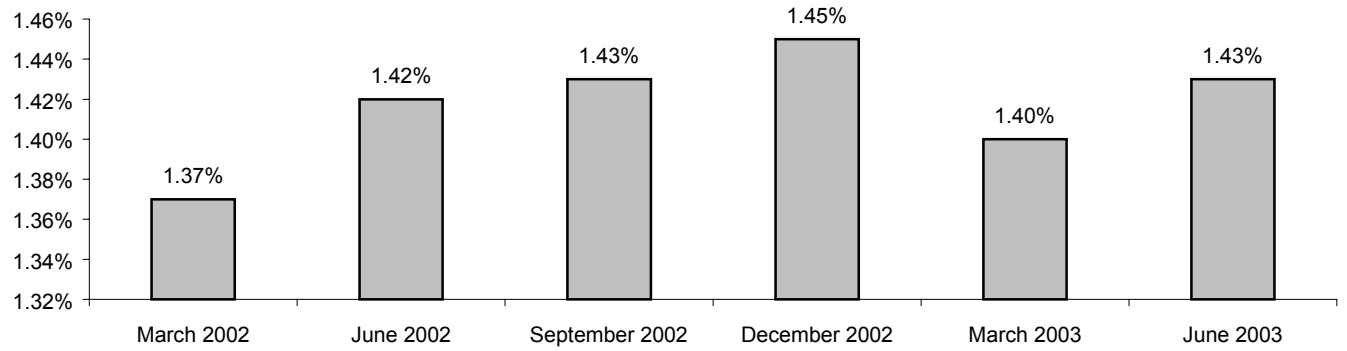
Source: Tables 1 and 2.

until reaching $0.33 per hour in 2000 and 2001, and then increased to $0.35 per hour in March 2002 and $0.40 in March 2003 (Figure G). The quarterly data indicate that private sector employers expended $0.35 per hour on workers' compensation in March 2002 and that these expenditures increased to $0.41 per hour in June 2003 (Figure H). Using this measure of costs, private sector workers' compensation costs in June 2003 matched the previous high of $0.41 per hour reached in 1994.

State and Local Government Employees. The employers' costs of workers' compensation in dollars per hour worked for workers in the state and local government sector from March 1991 to June 2003 are shown in Figures I and J and Panel B of Tables 1, 2, and 3. The employers' costs of workers' compensation per hour worked in the state and local government sector were $0.26 in March 1991 (the first year with data), increased to $0.31 in 1994, fluctuated in a narrow band between $0.30 and $0.31 per hour from 1994 to 2000, and finally "spurted" to $0.34 per hour in 2001 and 2002 and $0.36 in March 2003 (Figure I). The quarterly data indicate that state and local government employers expended $0.34 per hour on workers' compensation in March 2002 and that these expenditures fluctuated between $0.36 and $0.37 per hour between September 2002 and June 2003 (Figure J). Using this measure of costs, workers' compensation costs for state and local government employers were $0.37 per hour in June 2003, which is as high as they have been since the series began in 1991.

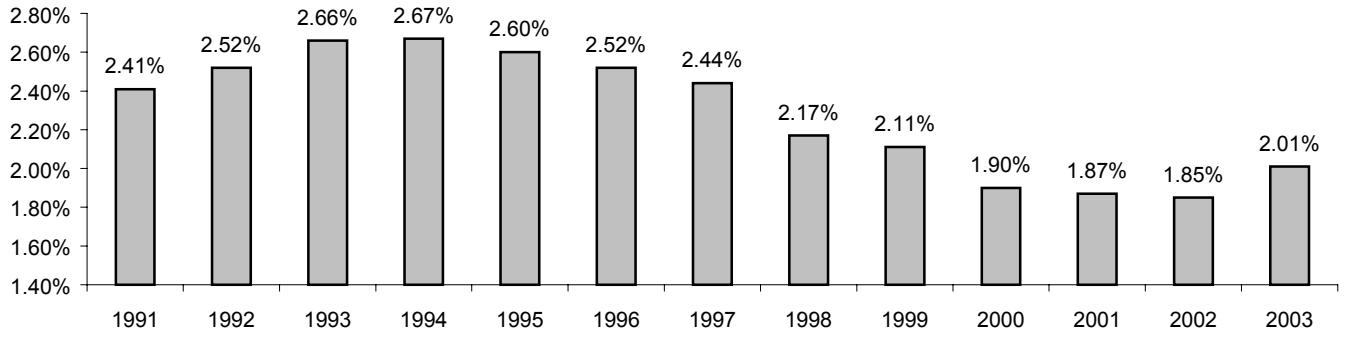
All Non-Federal Employees. The employers' costs of workers' compensation in dollars per hour worked for all non-federal government employees from March 1991 to June 2003 are shown in Figures K and L and Panel C of Tables 1, 2, and 3. Workers' compensation costs per hour worked for all non-federal government employees were $0.32 in 1991

Figure D
Workers' Compensation Costs as a Percentage of Gross Earnings, State and Local Employees, March 2002 - June 2003



Source: Table 3

Figure E
Workers' Compensation Costs as a Percentage of Gross Earnings, All Non-Federal Employees, March 1991-2003



