

# WORKERS' COMPENSATION NOTES

**AFL-CIO DEPARTMENT OF  
OCCUPATIONAL  
SAFETY AND HEALTH**

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## **Schwarzenegger Wins Comp Reforms Insurance Companies Escape Again**

Governor Arnold Schwarzenegger (R-CA) celebrated his first 100 days in office with a major victory March 2, when California voters approved his plan to borrow \$15 billion to pay down the state deficit. Just five weeks later, his threatened workers' compensation ballot initiative—a 50% cut in the state's \$18.9 billion system—forced legislators to enact reforms supported by business and insurance companies. On the final vote, Labor was officially “neutral.”

Applicants' attorneys and some of their clients opposed the bill. They attacked Labor's efforts to shape the Schwarzenegger reforms and refused to offer any alternatives to the most litigious and expensive system in the country.

California Labor Federation President, Tom Rankin, said the bill “maintained a worker's right to choose his or her own doctor. Union members will be able to name their current doctor as their treating doctor should they suffer an injury on the job. Our members must pre-designate their doctors immediately by completing a form and returning it to their employers.”

Rankin reminded legislators that insurance companies were “the big winners in this deal. Not only did companies and their brokers escape any form of regulation, but they also exacted specific [cuts in] benefits in this legislation.”

“Last year,” said Rankin, “Labor worked to contain medical costs. Those reforms produced great savings to the system. But insurance companies did not pass on the savings to the employers. The legislature and the Governor should have learned their lesson. Without insurance re-regulation, savings to employers from this year's bill are just as unlikely to materialize as last year. We must sustain our efforts to re-regulate workers' compensation insurance companies or this crisis will never be solved.”

Insurance Commissioner John Garamendi called upon insurance companies to cut premiums by 20.9% for policies renewing July 1. “Our work is not finished. We must now do everything in our power to ensure that all of the savings go to premium relief for employers and not to insurers' bottom lines.”

Neither Governor Schwarzenegger nor the insurance companies supported Garamendi's call, however. The American Insurance Association's Nicole Mahrt said, “The bottom line is there will be savings, but how much is a little uncertain.” Zenith National Insurance Company, a major California-based insurer, cut its premiums by only 10%. According to the California Chamber of Commerce, premiums have risen an average of 153% since 2003.

The California reforms are already circulating in legislatures around the country. The Texas legislature began hearings April 29, citing California as a possible model for medical care reform. The Wisconsin Manufacturers and Commerce and the Washington State Business and Industry Council also cited the California legislation as they called for reforms efforts in their states. Breaking off reform talks that were sponsored by Governor Gary Locke ((D-WA) the Business and Industry Council threatened to put a referendum on the November ballot to slash benefits to injured workers.

Following is the California Labor Federation's summary of the 2004 reforms:

### **TEN THINGS UNION MEMBERS NEED TO KNOW ABOUT CHANGES IN WORKERS' COMPENSATION**

**1. Pre-designate your doctor before you are injured.** If you have group health insurance, like Kaiser or Blue Cross, you can choose your doctor to treat your injury. You must complete and submit a personal physician form to you employer. Even if you have previously completed such a form, do it again

because the laws have changed. Your doctor must agree to be pre-designated.

**2.** Injured workers will receive immediate medical treatment, up to a \$10,000 cap, until their workers' compensation claim is accepted or denied.

Previously, injured workers had to wait - sometimes up to 90 days - for their claim to be accepted prior to getting medical care.

**3.** The most severely disabled workers will receive seven additional weeks of benefits for each percentage of disability rating over 70%. The least severely disabled workers will receive one week less of benefits for each percentage of disability rating below 15%.

**4.** Injured workers who cannot return to work will get a 15% increase in their permanent disability award. Injured workers who return to work will get 15% less in permanent disability benefits, provided that they keep their jobs for at least a year. Once back at work, if you lose your job through no fault of your own, you will once again get your full permanent disability award.

**5.** Temporary disability benefits will be limited to two years. Although the vast majority of claims receive less than 2 years of TD benefits, injured workers could previously receive up to 5 years of TD benefits. Injured workers with specified injuries, like amputations, chronic hepatitis or severe burns, will remain subject to the 5-year cap.

