Workers' Compensation: Can the State System Survive?

The Keynote Address for the

Centennial Celebration of the Pennsylvania Workers' Compensation Program

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John F. Burton Jr.

I. Introduction

Thank you for the honor of being invited to present the Keynote Address for this important event in the history of workers' compensation in Pennsylvania. I hope the invitation was not solely due to my seniority in having contacts with the Pennsylvania workers' compensation program. Professor James Morgan at the University of Michigan had co-authored in 1959 a study of lump sum settlements and rehabilitation in Michigan (Morgan, Snider, and Sobol 1959). He contemplated a national study of this topic and several graduate students were dispatched to other states to determine whether the workers' compensation files could be used to draw a sample of workers who had received settlements. I was one of the students who drew straws to see which states we would visit. I don't recall if I drew a short or a long straw, but my states were New Jersey and Pennsylvania. And so in 1960 or 1961, I visited Trenton and Harrisburg and examined the workers' compensation record-keeping and filing systems. Based on the results of the field trips, the project to conduct a national study of lump sum settlements was abandoned. Surely it must have been due to data deficiencies in other states than Pennsylvania.[1]

I have had a few subsequent exposures to the Pennsylvania workers' compensation program. My 1965 dissertation examined the costs of workers' compensation in 29 states, including Pennsylvania (Burton 1965). The 1987 book I co-authored with Monroe Berkowitz on permanent disability benefits examined ten states, including Pennsylvania (Berkowitz and Burton 1987). And I have been cramming the past week on Pennsylvania workers' compensation by reading the superb centennial history edited by Judge Torrey (2015a). But I am not here to serve as an expert on this state's program. Rather my role is to provide some suggestions about the relevance of both the origins of workers' compensation and recent national developments for the future of workers' compensation in both Pennsylvania and the nation.

II. Origins of Workers' Compensation in the U.S. and Pennsylvania

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

Prior to the enactment of workers' compensation statutes, a worker had to bring a negligence suit against the employer in order receive payment for a work-related injury. A

negligence suit is a form of tort or civil remedy, for which the legal doctrines developed over time in decisions made by judges under common law. Injured workers were often unsuccessful in tort suits, not only because the worker had to prove that the employer was negligent, but because the courts had established several legal defenses – known as the "unholy trinity" -- that a negligent employer could use to avoid liability. One such defense was the fellow servant rule, which preluded an injured worker from suing the employer when the worker was injured by the negligence of another worker. In contrast, an employer was liable for damage to a stranger (such as a customer) caused by the negligence of an employee.[2]

In many jurisdictions, the first effort to deal with the deficiencies of the common-law approach to workplace injuries was the enactment of statutes - known as employer liability acts – which removed or limited the employers' use of the defenses such as contributory negligence. An example of such an act is the Casey Act, enacted by the Pennsylvania legislature in 1907 (McIntyre 2015, 55). However, the employee's success in a suit still required the demonstration that the injury resulted from the employer's negligence, which often was impossible. Moreover, the Pennsylvania Supreme Court interpreted the Casey Act narrowly and essentially maintained the fellow servant rule in most cases (McIntyre 2015, 55-61). A study cited by Somers and Somers (1954, 24), indicated that in 32.5 percent of 604 cases the survivors or workers who died in workplace accidents before 1911 received no compensation under employers' liability laws in New York, Pennsylvania, and Minnesota. In another 47.8 percent of the cases, the award was $500 or less.

Despite this record of meagre recoveries under the common law or employer liability acts, a study by Posner (1972) found that between 1875 and 1905, there was a tremendous growth in litigation over workplace injuries and employees were increasingly recovering damages in negligence suits. A similar trend of injured workers receiving substantial verdicts in tort cases was noted in Pennsylvania (Torrey 2015b, 28). In essence, the negligence suit approach was like a lottery, where employees usually recovered small or no awards – which workers did not like – but where employers were increasing losing and paying large awards - which employers did not like.