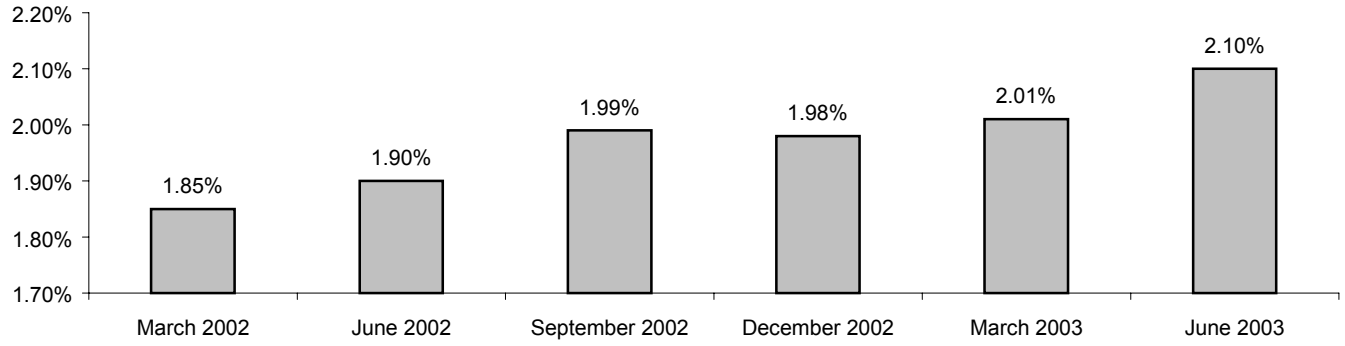
Source: Tables 1and 2.

(the first year with available data), increased to $0.39 in 1994, declined to $0.33 in 2000, and then increased significantly to $0.35 in 2002 and $0.39 in March 2003 (Figure K). The quarterly data indicate that employers of all non-federal employees expended $0.35 per hour on workers' compensation in March 2002 and that these expenditures increased in most quarters until they reached $0.41 per hour worked in June 2003 (Figure L). Using this measure of costs, workers' compensation costs for all non-federal employees were the highest they have been in June 2003 since the series began in 1991.

Analysis

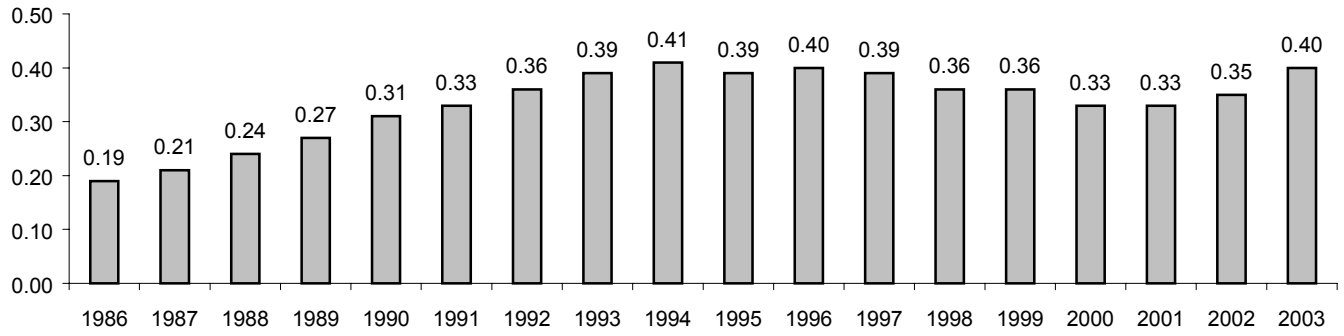
Workers' compensation costs as a percentage of gross earnings (or payroll) is the most common comparison used in the workers' compensation literature. The rationale is that, over time, employer expenditures on remuneration for employees, including wages, health insurance, pensions and workers' compensation, increase. Between March 1990 and March 2003, for example, the gross earnings (payroll) paid by employers for private sector employees increased from $12.24 to $18.26 per hour worked (Panel A, Tables 1 and 2), which is a 49 percent increase. Meanwhile, private sector employers' expenditures for workers' compensation increased from $0.31 per hour worked in March 1990 to $0.40 in March 2003, which represents a 21 percent increase. One way to put the developments over time in employer expenditures on workers' compensation in perspective is to compare them to payroll in each year. That workers' compensation expenditures represented 2.53 percent of payroll in March 1990 for private sector employers and 2.19 percent of payroll in March 2003 provides information more useful than simply stating that workers' compensation costs per hour increased by 21 percent over those 13 years.

Figure F
Workers' Compensation Costs as a Percentage of Gross Earnings, All Non-Federal Employees, March 2002 - June 2003



Source: Table 3

Figure G
Workers' Compensation Costs for Private Industry Employees, March 1986-2003 (In Dollars per Hour Worked)