**6.** Unions and their employers can pursue alternative dispute resolution programs (carve-outs) to create an integrated system of medical treatment, also known as 24-hour care. Group health coverage and medical treatment for injured workers would be seamless. They can also negotiate to integrate temporary disability payments and non-industrial disability payments to create a seamless system of temporary wage replacement benefits without regard to how or where the injury occurred.

**7.** Employers will be eligible for financial incentives to take injured workers back to work. Worksites with bad accident records will be inspected by insurance companies as an additional check for safer workplaces.

**8.** Permanent disability benefits will be apportioned between work and non-work related causes. Injured workers will not get more than 100% disability rating

for repeated injuries to the same body part.

Temporary disability benefits and medical treatment will not be affected by the new apportionment rules. A worker whose cumulative injury is 30% caused by non-work related factors will receive only 70% of his/her permanent disability award.

**9.** A draconian anti-worker initiative, championed by Governor Schwarzenegger and the Chamber of Commerce, will not be on the November, 2004 ballot. This legislative compromise takes away the risk of losing the heart of our workers' comp system.

**10.** The big winners of this compromise are profiteering insurance companies. Not only did they and their brokers escape any form of regulation, but they also exacted specific benefits in this legislation. We must sustain our efforts to re-regulate workers' compensation insurance companies or this crisis will never be solved.

For more details on the California legislation, go to the California Commission on Health Safety and Workers' Compensation: <http://www.dir.ca.gov/CHSWC/chswc.html>

### **Maryland Holds the Line**

Maryland's 2004 session of the General Assembly was one of the brighter spots for Labor's effort to protect injured workers. Not one of the nearly two dozen bills proposed by insurance companies and businesses to eliminate workers' rights to choose their doctors, restrict preferences for injured police and firefighters and overturn the state's high court decision favoring injured workers made it past committee votes.

Like Wisconsin and Texas, medical care costs will be on the agenda in Annapolis when the legislature reconvenes next January. The Maryland Chamber of Commerce is already laying the groundwork, using a questionable study by the Workers' Compensation Research Institute that shows injured workers are "more satisfied" with their care in states that require workers to go to doctors selected by insurance companies.

Like many states, Maryland has a state-run, Injured Workers' Insurance Fund (IWIF), which serves as the insurer of last resort for businesses and the source of all insurance for state and local

governments. IWIF has a market share of nearly 25%. Unlike commercial insurance companies that are at least required to file their rates and finances with the state insurance department, IWIF sets its own rates and the state insurance commissioner only occasionally reviews its finances. Citing its own losses in the capital markets along with rising medical are costs, IWIF launched a major drive to cut benefits and impose managed care during the 2004 session of the Maryland General Assembly.

Labor challenged the insurance companies and their WCRI studies, pointing out the conflicts of interest and blatant errors in their arguments for benefit cuts. Legislators listened and, when insurers could not answer basic questions about their finances and the ramifications of their proposals to cut benefits, refused to approve the proposed cuts.

### **Insurance Reform**

Labor also demanded insurance reform and public accountability, citing the Virginia system as a possible model for reform. Virginia's rate review process has kept workers' compensation insurance premiums among the lowest in the Nation.<sup>1</sup> Each year the National Council on Compensation Insurance files its rates with Virginia's State Corporation Commission (VSCC), which conducts public hearings. The Insurance Commissioner and the Attorney General each participate in the hearings and, with funds provided by the filing fees required of NCCI, present their own independent actuarial review of NCCI's rates before the VSCC. NCCI's actuaries are also witnesses who are subjected to cross-examination at the VSCC hearing.

According to lawyers for the Virginia Insurance Department, the Virginia State Corporation Commission hearings regularly uncover NCCI errors that result in reduced rates for workers' compensation insurance policies throughout the state. In 2003, for example, the Virginia Insurance Department's actuary reported that NCCI had based its request for a 56% rate increase for coal mine operators upon an erroneous life table showing miners with Black Lung live 27 years longer than non-smokers. The VSCC reduced NCCI's rate request accordingly.

Virginia's rate review saves businesses millions of dollars each year. It is based on a system

that has worked well for insurers, businesses, labor and the public. Indeed, interested parties may intervene in the VSCC public hearings and cross-examine witnesses before the Commission, providing an additional safeguard against over-charging by insurance companies.