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

Workers' compensation laws also prescribe cash benefits by formulas, including weekly benefits that are a specified percentage of pre-injury earnings and durations of benefits for permanent impairments that are specified in the statues. The statutory specificity of benefits was intended to reduce the litigation, delays, and uncertainty associated with tort suits. In addition, workers' compensation statutes in most states removed workplace injuries from the

general court system and established workers' compensation agencies and industrial commissions that were given the primary responsibility for resolving disputes between workers and employers. Reformers felt this delivery system would also reduce the delays, uncertainties, and inconsistencies of the court system (Berkowitz and Berkowitz 1985, 161-163).

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

The legal context of the early 20th century also affected the level of government where workers' compensation programs were enacted. At that time, the U.S. Supreme Court interpreted the commerce clause of the Constitution in a narrow fashion, which limited the ability of Congress to regulate activities not directly involved in interstate commerce. The federal government was able to enact a workers' compensation program for its own employees.[3] However, most workers in the private sector as well as state and local government employees could not be regulated by the federal government, and therefore, of necessity, most of the initial workers' compensation laws were enacted by the states.

New York was the first state to enact a comprehensive workers' compensation statute in 1910. However, the act was held invalid in March 2011 by the New York Court of Appeals in *Ives v. South Buffalo Ry. Co*., 201 N.Y. 271 (1911) because it conflicted with the due process provisions of the state constitution and of the Fourteenth Amendment. Subsequently, the New York state constitution was amended to allow a mandatory workers' compensation law and the state enacted a new workers' compensation law in 2013 that was found constitutional by the New York Court of Appeals and ultimately by the U.S. Supreme Court in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).

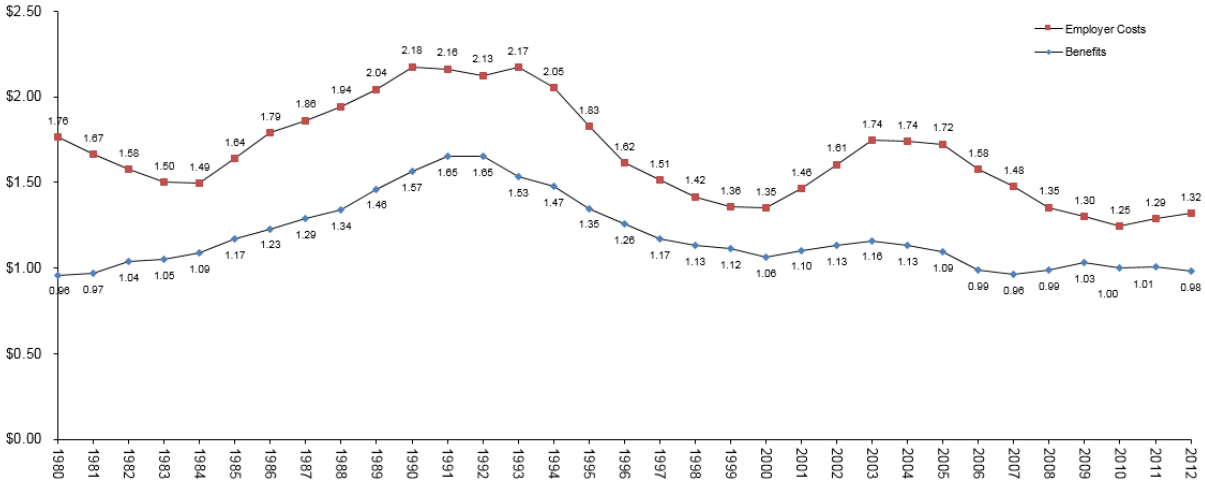
The first workers' compensation laws to withstand constitutional challenges were enacted in 1911, first by New Jersey and then Wisconsin.[4] By 1920, all but five states enacted workers' compensation statutes. Many of these early laws were made elective for employers in order to avoid constitutional challenges. Pennsylvania amended its constitution in 1915 to allow a compulsory law (Torrey 2015b, 21), which was enacted that year