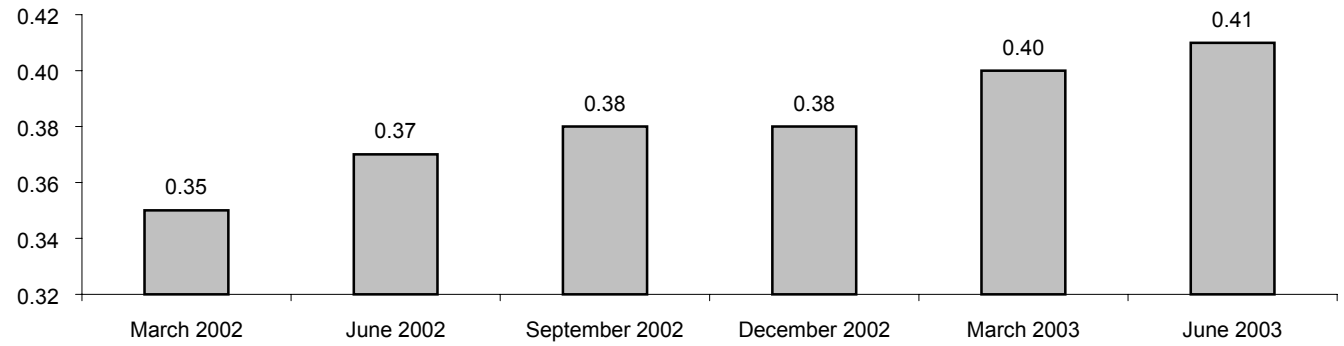
Source: Tables 1 and 2.

The preceding sections have documented the changes in employer expenditures on workers' compensation as a percent of payroll for three levels of aggregation of employees. For private sector employees, where the data are available since 1986, the costs increased from 1986 to 1994, declined sharply through 2001, and then increased moderately from 2001 to 2003. For state and local government employees, where the data are only available since 1991, the pattern is similar: employers' costs increased through 1995, declined until 2000, and then increased through 2003. Finally, for all non-federal employees (which primarily consists of private sector employees), the data series shows a decline in employers' costs between 1991 and 2002, followed by an increase in the last year. While the patterns differ slightly in recent years, the experience in all of the sectors indicates that the employers' costs of workers' compensation have been increasing in the last year or two.

The BLS information on employers' expenditures on workers' compensation has some advantages over other sources of data on national workers' compensation costs. One significant advantage, compared to the annual data prepared by the National Academy of Social Insurance (NASI), is timeliness: the most recent NASI data pertain to 2001 (Williams, Reno, and Burton 2003), while BLS data for 2003 are already available. The BLS data are also disaggregated by region, major industry group, occupational group, establishment employment size, and bargaining status -- useful distinctions that are not available in the NASI data.

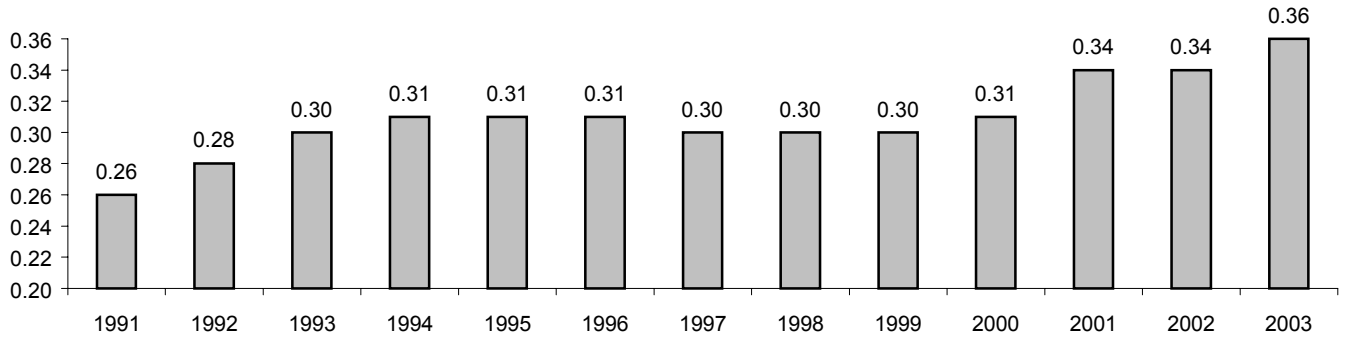
The BLS data also have their limitations when compared to the NASI data. The NASI data, for example, provide state-specific information on benefit payments that differentiate among the types of insurance arrangements (private carriers, state funds, and self-insurers) and that distinguish between medical and cash benefit payments. The NASI national

Figure H
Workers' Compensation Costs for Private Industry Employees, March 2002 - June 2003 (in Dollars per Hour Worked)



Source: Table 3

Figure I
Workers' Compensation Costs for State and Local Government Employees, March 1991-2003 (In Dollars per Hour Worked)

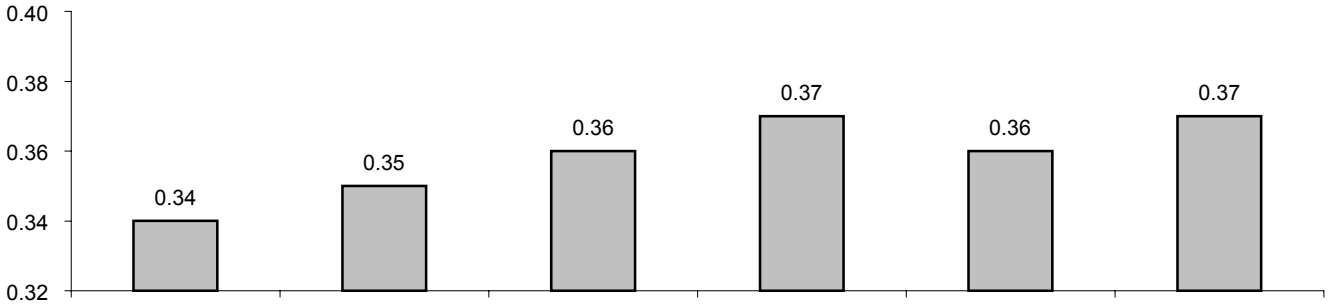


Source: Table 1.

data also include the federal sector, which are missing from the BLS data.