The Virginia Corporation Commission's statutory authority for rate review is contained in Chapters 19 and 20 of the Title 38.2 of the Virginia Code. The Virginia State Corporation Commission's rules for hearings are posted on its website: <http://www.state.va.us/scc/commission/rules.htm>. For more information contact Peter B. Smith, Senior Counsel, Virginia State Corporation Commission.

Maryland, like most states during the 2004 legislative session, also faced an insurance company-financed campaign for medical malpractice reform. Property/casualty companies, which also sell workers' compensation insurance, convinced physicians that skyrocketing premiums could only come down if the legislature enacted caps on non-economic damages for pain and suffering. Just as the insurance solution for workers' compensation is to cut benefits for injured workers, their solution for medical malpractice is to cap the amount injured patients can recover at trial.

The Maryland General Assembly rejected malpractice caps. At a hearing on Senate President Mike Miller's proposal to create a People's Counsel to intervene in rate proceedings, insurance companies lined up in opposition, claiming public scrutiny would only interfere with the "market" and that a People's Counsel would only drive up the price of insurance. The bill failed to pass, although both medical malpractice and workers' compensation reform are certain to return in the 2005 session, just as they will in state legislatures throughout the country.

### **Labor Department Workers' Compensation Survey Delayed**

Glenn Whittington, Chief of the US Department of Labor's Workers' Compensation Survey Research Branch, reports that the annual state survey has once again been delayed by slow responses from state survey recipients. He expects data to be available later this summer. It will posted

on the DOL website:

<http://www.dol.gov/esa/regs/statutes/owcp/stwclaw/stwclaw.htm>

The AFL-CIO will publish its state comparison chart shortly as soon as the DOL data becomes available.

## Workers' Comp—Poverty Awaits

Mississippi's payments to injured workers are the lowest in the nation. Temporary Total Disability payments average \$193.15 a week. That works out to \$10,044 a year--- less than 70% of the government's official poverty level of \$14,348 for a family of three. Most Americans could not survive poverty at the government's official rate, let alone recover from an injury with even less money. But injured workers in 16 states get workers' compensation benefits that, by law, force them to live below poverty, according to a new study by Dr. Alan Hunt for the National Academy of Social Insurance.<sup>2</sup>

Hunt and his colleagues found that workers compensation laws in 16 states (Alabama, Iowa, Kentucky, South Carolina, Nebraska, Oklahoma, Maine, North Dakota, Idaho, New Mexico, Georgia, Louisiana, Kansas, South Dakota, and Montana) pay injured workers less than it takes to stay out of poverty. (Table1)

The highest workers' compensation payments ---in Washington, DC--- were only 170% of the poverty level, with most states paying little more than 120% of poverty, or \$12, 060 per year.

But workers' compensation is not a poverty program. It is not welfare. It is a mandatory insurance program for almost all businesses in every state but Texas. (In Texas businesses can opt out of the system and face lawsuits by injured workers.) Workers compensation requires payment for all medical treatment (without co-insurance or deductibles) as well as payment of a portion of lost wages (usually 2/3 of the state's average weekly wage) for workers injured on the job.

Workers' compensation is the first and oldest social insurance program in America. It's America's first tort reform system, protecting businesses from lawsuits that would otherwise be filed against employers by injured workers. Samuel Prescott

Bush, the great-grandfather of President George W. Bush negotiated the terms of one of the first state workers compensation laws in Ohio with William Green, President of the American Federation of Labor in 1912.