III. Workers' Compensation National Developments in the last 50 Years

A. Fluctuations in Benefits and Costs

Workers' compensation programs have varied over time in the benefits paid to workers and the costs for employers. Figure 1 indicates that benefits per $100 of covered wages increased from 1980 (the earliest year with comparable data) to the early 1990s, declined rapidly during the 1990s, and then generally declined slowly from 2000 until 2013. Costs fluctuated very roughly in tandem with benefits: costs declined from 1980 to the mid-1980s, then increased until the early 1900s, followed by steep declines in the balances of the 1990s, followed by increases for several years in the early 2000s, and then generally declining until 2012. In recent years, both benefits and costs as a percent of payroll have been near their low points for the period since 1980.

Figure 1
Workers' Compensation Benefits and Costs per $100 of Covered Wages, 1980–2012



Source: Sengupta, Baldwin, and Reno 2014, Figure 1

B. Causes of the Changes in Benefits and Costs

The changes in benefits and costs per $100 of covered wages since 1980 are explained in part by the changes in state workers' compensation statutes. The National Council on Compensation Insurance (NCCI) provides advisory ratemaking and statistical services for the workers' compensation programs in 35 states (including the District of Columbia) (NCCI 2014, 7). The NCCI publishes an *Annual Statistical Bulletin* (ASB), which includes data on these 35 states plus data from all other states except those with exclusive state funds. The NCCI publishes state and countrywide data on adjustments in premium level due to several factors, including benefit change, which "refers to adjustments in premium level to account for benefit changes adopted by the various state legislatures, as well as medical fee and hospital rate changes (NCCI 2014, Exhibit 1)." Figure 2 shows the changes in statutory benefits for the five year intervals from 1959 (when the NCCI data series began) to 2013.

• **The 1960s.** Statutory benefits increase by more than 28 percent.

• **The 1970s.** Statutory benefits increased by more than 50 percent.

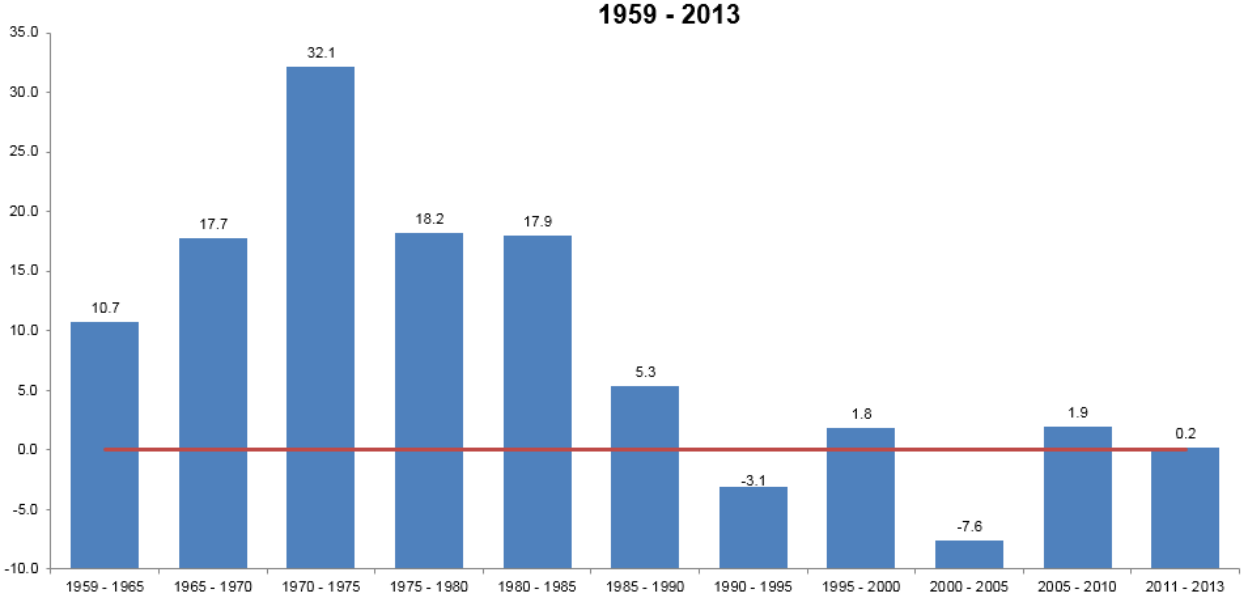
• **The 1980s**. Statutory benefits increased varied over the decade: up 18 percent in the first five years but only 5 percent in the last five years. 1985.