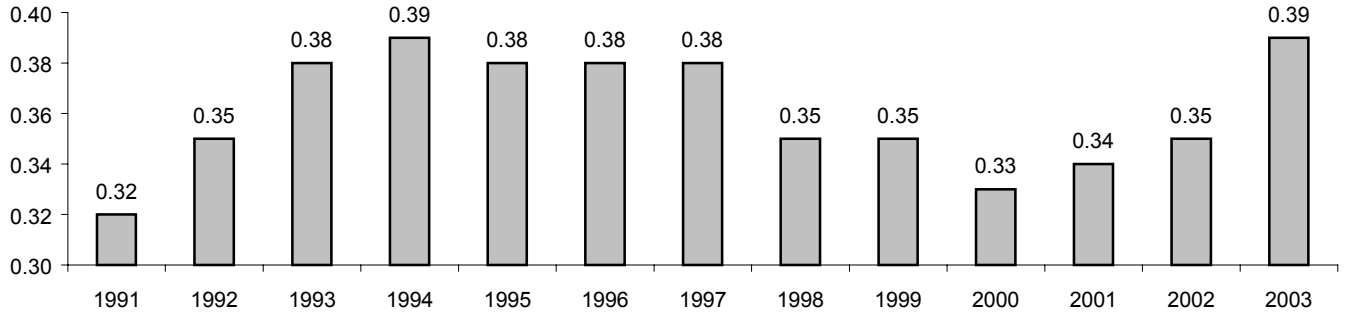
The NASI data and BLS data are, to a considerable degree, complementary and, as such, both sources of information are valuable. One problem, however, is that the two data series are not entirely consistent with one another. For example, the NASI data for 2001 (the latest year with data available from that source) indicate that the employers' costs of workers' compensation were 1.39 percent of covered payroll for employers in all sectors (including the federal government); the BLS data for all non-federal employees in 2001 yield an estimation of workers' compensation costs for that group of 1.87 percent of payroll.[3] In addition, the NASI data showed 1990 as the peak year (with employers' costs at 2.18 of payroll), while the BLS data (as shown in Table 1) for all non-federal employees showed continuing **increases** in workers' compensation costs as a percent of payroll through 1994, with a decrease in costs only beginning in 1995. But even though the NASI and BLS data have different peak years, both sources of data indicate that the employers' costs of workers' compensation measured as a percent of payroll substantially declined during the latter half of the 1990s. Finally, the BLS data for the non-federal employees showed that workers' compensation costs as a percent of payroll declined until 2001 and only started to increase in 2002, while the NASI data show an increase from $1.32 per $100 of payroll in 2000 to $1.39 in 2001, thus anticipating the start of higher costs by a year compared to the BLS data. What remains to be seen is whether the increases in employer costs evidence in both series in the last few years persists for the rest of 2003 and beyond. We will continue to publish updates as the BLS quarterly data are available.

Figure J
Workers' Compensation Costs for State and Local Employees, March 2002 - June 2003 (in Dollars per Hour Worked)



Source: Table 3

Figure K
Workers' Compensation Costs for All Non-Federal Employees, March 1991-2003 (In Dollars per Hour Worked)



Source: Tables 1 and 2.

APPENDIX A
Source of the Information and Methodology

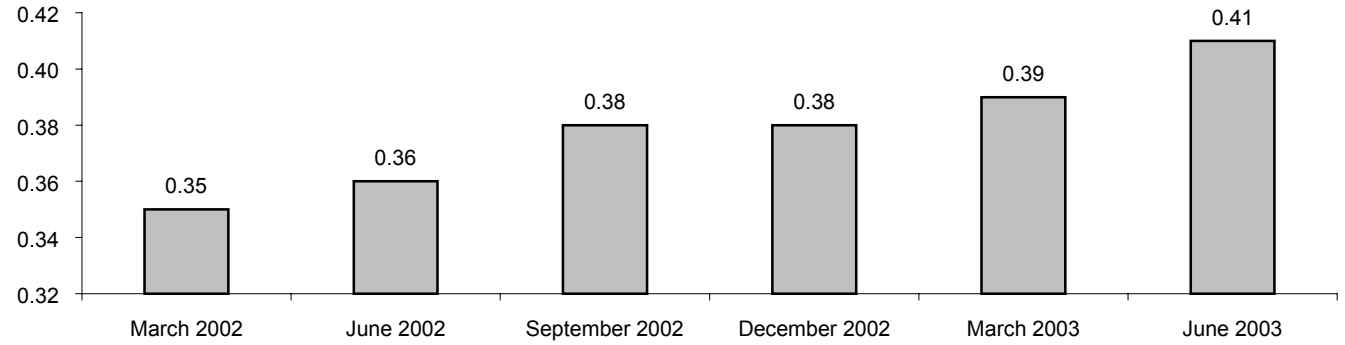
Tables 1, 2, and 3, and Figures A through L, are based on data published by the Bureau of Labor Statistics (BLS), which is a part of the U.S. Department of Labor.[4] The BLS data are based on a national survey of approximately 8,500 establishments in the private sector and 800 establishments in state and local government. The BLS published annual data based on the survey conducted each March from 1986 to 2002. Beginning with March 2002, the BLS has conducted the survey every quarter, and this article includes the data on workers' compensation costs through June 2003. This appendix discusses the data from March 2003 shown in Table 2 (since the March 2003 data are most comparable to the data from earlier years).[5]