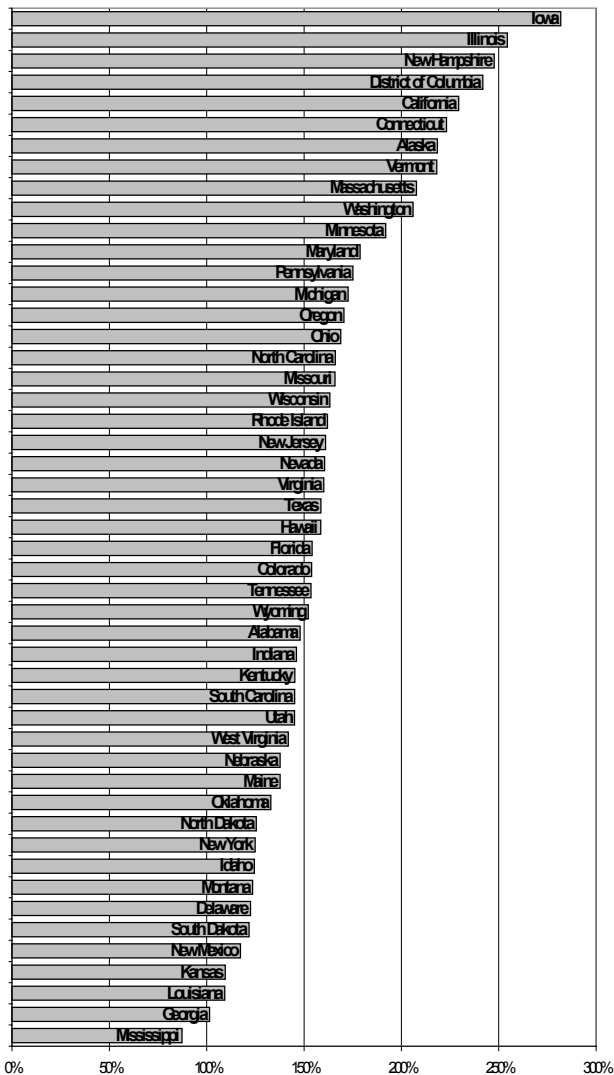
Before New York enacted the first comprehensive state workers' compensation law in 1910, a worker who was hurt on the job had to rely on his family or his employer for the necessary medical care and lost wages to survive until he could return to work. If his employer refused to pay, the only alternative was a lawsuit. Workers' compensation laws changed all of that, protecting workers with medical care and lost wages if they were hurt or became sick from a job-based occupational disease, and protecting employers against potentially ruinous lawsuits.

There is no federal oversight or regulation of workers' compensation insurance, thanks to the McCarran-Ferguson Act. This means that the cost of insurance---the only concern for businesses ---is determined by the rise and fall of the stock and bond markets. Insurance companies invest the premiums they charge businesses. When the markets are doing well, the return on insurers' investments allows them to keep premium prices low. When the markets decline, insurers have to raise prices to cover their losses and pay claims. If they have not set the price for their premiums with stock market cycles in mind, they can go bankrupt, as 26 companies did in California.

Insurance companies rarely discuss this aspect of their business, however. Instead, they regularly time reports for release, claiming that premium increases are due to rising medical care costs, attorneys who litigate claims (insurers hire legions of lawyers to fight claims, of course) and overly generous benefits paid to injured workers.

Insurance companies and their research organizations regularly call for state workers' compensation reform legislation whenever they have financial difficulties. Rutgers Professor John Burton and Northeastern University Law School Dean Emily Spieler documented the success of insurance companies and their business allies from 1990-1995, during the last recession.<sup>3</sup>

Figure 52 TTD Maximum Relative to the Poverty Threshold, 1998



Across the street from the Speaker Busch’s office, harried staffers of the Maryland Department of Legislative Services raced to complete their analyses and cost impact statements on each of the bills in time for hearings. Each bill required a separate analysis and staffers dutifully cited the reports of the National Council on Compensation Insurance (NCCI), a private, insurance industry-funded company that prepared the analyses. Legislators were not told, however, that NCCI is wholly dependent upon the income it receives from property/casualty insurance companies, not that NCCI files premium rates on behalf of these same companies in 37 states.

NCCI reports were not the only insurance company reports making their way to legislators. The Workers’ Compensation Research Institute (WCRI), another industry-funded and controlled think-tank, headquartered in Cambridge, Massachusetts also got its work to Maryland legislators. Both the National Council on Compensation Insurance, based in Boca Raton, Florida, and the Maryland Injured Workers Insurance Fund (IWIF) regularly cited WCRI research as they tried to persuade legislators to support the insurance industry’s position on workers’ compensation benefit cuts. IWIF also hired Milliman, one of the country’s top actuarial and consulting firms, to bolster its case for mandatory managed care. Milliman’s report cited identical WCRI research as evidence that Maryland’s medical care costs were becoming a serious threat to the price stability of the Maryland system.