•**The 1990s.** For the first time since at least the 1950s, statutory benefits declined during the decade, although the decline was only one percent.

• **The 2000s.** Statutory benefits declined over five percent during the decade.

● **The 2010s.** Statutory benefits have been essentially been flat.[5]

Figure 2
Workers Compensation Statutory Benefits Changes
Percentage Changes in Subperiods
1959 - 2013



Source: Calulations by John Burton based on NCCI (2014 and earlier editions)

The declines since 1990 have been due to several factors. In some jurisdictions the weekly benefit amounts or the durations of some types of benefits have been reduced. While the reductions in the statutory amounts and duration of benefits explain some of the decline in benefits shown in Figures 1 and 2, a less obvious set of changes that limit access for disabled workers to the workers' compensation programs may be more important (Guo and Burton 2010; Spieler and Burton 2012). These changes include limiting the compensability of claims involving particular medical diagnoses, such as stress claims; limits on coverage when the injury aggravates a pre-existing condition; and procedural and evidentiary changes, such as requiring "objective" medical evidence and imposing a stricter burden of proof on workers.

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

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

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

In addition to reductions in the duration or weekly amounts of cash benefits and the constriction of compensability rules, there is a nascent movement to reduce the coverage of workers. The most significant recent development concerning legally required coverage was Oklahoma's adoption of an opt-out provision in 2013 which applies to injuries sustained after January 1, 2014. Robinson (2013, 154-55) distinguishes the Oklahoma approach from the long-standing provision in Texas that allows employers to be "non-subscribers" to the workers' compensation statute and thus subject themselves to tort suits (although many Texas employers have voluntarily established disability plans that provide some protection to injured workers). The Oklahoma law allows employers the choice of (1) remaining with the "traditional" workers' compensation act or (2) establishing a written benefit plan that provides "for payment of the same form of benefits" that are at least equal to or greater than the state's workers' compensation act. The advantage to an employer is that the benefit plan adopted by the employer may qualify as an ERISA plan, which could mean that a dispute involving any provision of the benefit plan could only be resolved in Federal courts and could not be resolved by the Oklahoma Workers' Compensation Commission or Oklahoma state courts. It is too soon to assess the extent to which the 2013 Oklahoma law will result in significantly reduced workers' compensation coverage for the state's workers, but several commentators, including Judge Torrey (2015, 10-11), have expressed concern about the opt-out provision.

C. Consequences of Changes

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

Another consequence of the reduction in permanent disability benefits and the tightening of eligibility standards in workers' 'compensation is that some disabled workers are turning to the Social Security Disability Insurance (SSDI) program for financial support. Guo and Burton (2012) examined the increase in SSDI applications between the 1980s and 1990s and found that most of the increase is applications was due to aging of the population and women's increasing workforce participation, but that changes in state workers' compensation programs during the 1990s resulted in a modest but statistically significant increase in SSDI applications during that period.