The BLS data are known as the Employer Costs for Employee Compensation (ECEC). They measure the average cost per employee hour worked that employers pay for wages and salaries and benefits. These benefits include those voluntarily paid as well as legally required benefits, such as workers' compensation. I have calculated workers' compensation as a percent of gross earnings (payroll) for this article, as explained below.

Data are available since 1986 for private sector employers' expenditures per hour on employees' total remuneration, and (as shown in Panel A of Tables 1, 2, and 3) on a number of components of remuneration, including wages and salaries, paid leave, insurance, and legally required benefits (including separate information on workers' compensation).[6] Comparable data pertaining to state and local government employees (Panel B of Tables 1, 2, and 3) and to all non-federal employees (Panel C of Tables 1, 2, and 3) are available for the period 1991 to 2002.

The only employees not included in this BLS data series are federal government, agriculture, and household workers, who in aggregate account

Figure L
Workers' Compensation Costs for All Non-Federal Employees, March 2002 - June 2003 (in Dollars per Hour Worked)



Source: Table 3

for only about 4 percent of all employees. Of the 96 percent of all employees who are included in the BLS data, private industry employees clearly predominate (83 percent of all employees), whereas state and local government employees account for the remaining 13 percent of all employees.[7]

Private Industry Employees

The March 2003 data for private industry employees presented in Panel A of Table 2 further explain the BLS data series. In 2003, private sector employers spent, on average, $22.37 per hour worked on *total remuneration* (row 1). The $22.37 of total remuneration included *gross earnings* of $18.26 per hour (row 2) and *benefits other than pay* of $4.11 per hour (row 6).[8] *Gross earnings*, or *payroll*, included wages and salaries ($16.15 per hour; row 3), paid leave ($1.47 per hour; row 4), and supplemental pay ($0.64 per hour; row 5). *Benefits other than pay* included insurance ($1.52 per hour; row 7), retirement benefits ($0.67 per hour; row 8), legally required benefits ($1.89 per hour; row 9), and other benefits ($0.03 per hour; row 10). *Workers' compensation*, which averaged $0.40 per hour worked (row 9A), is one of the legally required benefits (row 9).[9]

The BLS data in Panel A of Table 2 indicate that private sector employers' workers' compensation expenditures ($0.40 per hour) were 1.79 percent of total remuneration (row 11) and 2.19 percent of gross earnings (payroll) (row 12) in March 2003.[10]

State and Local Government Employees

The BLS data with respect to state and local government employees' remuneration are only available since 1991. There are several interesting differences between the employer expenditure patterns in the state and local government sector (Panel B of Tables 1, 2, and 3) and in the private sector (Panel A). In March 2003, for example, the state and local sector had higher figures than the private sector for gross earnings per hour ($25.66 vs. $18.26); benefits other than pay ($6.96 vs. $4.11); and, therefore, total remuneration ($32.62 vs. $22.37). Workers' compensation costs per hour worked were somewhat lower in the state and local sector ($0.36) than in the private sector ($0.40). However, because of the higher wages in the government sector, workers' compensation costs as a percentage of gross wages and salaries (payroll) in 2003 were considerably lower in the state and local government sector than in the private sector (1.40 percent vs. 2.19 percent), as they have been each year from 1991 to 2003.

All Non-Federal Employees

The most comprehensive variant of the BLS data, the data for all non-federal employees, is shown in Panel C of Tables 1, 2, and 3. Available since 1991, this grouping, which is the total of private sector employees and state and local government employees, covers about 96 percent of all U.S. employees.

In March 2003, total remuneration per hour worked averaged $23.93 per hour and gross earnings (payroll) averaged $19.39 per hour. Workers' compensation expenditures were $0.39 per hour in March 2003, which represented 2.01 percent of payroll.

ENDNOTES

[1] Data on workers' compensation costs for state and local government employees are only available since 1991.

[2] Data on workers' compensation costs for all non-federal employees are only available since 1991.

[3] The differences between the NASI data and the BLS data used in this article is the employers' costs of workers' compensation as a percentage of payroll are greater than is immediately obvious. The NASI data relate the employers' costs for workers' compensation only to the payroll of employers who are covered by state or federal workers' compensation programs. The costs would be a lower percentage if the base were payroll for all employers (whether covered or not), which is the base used for the BLS data.

[4] Citations to the U.S. Department of Labor publications containing the data used to prepare this article are provided in the references.