Both NCCI and WCRI have become leading sources of information on workers’ compensation. Both are controlled by the property/casualty insurance industry, which sells the workers’ compensation insurance businesses must by law, either purchase or self-insure for, in order to do business in each state. Indeed, NCCI, as the data collection agency for workers’ compensation in 37 states, is the sole source of the claims information necessary to determine insurance rates. It then files the workers’ compensation “pure premium” or lost cost, base rates on behalf of its member insurance companies that sell workers’ compensation insurance. Companies are free to set premiums higher or lower than the NCCI rates, and a few states actually conduct and independent review of NCCI’s rate filings.

**WCRI and NCCI Research: Fueling the Insurance/ Business Drive for Benefit Cuts:**

As the Maryland General Assembly considered the American Insurance Association’s (AIA) proposal to eliminate the rights of injured workers to choose their own doctors, the National Council on Compensation Insurance (NCCI) fed a steady stream of papers analyzing pending workers’ compensation bills into the office of House Speaker Michael Busch.

Each year the National Council on Compensation Insurance files its rates with Virginia's State Corporation Commission (VSCC), which conducts public hearings. The Insurance Commissioner and the Attorney General each participate in the hearings and, with funds provided by the filing fees required of NCCI, present their own independent actuarial review of NCCI's rates before the VSCC. NCCI's actuaries are also witnesses who are subjected to cross-examination at the VSCC hearing.

According to lawyers for the Insurance Department, the Virginia State Corporation Commission hearings regularly uncover NCCI errors that result in reduced rates for workers' compensation insurance policies throughout the state. In 2003, for example, the Virginia Insurance Department's actuary reported that NCCI had based its request for a 56% rate increase for coal mine operators upon an erroneous life table showing miners with Black Lung live 27 years longer than non-smokers. The VSCC reduced NCCI's rate request accordingly.

At the same time NCCI actuaries are preparing rate filings on behalf of property/casualty insurers, they are also preparing analyses of state legislation that is almost always the only source of information available to legislators voting on bills to amend state workers' compensation laws. Indeed the same NCCI actuary, who attempted to defend the use of the erroneous life table for Clack Lung victims in Virginia, was an expert witness in support of cutting permanent disability benefits in Tennessee.

While NCCI was founded in 1922 as state workers' compensation programs were beginning, the Workers Compensation Research Institute, established by major property/casualty insurers in 1983, has become a major force in the industry's drive to cut costs by cutting benefits for injured workers. WCRI has its own staff and it publishes its own research, which it aggressively markets to governors and state legislators across the country. WCRI's director, Richard Victor, regularly appears as a witness at state workers' compensation hearings.

### **WCRI and Tennessee's Benefit Cuts**

Tennessee cut its permanent disability benefits in May, capping a drive that began with WCRI and NCCI research and testimony claiming that the state's workers' compensation costs –ranked

a reasonable 22 in a widely used Oregon study---were far higher than neighboring states.

Asked by Tennessee legislators if workers' compensation costs were responsible for the loss of 77, 000 manufacturing jobs, Victor answered, "When you think about industrial locations, often they are moving short distances," he said. "One thing about Tennessee is you can move short distances and go across state lines more easily than in any other state, so it wouldn't surprise me if Tennessee was more vulnerable because of that fact."<sup>4</sup>

In the end, WCRI's research, along with numerous NCCI analyses circulated among legislators by the Governor, the Chamber of Commerce and insurance companies, proved overwhelming to the only groups defending the benefits of injured workers, the Tennessee AFL-CIO and the Tennessee Trial Lawyers Association. The Governor's legislation, aimed primarily at reducing the multiplier used by the state's trial judges to adjust permanent disability benefits, passed by a large margin.

### **Next on WCRI and NCCI's Target List: Healthcare Costs**

Both WCRI and NCCI regularly publish reports on state workers' compensation costs. This year their focus is overwhelmingly on healthcare costs. Health care inflation has shown signs of moderating, according to recent reports from leading health insurers, including Aetna, United Healthcare and Anthem. State regulation of non-profit Blue Cross plans has been credited with holding down the rate of increase, which, at 9% for the 2005 premium year, is still more than double the rate of inflation.