IV. The Fundamental Cause of Inadequate Workers' Compensation Benefits

Although WC statutory benefits were increasing in the 1960s (Figure 2), benefits and coverage were criticized in the period. One result is that when the Occupational Safety and Health Act (OSHAct) of 1970 was enacted, the National Commission on State Workmen's Compensation Laws (National Commission) was created and directed to determine if state workers' compensation laws "provide an adequate, prompt, and equitable system of compensation for injury of death arising out of in the course of employment."

The National Commission, whose 18 members included three representing Cabinet members and 15 appointed by the Nixon White House, issued a unanimous report in 1972. The *Report* of the National Commission documented serious deficiencies with state workers'

compensation statues: for example, “the *maximum* weekly benefit for temporary total benefits in more than half of the states” did not reach the 1971 national poverty level for a non-farm family of four ($79.56 a week) (National Commission 1972, 61). The report also reported that in most states the maximum weekly benefits for temporary total disability benefits relative to the state’s average weekly wage were lower in 1972 than they had been in 1940 (National Commission 1972, Table 3.6).

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

> **Competition among States.** The economic system of the United States encourages the forces of efficiency and mobility. These forces tend to drive employers to locate where the environment offers the best prospects for profit. At the same time, many of the programs which governments use to regulate industrialization are designed and applied by States rather the Federal government. Any State which seeks to regulate the by-products of industrialization, such as work accidents, invariably must tax or charge employers to cover the expenses of such regulations. This combination of mobility and regulation poses a dilemma for policymakers in State governments. Each State is forced to consider carefully how it regulate its domestic enterprises because relative restrictive or costly regulation may precipitate the departure of the employers to be regulated or deter the entry of new enterprises.
>
> Can a State have a modern workers’ compensation program without driving employers away? Our analysis of the cost of workmen’s compensation has convinced us that no State should hesitate to adopt a modern workmen’s compensation program. . . .
>
> While the facts dictate that no State should hesitate to improve its workmen’s compensation program for fear of losing employers, unfortunately this appears to be an area where emotions too often triumphs over facts. . . . whenever a State legislature contemplates an improvement in workers’ compensation which will increase insurance costs, the legislators likely will hear claims from some employers that the increase in costs will force a business exodus. It will be virtually impossible for the legislators to know how genuine are these claims. To add to the confusion, certain States have abetted the illusion of the runaway employer by advertising the low costs of workmen’s compensation in their jurisdictions.
>
> When the sum of these inhibiting factors is considered, it seems likely that many States have been dissuaded from reform of their workmen’s compensation programs because of the specter of the vanishing employer, even if that apparition is a product of fancy not fact. A few states have achieved genuine reform, but most suffer with inadequate laws because of the drag of laws of competing States.

V. The Current Challenge for Workers' Compensation: A Race to the Bottom

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

VI. The Solutions to the Current Challenges to Workers' Compensation

A. Federal Standards

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

Federal standards for workers' compensation have not been enacted. The threat of federal intervention probably explains the surge in improvements in workers' compensation statutes in the 1970s shown in Figure 2. With the change in the national political environment since 1980, the threat of federal standards diminished as a threat in the 1980s and disappeared in subsequent decades.

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

B. A federal workers' compensation statute?

A federal workers' compensation program to replace state programs (i.e. federalization of the workers' compensation program) is even more unlikely to be enacted than federal standards. To use the analytical term of the Garden State: forgetaboutit.

C. Absorption of Workers' Compensation into Existing Federal Programs

Workers' Compensation Cash Benefits Absorbed by Social Security Disability Insurance

Another possible outcome for workers' compensation is that the responsibility for providing cash benefits to workers disabled by work-related injuries and diseases could be taken over by the SSDI programs, which already provides cash benefits to workers disabled from any cause. The SSDI program pays more than four times as much to disabled workers and their dependents as does the workers' compensation program and so the whale could probably swallow the walrus.[6] One advantage of such a merger is the resources currently devoted by the workers' compensation program to deciding whether injuries or diseases are work-related could be reduced or perhaps even eliminated However, the SSDI program currently only provides benefits for permanent and total disability, while 62.6 percent of all workers' compensation claims involve temporary disability and 61.8 percent of workers'

compensation benefits are paid for permanent partial disability. Of particular concern are PPD benefits, which are even more complex and litigious than current DI benefits, and so an SSDI program that absorbed the workers' compensation program would have to develop a much more elaborate delivery system to provide both temporary and permanent as well as with total and partial disability benefits.