[5] The data are from the survey conducted in March 2003. The BLS uses the current-cost approach. That is, the costs do not pertain to the costs for the previous year. Rather, annual costs are based on the current price of the benefits and current plan provisions as of March 2003. The annualized cost of these March 2003 benefits are then divided by the annual hours worked to yield the cost per hour worked for each benefit, including workers' compensation benefits. Thus, if the annual workers' compensation premium per worker is $800 and the employee works 2,000 hours per year, the workers' compensation cost is $0.40 per hour worked. For further explanation of the BLS data, see Appendix A of U.S. Department of Labor 2000a.

[6] This article uses the term "remuneration" in place of the term "compensation" that is used in the BLS publications in order to more clearly distinguish between workers' compensation and remuneration.

[7] U.S. Department of Labor 2000a. See Chart 1, "Coverage of the Employment Cost Index, Total Civilian Employment, 1999." Comparable data for 2002 are not yet available, but should not differ much from the 1999 data.

[8] The terms "gross earnings" and "benefits other than pay" are not used in the BLS publications. These terms are used here to make the base for calculating workers' compensation costs as a percentage of payroll comparable to measures used in other publications.

[9] The parentheses around the workers' compensation figures in row 9A of each panel in Tables 1, 2, and 3 are to show that these figures are included in the legally required benefits figures in row 9 of each panel.

[10] Relating workers' compensation costs to "gross wages" (which is straight-time hourly wages plus paid leave and supplemental pay) is based on advice in an April 7, 1995 letter to me from Mr. Albert Schwenk, Supervisory Economist, Division of Employment Cost Trends, Bureau of Labor Statistics, U.S. Department of Labor. I appreciate this suggestion from Mr. Schwenk.

REFERENCES

U.S. Department of Labor, Bureau of Labor Statistics. 2000a. *Employment Cost Indexes, 1975-99*. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2000b. *Employer Costs for Employee Compensation*, 1986-99. Bulletin 2526. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2000c. *Employer Costs for Employee Compensation - March 2000*. USDL: 00-186, June 29, 2000. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2001. Employer Costs for Employee Compensation – March 2001. USDL: 01-194, June 29, 2001. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2002a. Employer Costs for Employee Compensation – March 2002. USDL: 02-346. June 19, 2002. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2002b. Employer Costs for Employee Compensation – June 2002. USDL: 02-518. September 17, 2002. Washington, D. C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2002c. Employer Costs for Employee Compensation – September 2002. USDL: 02-674. December 11, 2002. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2003a. Employer Costs for Employee Compensation – December 2002. USDL: 03-130. March 18, 2003. Washington, D. C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2003b. Employer Costs for Employee Compensation – March 2003. USDL: 03-297. June 11, 2003. Washington, D.C.: U.S. Department of Labor.

U.S. Department of Labor, Bureau of Labor Statistics. 2003c. Employer Costs for Employee Compensation – June 2003. USDL: 03-446. August 26, 2003. Washington, D.C.: U.S. Department of Labor.

Williams, Cecili Thompson, Virginia P. Reno, and John F. Burton, Jr.. 2003. *Workers' Compensation: Benefits, Coverage, and Costs, 2001*. Washington, D.C.: National Academy of Social Insurance.

Are the Employers' Costs of Workers' Compensation Soaring?

By John F. Burton, Jr.

The June 23, 2003 issue of *The New York Times* contained an article with the headline "Cost of Insurance for Work Injuries Soars Across U.S." The lead paragraph of the article by Joseph B. Treaster indicated that:

> Across the country, the cost of workers' compensation insurance is soaring at the highest rate in nearly a decade, adding yet another heavy burden on businesses and the struggling national economy.

The article quantified the rate of increase in a subsequent paragraph:

> Nationwide, the average cost of workers' compensation insurance has risen 50 percent in the last three years, according to Robert P. Hartwig, the chief economist at the Insurance Information Institute, a trade group in New York.

Much of the article was devoted to the workers' compensation problems in California, and Treaster was probably accurate in his assertion that nowhere in the country have insurance rates been rising faster and with more debilitating impact than in that state. Other aspects of the article were also useful and accurate. (I was quoted as saying that "For workers, it is a very intimidating system," which surely is accurate if not particularly useful.)

But what about the assertion that the employers' cost of workers' compensation insurance is soaring across the country?

I responded to the article by submitting the following letter to the *Times:*

[Letter to *The New York Times* submitted on Rutgers University Stationary]

June 24, 2004

To the Editor:

Re "Cost of Insurance for Work Injuries Soars Across U.S." (news article, June 23):

The article provides examples of rapidly increasing workers' compensation insurance rates in California, which may be accurate. However, the assertion that nationally the average cost "has risen 50 percent in the last three years" must be used with caution.

The Bureau of Labor Statistics samples almost 7,000 private sector establishments nationally in order to prepare the Employment Cost Index. Employers' expenditures on workers' compensation in the private sector as a percent of payroll in March of the last four years were 2.02% in 2000, 1.92% in 2001, 1.96% in 2002, and 2.19% in 2003. By this measure, employers' costs have increased about 14% from the low point in 2001 to 2003. The increase would be even less for the three years since 2000. Moreover, the March 2003 figure is lower than for any year in the 1990s and is well below the peak of 2.99% reached in 1994.

These figures, provided to your reporter prior to publication, convey a different picture about the national developments in workers' compensation costs. Unfortunately, the impression conveyed by the article of runaway costs and vanishing employers provides inappropriate ammunition to proponents of workers' compensation "reforms" that reduce benefits and limit eligibility.

