

GOOD GRIEF! DOES OUR FUTURE LIE IN CALIFORNIA?

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Today, from atop the almost century-old mountain of statutes and statistics, medicine and money, not to mention the countless parties that pepper the landscape below, it is easy to forget that workers compensation is a supremely simple concept. It is elegant in design, born of logic, necessity, and common sense. Straightforward, clear, and plain, it is an unambiguous agreement between employer and employee. At least, that's what it was meant to be, but, oh, what time and the hand of man have wrought!

Like today's technological revolution, the story of the 19th century's industrial revolution is replete with great leaps of imagination, determination, sacrifice, and serendipity. The move from agriculture to industry and from the farm to the city is a heroic tale, a metaphor for the human condition. From Whitney to the Wright Brothers, from Edison to Ford to

Rockefeller, men who were remarkably focused and obsessively driven to accomplish great things pulled society, kicking and screaming, into the modern age.

But the road to greatness was littered with casualties in the form of the countless accidents and injuries that befell the workers who made the journey possible. Along with the modern society in which we now live so well, these men and women — sacrificial offerings on the altar of progress, some would say — gave us one of the greatest social welfare programs ever devised. They gave us what we now know as workers compensation.

Until late in the 19th century, workers who were injured on the job or made ill by the job more often than not found themselves out of work and on their own, replaced by a healthy person who might suffer the same fate if he or she also became injured or ill.

However, because the legal system of the time made it difficult for a worker to obtain compensation from an employer, there was a movement in the latter part of the 19th century in Great Britain and the United States to modify, by court decisions and by employer liability statutes, the common-law defenses of the employer and to specify, through “safety codes,” the employer’s particular duties to provide safe working conditions.

Subsequently, out-of-work, injured employees who had no other recourse to compensation began to drag their employers into court for violation of the safety codes.

Over time, this became judicially and economically intolerable, and a system of wage and medical compensation for injured workers gradually replaced the safety codes.

THE CONCEPT GAINS A FOOTING

The United States did not invent workers compensation. That honor goes to Germany, which first introduced the concept in 1884. By the middle of the 20th century, most countries throughout the world had some kind of workers compensation or employment injuries legislation. Some systems take the form of compulsory social insurance; in others, the employer is legally required to provide certain benefits, but insurance is voluntary. In most countries, employers finance some type of employment injury benefits for workers.

In common law countries, such as the United States, workers compensation is based upon a doctrine of strict liability, or liability without fault. This is a departure from the principle of tort law in which the injured party receives no damages unless it can be shown that someone else maliciously

or negligently caused the damage. The rationale for the “social fault doctrine” is that, under conditions of modern industrial employment, employers are in the best position to prevent accidents and disease, and they should therefore be given economic incentive to take preventive action.

In 1911, after failed legislative attempts in Massachusetts and New York that had been ruled unconstitutional, Wisconsin successfully followed the lead of Germany and England and became the first state in America to enact a workers compensation statute. Over the next few years, the rest of the nation followed suit. Today, our 50 states have 50 different laws.

One might be tempted to say that what we really have are 50 bottles of identical wine with 50 different labels, but the differences go far beyond that. Benefits differ by state, as do systems for medical reimbursement. The workers compensation system in most states operates through some form of private insurance, but in some states, such as Ohio and West Virginia, the system is operated by the public sector; there are even two states, Texas and New Jersey, that make workers compensation insurance optional for employers.

The differences that abound among the states in their approaches to workers compensation lead to some states having economically “healthier” systems than others. Nowhere is this difference in wellness more vivid than in California, the state that, if it were a country, would have the fifth leading gross national product in the world.

Because California often serves as a national bellwether, and because its system is, in my view, the one that has veered the farthest from the original intent of the early 20th century legislation, it might be both illuminating and instructive to examine briefly its current workers compensation dilemma.

A STUDY IN PAIN

As of this writing, California’s workers compensation system is in near-total meltdown. Notwithstanding the crisis in electric power production and consumption, workers compensation has become the most serious economic issue facing the state’s employers. In seven years, while costs around the nation have continued their eight-year decline, costs in California have risen from \$9 billion to \$29 billion, and there is a 14 percent increase in premium rates scheduled for January 2004.¹ Business owners who can are weathering the storm through serious expense and work force reductions. Others are aggressively pursuing relocation to more friendly territory. Many, far too many, have been forced to close their doors entirely.

Yet, wage replacement benefits to injured workers in California are among the lowest in the nation. The system that was designed to be a simple agreement for the betterment of both employees and employers is enriching the medical and attorney communities and seriously harming the two groups it was created to benefit.

It takes only one example to illustrate the problem.

Imagine two manufacturing plants of similar size, employment, and industry. Practically speaking, they are mirror images. Both are on the California-Arizona border, except that one is in California and the other is in Arizona. Two employees, one from each plant, suffer similar strains to the lower back. Each seeks chiropractic help. The injury that happens to the Arizonian will result in seven visits to the chiropractor; it is astonishing to learn that the Californian will cross the chiropractic threshold 34 times!² Further, the rates of reimbursement per visit are significantly higher in California than in any of its neighbors. In fact, medical costs for workers compensation in California far exceed those for indemnity wage replacement.