Another potential drawback of an SSDI program that absorbed workers' compensation concerns the manner of financing the new program. The SSDI program is financed by a portion of the FICA tax that is paid by both workers and employers and that does not vary among these contributors, while the workers' compensation premium is paid solely by employers and is experienced rated so that employers pay more or less depending on their industry and their own prior history of benefit payments. The historical rationale for experience rating is that the procedure promotes workplace safety and, although there is disagreement among scholars about whether experience rating actually improves workplace safety (Burton 2015c), nonetheless the absence of experience rating in the SSDI program will be of concern to some supporters of workers' compensation if the SSDI and workers' compensation programs are combined. Of course, the "obvious" solution is to experience rate the SSDI program, which has long been advocated by some (Burton and Berkowitz 1971, 351) and which has recently been proposed as a partial solution to the current SSDI financial problems (Burkhauser and Daly 2011, 110-13).

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

Workers' Compensation Medical Benefits Absorbed by the ACA

The relationship between the workers' compensation health care system and the Affordable Care Act[7] (ACA) health care system for non-work-related injuries and diseases is murky at best. Gruber (2014) suggested that because more workers will have health insurance there will less need for them to rely on workers' compensation if they are injured, which should lower the costs of workers' compensation. On the other hand, he recognized that effect could be offset by changes in the health care plans offered by employers for non-work-related medical conditions, such as high-deductible plans, provider networks with limited choices of providers, and caps on reimbursements for medical care providers. These changes could encourage workers and providers to shift marginal cases into the workers' compensation health care system unless workers' compensation quickly adjusts its own health care system. If these adjustment do not occur, then health care costs in workers' compensation could increase, which is reminiscent of what happened to workers' compensation health care costs in the 1980s when managed care in other parts of the health care system preceded changes in the workers' compensation program.

This raises the question of whether there should be separate health care systems for employees if their injuries or diseases are work-related or if their injuries or diseases are caused by other conditions. Is such a dual system of health care beneficial for workers, carriers, and employers? Carriers and employers expressed concerns about the unitary health care system included in the Clinton health care proposal because they feared that loss of control over health care would jeopardize their chances to quickly heal workers and return them to work, and the

resulting lags would lead to higher payments of cash benefits. However, as discussed by Mustard and Sinclair (2005), Ontario has a health care system that essentially uses the same health care delivery system to treat all sources of disability for workers and the costs of both the medical care and the overall costs of the workers' compensation program in Ontario appeared to be lower than in most U.S. jurisdictions.

D. Tort Remedies

Tort Suits in State Courts

I argued in a statement presented to the Illinois House of Representatives (Burton 2015b) that the Governor's history of the major contributing cause (MCC) standard is truncated in his document supporting the adoption of this causation standard (Rauner 2015). The MCC requirement was introduced into the Oregon workers' compensation statute in 1993. Thomason and Burton (2001) estimates that a series of legislative provisions (including the MCC provision) resulted in Oregon benefits (and costs) being about 25 percent below the amounts they would have been in the absence of the more restrictive eligibility standard. The purpose of Governor Rauner's proposal is to improve the competitive environment in Illinois by reducing workers' compensation costs, but this can only accomplished by reducing benefits paid to injured workers. There is another aspect of the MCC proposal that is also not mentioned in the Governor's document, namely the possibility that the MCC provision may jeopardize the exclusive remedy provision in workers' compensation. A brief review of the history of workers' compensation provided earlier in this presentation may be helpful.