Sincerely yours,

John F. Burton, Jr.
Professor

Burton is Chair of the Workers' Compensation Steering Committee of the National Academy of Social Insurance. He was Chairman of the National Commission on State Workmen's Compensation Laws, which submitted its report to the President and Congress in 1972.

Alas, despite the compelling analysis in the letter and the impeccable credentials of the writer, the *Times* did not publish my submission. (The *Times* did publish four other letters on June 29 in response to the Treaster article, but none dealt with the assertion that costs were soaring nationally.) I have corresponded further with Joseph Treaster after the publication of the June article, and he stands by his conclusion on the soaring costs.

I have also corresponded with Robert Hartwig, the person quoted in the *Times* article as the source of the figure that the average cost of workers' compensation insurance has risen 50 percent in the last three years.

Hartwig sent me excerpts from *Casualty Cost of Risk 2003* published by Marsh Inc. in January 2003 showing that the average rate increases for insurers with good loss experience were 10-15 % in January 2001, 20-40% in January 2002, and 10-30% in January 2003. Hartwig also indicated that other sources of information on insurance costs are the quarterly rate survey from the Council of Insurance Agents and Brokers and data on the combined effect of rate/loss changes, departures from rates, schedule rating, and dividends published by the National Council on Compensation Insurance. Hartwig has tentatively agreed to prepare an article for the *Workers' Compensation Policy Review* in which he will provide more information about these sources of information on workers' compensation costs. I look forward to publishing that article because of the importance of accurate information on what is happening to the employers' costs of workers' compensation.

In the meantime, I want to make certain that readers of the *Workers' Compensation Policy Review* are aware of data that suggests the costs of workers' compensation for employers are increasing at a slower rate than the 50 percent increase over three years figure provide by Hartwig and quoted by Treaster. One limitation of the data I will cite is that they pertain to all employers nationally, not just employers who purchase insurance from private carriers (and perhaps, to some extent, competitive state insurance funds), who represent the primary sources of the information relied on by Hartwig. Apparently missing from the sources relied on by Hartwig are workers' compensation costs data for self-insuring employers, employers who purchase insurance from the exclusive state funds in five states, and (probably) some of the employers who purchase insurance from competitive state funds and federal programs. Private carriers accounted for 54.8 percent of benefits paid in 2001, state funds for 16.1 percent of benefits, federal programs for 6.2 percent of benefits, and self-insuring employers for 22.9 percent of benefits (Williams, Reno, and Burton 2003, Table 5). So the Hartwig figures represent the experience of most employers, but not the universe of employers included in the data in Tables 1 and 2.

Table 1 contains data from the National Academy of Social Insurance (NASI) on the employers' costs of workers' compensation, which are available through 2001 (Williams, Reno, and Burton 2003). Two measures of costs are shown: the total employers' costs in billions of dollars (column (1)) and the costs as a percent of payroll (column (3)). In Panel A, the data begin with the year in which costs peaked. The peak year for overall dollar costs in the 1990s was 1993, when the employers' costs were $60.819 billion. This measure of costs declined until 1998, when the costs of $52.635 billion were down

Table 1
Workers' Compensation Costs for Employers:
National Academy of Social Insurance Data

Panel A: Change from Peak Year

Year	Costs in Dollars (Billions) (1)	Cumulative Change (Percent) (2)	Costs Per $100 of Wages (3)	Cumulative Change (Percent) (4)
1990			2.18	
1991			2.16	-0.9%
1992			2.12	-2.8%
1993	60.819		2.16	-0.9%
1994	60.517	-0.5%	2.05	-6.0%
1995	57.089	-6.1%	1.82	-16.5%
1996	55.293	-9.1%	1.48	-32.1%
1997	53.053	-12.8%	1.35	-38.1%
1998	52.635	-13.5%	1.33	-39.0%
1999			1.32	-39.4%

Panel B: Change from Trough Year

Year	Costs in Dollars (Billions) (1)	Cumulative Change (Percent) (2)	Costs Per $100 of Wages (3)	Cumulative Change (Percent) (4)
1998	52.635			
1999	55.173	4.8%		
2000	59.204	12.5%	1.32	
2001	63.931	21.5%	1.39	5.3%

Source: Data in Columns (1) and (3): Williams, Reno, and Burton (2003), Tables 11 and 12.

Table 2
Workers' Compensation Costs for Employers:
Bureau of Labor Statistics Data for All Non-Federal Employees

Panel A: Change from Peak Year

Year (March)	Costs in Dollars Per Hour Worked (1)	Cumulative Change (Percent) (2)	Costs Per $100 of Payroll (3)	Cumulative Change (Percent) (4)
1994	0.39		2.67	
1995	0.38	-2.6%	2.60	-2.6%
1996	0.38	-2.6%	2.52	-5.6%
1997	0.38	-2.6%	2.44	-8.6%
1998	0.35	-10.3%	2.17	-18.7%
1999	0.35	-10.3%	2.11	-21.0%
2000	0.33	-15.4%	1.90	-28.8%
2001			1.87	-30.0%
2002			1.85	-30.7%

Panel B: Change from Trough Year

Year and Month	Costs in Dollars Per Hour Worked (1)	Cumulative Change (Percent) (2)	Costs Per $100 of Payroll (3)	Cumulative Change (Percent) (4)
2000 March	0.33			
2001 March	0.34	3.0%		
2002 March	0.35	6.1%	1.85	
2003 March	0.39	18.2%	2.01	8.6%
2003 June	0.41	24.2%	2.10	13.5%

Source: Data in Columns (1) and (3): Williams, Reno, and Burton (2003), Tables 11 and 12.