WCRI's reports cite Illinois, Wisconsin, Texas, Florida and Massachusetts as states with high rates of workers' compensation medical care costs. Wisconsin has already begun joint committee efforts with its business and labor council on medical care.

Texas hearings in April featured Victor, who presented the results of WCRI's medical care satisfaction survey of workers injured in 1998, who were surveyed in 2002. The survey instrument was the SF-12, which is only intended for use within a four-week period after a medical event. The WCRI survey covered a recall period of four years.

NCCI's reports also cite medical care as the leading cost driver in workers' compensation. According to NCCI, medical care costs have increased from 44% of total costs in 1983 to 55% of total workers; compensation costs nationwide in 2003.<sup>5</sup>

### **Iraq and Workers' Compensation**

As the War in Iraq continues and contractor casualties rise, workers' compensation insurers are raising rates. "People die very easily in Iraq," said David Bruce, an underwriter at Hiscox Syndicates Ltd. "Your rates have to reflect that."<sup>6</sup>

The estimated 100,000 contractor employees in Iraq are covered under the War Risk Hazards Compensation Act, 42 USC §§ 1701, *et seq.*, which sets benefit standards consistent with the Longshore and Harbor Workers Act. The War Risk Hazards Compensation Act provides for full federal reimbursement of contractor costs pursuant to any workers' compensation claim.

Insurers report that premium costs have tripled since the War began in March 2003.

### **Congress Attempts to Fix Broken Energy Employees Occupational Injury Compensation Act –23,000 Claims Await Energy Department Review**

Congress enacted the Energy Employees Occupational Illness Compensation Act in October 2000, directing the Labor Department to process claims for occupational diseases designated in the Act and requiring the Energy Department to assist all other affected workers with preparing and filing claims under state workers' compensation laws.

The Labor Department has paid benefits to 10,995 claimants and denied benefits to 16, 884. By contrast, the Department of Energy, which has traditionally maintained close, working relationships with its contractors who employed the affected workers, had only processed "about 6% of the more than 23,000 cases received," according to the General Accounting Office, which reviewed the entire

program after complaints mounted from Republicans and Democrats. Only one claimant received benefits after DOE and state workers' compensation review.

Leading Senators, including Senate Finance Chairman Charles Grassley (R-IA), Edward Kennedy (D-MA) and Jim Bunning (R-KY) prepared an amendment in May for the Defense Appropriations bill. The amendment transfers the DOE's operations to the Department of Labor and provides funding for all claims, after DOL determines eligibility based on the applicable state law of the claim. While the AFL-CIO and its affiliates, including the Building and Construction Trades Department and the PACE International Union, favored a federalization of claims with a Longshore and Harbor Workers Act benefit structure, together with a broadening of the eligibility for Special Exposure Cohort application, the amendment does move this flawed program in the direction of finally paying benefits to the workers Senator Grassley has called correctly "Patriots."

Neither the Bush Administration, nor the House of Representatives supports this amendment, however, and its fate is uncertain.

<sup>1</sup> Actuarial and Technical Solutions, "Workers' Compensation State Rankings Manufacturing Industry Costs and Statutory Benefit Provisions 2003 Edition," p. 3; Oregon Department of Consumer and Business Services, "Oregon Workers' Compensation Premium Rate Ranking, Calendar Year 2002," p. 3.

<sup>2</sup> Hunt, A., *et al* "Adequacy of Earnings Replacement in Workers' Compensation Programs," unpublished study of the National Academy of Social Insurance (Washington, DC: 2004).

<sup>3</sup> Emily A. Spieler and John F. Burton, Jr, "Compensation for Disabled Workers: Workers' Compensation," in *New Approaches to Disability in the Workplace*, Industrial Relation Research Association, (Madison, WI, 1998), pp. 205-244

<sup>4</sup> *Chattanooga Times Free Press*, March 4, 2004, p. B1.

<sup>5</sup> NCCI, "State of the Line," May 6, 2004.<sup>6</sup> *Chicago Tribune*, May 13, 2004, p. C1.