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

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

The Oregon legislature passed legislation in 1993 denying workers' compensation benefits unless the worker could prove that work exposure was the major contributing cause (MCC) of an occupational disease. A worker who experienced a work-related disease that did not meet the MCC requirement was denied workers' compensation benefits. The Oregon Supreme Court, in *Errand v. Cascade Steel Rolling Mills, Inc*., 888 P.2d 544 (Or.1955), relying on a statutory interpretation of the Oregon workers' compensation law, held that exclusive remedy provision did not preclude the worker from bringing a tort suit against the employer. In

response to *Errand*, the Oregon legislature amended the workers' compensation statute in 1995 to provide that workers' compensation was the exclusive remedy for work-related injuries and diseases, even if the condition was not compensable under workers' compensation because the work exposure was not the major contributing cause. In essence, the Oregon legislature said: when we say dual denial for diseases for which the workplace is not the MCC, we mean it. In *Smothers* v. *Gresham Transfer, Inc*., 23 P.3d 333 (2001), the Oregon Supreme Court responded by holding that the Oregon constitution did not allow the legislature to eliminate both the workers' compensation remedy and a tort remedy when the employment is not the major contributing cause of the condition.

While this case established a clear limitation on the exclusive remedy provision in Oregon, similar constitutional challenges in other states have not all been successful[8]. Nonetheless, adoption of the MCC provision in Illinois (or in other states) may lead to a challenge that this provision violates the state's constitution and arguably also the U.S. Constitution.[9]

The challenge to the dual denial of both workers' compensation and tort remedies does not depend on a constitutional issue. A recent Pennsylvania Supreme Court decision, *Tooey v. AK Steel Corp*., 81 A.3d 851 (Pa. 2013), considered the statute of repose, which requires a disease to manifest within 300 weeks of the last exposure to the source of the disease.[10] Two workers, Tooey and Landis, were exposed to asbestos and developed mesothelioma, but their last exposures were 1,300 and 780 weeks before the manifestation of their diseases. Because the claims did not meet the 300 week manifestation rule, they did not qualify for workers' compensation benefits. As a result, the workers' brought tort actions against their employers, who invoked the exclusivity provision of the Pennsylvania workers' compensation act. The lower courts dismissed the cases, but the Supreme Court reversed the decision based on statutory construction:

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

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

The essence of this brief excursion into challenges to the dual denial doctrine is that there is in my opinion a significant risk that the adoption of this approach in Illinois will result in challenges to the exclusive remedy provision that will make Illinois employers susceptible to tort suits for work injuries that are no longer eligible for workers' compensation benefits. This surely qualifies as an unintended consequence of the effort to make Illinois "more competitive in order to increase jobs and grow the economy."

Tort Suits in Federal Courts

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

Fortunately, the recent *Report of the National Commission on a Modern Employers' Liability Act* provides at least a partial antidote to the Dual Denial Doctrine. Here are the MELA Commission's key recommendations for the Modern Employers' Liability Act.

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

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

Prosser (1955, §44) describes another rule, commonly referred to as the "but for" rule," which is "The defendant's conduct is not a cause of the event, if the conduct would have occurred without it." However, Prosser states that the "substantial factor" test is "clearly an improvement over the "but for" test," although "in the great majority of cases, it amounts to the same thing."[11]

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

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

(4) The injured worker has the burden of proof and must establish that it is more likely than not that the conduct of the employer was a substantial factor in causing the result of the injury.[12]

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

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

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

> Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability to cases of negligence.
>
> This, of course is not to say that any scale of compensation, however, insignificant on the one hand or onerous on the other, would be supportable.