13.5 percent from the 1993 peak. In Panel B, the data begin in the year that costs reached their low point (trough) of the late 1990s or 2000s. As shown in Panel B, workers' compensation costs for employers began to increase after 1998, and the $63.931 billion of costs in 2001 were up 21.5 percent from the trough year of 1998.

Table 1 also contains information on the employers' costs of workers' compensation as a percent of payroll. As shown in Panel A, this measure of costs peaked at 2.18 percent of payroll in 1990 and declined to 1.32 percent of payroll in 1999, which represented a cumulative decline of 39.4 percent over the nine years. Then, as shown in Panel B, employers' costs as a percent of payroll began to increase. By 2001, the employers' costs were 1.39 percent of payroll, up 5.3 percent from the low figure in the previous year.

Table 2 contains data from the Bureau of Labor Statistics (BLS) on the employers' costs of workers' compensation for all non-federal employees. The data, which were analyzed in the preceding article (Burton 2003) are available through June 2003, and thus are more current than the NASI data. Two measures of costs are shown: employer expenditures on workers' compensation per hour worked (column (1)) and the costs as a percent of payroll (column (3)). In Panel A, the data begin with the year in which costs peaked. In the case of costs per hour worked, the peak year in the 1990s was 1994, when the employers' costs on workers' compensation were $0.39 per hour worked. This measure of costs declined until 2000, when the costs of $0.33 per hour were down 15.4 percent from the 1994 peak. In Panel B, the data begin in the year that costs reached their low point (trough) of the late 1990s or 2000s. As shown in Panel B, workers' compensation costs per hour worked began to increase after March 2000, and the costs of $0.41 per hour in June 2003 were up 24.2 percent from the trough of March 2000.

Table 2 also contains information on the employers' costs of workers' compensation as a percent of payroll as measured using the BLS data. This measure of costs peaked at 2.67 percent of payroll in 1994, and as shown in Panel A, declined to 1.85 percent of payroll in 2002, which represented a cumulative decline of 30.7 percent over the eight years. Then, as shown in Panel B, employers' costs as a percent of payroll began to increase. By June 2003, the employers' costs were 2.10 percent of payroll, up 13.5 percent from the trough figure reached in March 2002.

The data in Tables 1 and 2 provide a different message about the extent of the recent increases in employers' cost of workers' compensation than the assertion in Treaster article in *The New York Times* that the cost was soaring across the country, and that employers' insurance costs had increased by 50 percent in the last three years. Again, to be clear, the figures in Tables 1 and 2 pertain to almost all employers, not just those that purchase insurance. However, the NASI and BLS data are the more comprehensive data, and thus ought to be preferred. I had conveyed the BLS data through March 2003 to Treaster before his article was published and also included those data in my unpublished letter to the *Times*. Since the data are now available through June 2003, restatement and elaboration of the recent increases in the employers' costs of workers' compensation costs are warranted.

The National Academy of Social Insurance data indicate that employers' costs in current dollars were up 21.5 percent in the three years between 1998 (the low point) and 2001 (the latest year with data). The NASI data also indicate that costs as a percent of payroll were up 5.3 percent between 2000 (the low point) and 2001. In my view, the most useful measure of workers' compensation costs is costs as a percent of payroll. Using that measure, it is worth noting that in 2001, workers' compensation costs as a percent of payroll were down 36 percent from the peak year of 1990.

The Bureau of Labor Statistics data indicate that employers' costs in dollars per hour worked were up 24.2 percent in the 39 months between March 2000 and June 2003. The BLS data also indicate that costs as a percent of payroll were up 13.5 percent between March 2002 (the low point) and June 2003. Using that measure, workers' compensation costs as a percent of payroll were down 21 percent from the peak year of 1994 to June 2003.

There is no doubt that workers' compensation costs have been increasing nationally in the past few years (and at a fast rate in some states, notably California). Given the lack of profitability in the workers' compensation insurance line (Yates and Burton, 2003), further increases seem likely as carriers increase their rates. Nonetheless, I fear that the article in *The New York Times* has exaggerated the extent of the increase in costs, which in turn has helped create an environment where workers' compensation reform will place undue emphasis on cost containment, rather than a more balanced approach that also recognizes the inadequacy of benefits and the inappropriate limitations on coverage in some jurisdictions.

REFERENCES

Burton, John F., Jr. 2003. "Workers' Compensation Costs for Employers Increase in 2003." *Workers' Compensation Policy Review* 3, no. 3 (May/June): 13-24.

Williams, Cecili Thompson, Virginia P. Reno, and John F. Burton, Jr. 2003. *Workers' Compensation: Benefits, Coverage, and Costs, 2001.* Washington, D.C.: National Academy of Social Insurance.

Yates, Elizabeth and John F. Burton, Jr. 2003. "Workers' Compensation Underwriting Results Improve in 2002." *Workers' Compensation Policy Review* 3, no.3 (May/June): 2-8.

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