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

There is an interesting case currently being litigated that examines the questions: What if a worker still qualifies for some benefits under a new state law but those benefits are substantially less than the worker was entitled to under the state's previous workers' compensation law or that the worker would be entitled to under a workers' compensation statute with adequate benefits? Can the state still deny the worker the right to bring a tort suit against the employer? Florida Judge Jorge Cueto said no in *Florida Workers' Advocates v. State of Florida* (generally referred to as the *Padgett* case) (Fla. 11th Cir. Ct., 2014). The case was reheard by the 11th circuit en banc on March 30, 2015 and a decision is pending.

(7) The MELA Commission debated whether there was a need for a federal tort remedy instead of relying on remedies in state courts. The Oregon Supreme Court did an admirable job of striking down the dual denial doctrine as unconstitutional, the Pennsylvania Supreme Court implicitly repudiated the dual denial doctrine as inconsistent with the workers' compensation statute, and the Florida decision in the *Padgett* case all suggest that states can solve the problem without federal intervention. However, the MELA Commission decided to endorse a federal solution for two reasons. First, some states have upheld the dual denial doctrine in response to constitutional challenges and the favorable results in Florida are still subject to reversal. Second, even if a state holds the dual denial doctrine unconstitutional, the state may not allow tort suits that meet the recommendations of the MELA Commission. Pennsylvania was identified as an example of a jurisdiction where the tort remedy may be deficient. The Casey Act, Pennsylvania's variant of an employers' liability act, was interpreted narrowly to allow the fellow servant rule to be used as a defense by a negligent employer (McIntyre 2015, 55-61). Moreover, the Casey Act was repealed in 1983 (McIntyre 2015, 59), which presumably means that the full set of employer defenses used by negligent employers to avoid liability in tort suits, including contributory negligence, are available in Pennsylvania.

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

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

VII. The Future of Workers' Compensation

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

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

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

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

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

And so let us not be too pessimistic about the future of workers' compensation. Indeed, as evidence of my optimism about the program, I today accept your invitation to be the keynote speaker at the 150th Anniversary Celebration of the Pennsylvania Workers' Compensation Act.

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Endnotes

[1] Today the leading legal scholar on lump sum settlements is Judge David Torrey. (See Torrey 2007).

[2] The other common law doctrines, which were part of the "unholy trinity" that severely limited the ability of workers to recover from their employers for workplace injuries in tort suits, were the contributory negligent doctrine and the assumption of risk doctrine (Willborn et al. 2012: 859-63). The contributory negligence doctrine precluded the employee from any recovery if he or she were negligent, even if the employer was the primary negligent party The assumption of risk doctrine barred recovery for the worker who was injured by the ordinary risks of employment as well as the extraordinary risks of employment if the worker knew of them or might reasonably have been expected to know of them. The application of the Fellow Servant Rule in Pennsylvania, including the Vice-Principal Exception, under common law is discussed in McIntyre (2015 50-53).

[3] The federal government was also able to enact an employers' liability act for railroad workers, since railroads were directly engaged in interstate commerce.

[4] As noted by Sengupta, Baldwin, and Reno (2014, note 21): "The New Jersey law was enacted on April 3, 1911, signed by Governor Woodrow Wilson on April 4, and took effect on July 4, 1911 (Calderone 2011, 169). The Wisconsin law was enacted and took effect on May 3, 1911 (Krohm 2011, 187).

[5] A national decline in statutory benefits in 2014 is possible since preliminary data indicate a 24.1% decline in cash benefits in Oklahoma and a 16.6% decline in cash benefits in Tennessee (NCCI 2014a, Exhibit 3).]

[6] The figures included in this paragraph are from Sengupta, Baldwin, and Reno (2014).

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

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

[9] The basis for a challenge to the dual denial doctrine under the U.S. Constitution is provided in Willborn et al. (2012, 901-902).

[10] This discussion of *Tooey* is largely based on Torrey (2014).

[11] Prosser (1955, § 44) also states that "If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from responsibility merely because other causes have contributed to the result."

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

[PA Centennial Address V01.word]