How can this be?

Most state workers compensation systems tie medical reimbursement to specified fee schedules, predominantly Medicaid. For example, in Massachusetts, although insurers and doctors often negotiate a higher rate, medical reimbursement is officially pegged at 80 percent of the current Medicaid rate; in Connecticut, the rate is 180 percent of Medicaid (a sizeable difference between neighboring states and one which deserves some comment³); yet, most important, each is tied to a specific fee schedule.

In California, while some procedures are bound by fees, many others, especially out-patient visits and treatments, are reimbursed at “usual and customary” rates — essentially, what a doctor would charge private, paying patients. Couple the reimbursement system with significant over-utilization and you have a recipe for the most unhealthy system in the United States.

Although former Governor Grey Davis recently signed legislation aimed at turning California’s ailing workers compensation system around, the crisis is unlikely to improve dramatically in the near term for three reasons. First, the most optimistic estimates of savings total only \$6 billion. While obviously considerable, even if this target is achieved, California’s system will still be the most costly in the nation by far, and, at \$23 billion, it will still be \$14 billion more than in the late 1990s. California’s employers will remain under the gun. Second, California’s health-care system, like the

nation's as a whole, is profoundly imperiled by the continuing national health-care emergency. Despite the new law's requirement that chiropractic visits due to work injury be limited to 24 and that a medical fee schedule be created and implemented by December 1, 2004,⁴ California's medical community is a powerful lobby and, at the moment, is deeply resistant to any reduction in its revenue.⁵ Finally, the history of workers compensation legislative reform in the United States is a bit hit or miss. For example, the last national workers compensation crisis began in the 1980s. In response to this, many states embarked on large-scale reformation of their laws.⁶ Most of these reforms failed miserably and had to be reformed, themselves, in the early 1990s. One hopes that California's new legislation will fare better.

However, as some companies are labeled "too big to fail," we may be forgiven for asking whether California's diseased workers compensation system is "too sick to cure." Is the system so over-doctored, over-lawyered, and over-complicated that employers are powerless victims? Or, more to the point, is there anything that California's employers can do to help themselves?⁷

The answer is, "Yes, but they need help."

THE ROOT OF THE PROBLEM

In early-1984, I was a relatively young director of safety at Fort Devens, Massachusetts, anxious to move on to greater challenges. The son of a successful entrepreneur, I was looking for a business to buy or create that would allow me to flourish. One day, an insurance broker friend casually mentioned that I ought to look at workers compensation because there was a serious crisis developing in Massachusetts, and that spelled "opportunity."

I began to research the subject. Not knowing the first thing about workers compensation was both a blessing and a curse. A curse in that there was a lot of learning to be done, but a blessing because I could approach it without blinders.

After absorbing the basics, I concluded that, while the subject seemed to be as complex as Medusa's head, it could be reduced to one, simple issue: Essentially, there were two kinds of injuries occurring in the Massachusetts, and by extension, the American workplace. The first were those that are easily verifiable, such as a broken arm. For these, the system marshaled its forces and went into high gear. The second variety — and the vast majority — was soft-tissue muscle strains and sprains. One couldn't "see" these injuries, at all; one only saw their manifestations. From these injuries arose the big problem and the resultant workers compensation crisis: A certain

percentage of injured workers, for one reason or another, seemed to be staying out of work far longer than the soft-tissue injuries warranted.

To prove the hypothesis, I consulted Alf Nachemson, M.D., one of the world's leading occupational orthopedists who was, at the time, a visiting fellow at Massachusetts General Hospital. I wanted to know the usual course of the normal, middle-of-the-bell-curve soft-tissue sprain or strain. Dr. Nachemson pointed out that for two to three days immediately following the injury, the injured party could become moderately to severely restricted in physical capacity. For the next seven to ten days, the patient would probably require some physical accommodations at work, but within ten to fourteen days following the injury, the worker should be back to full duty.

Workers compensation statistics contradicted Dr. Nachemson's experience. They showed that 13 percent of all workers suffering soft-tissue injuries stayed off the job for at least six months and that 12 percent stayed away from work for at least a full year. Something was terribly wrong, and it was causing a major crisis in Massachusetts, as well as in the rest of the nation.

It turned out that the answer lay in employer education. Employers were the weak link in the system — not because they wanted to be, but, rather, because they didn't know any better. Their insurers had never taught them how to manage workers compensation, let alone injured workers. For some reason, nobody in the insurer community had ever educated employers with respect to the benefits and protocols of a good modified, or transitional duty program. In fact, on the whole, employers had better systems in place to care for broken machinery than for injured workers.

Think about it for a moment. Imagine a service company's human resources department in need of a new copier. Paper copiers are important machines in today's business world. So it is perfectly understandable that when the new copier is purchased the department head will want to be certain that if disaster strikes and the copier "goes down," a reliable system is in place to make sure that it gets fixed as soon as is absolutely possible. No one thinks twice as we create systems, detailed systems, complete with appropriate personnel training and a flagon full of rules, to insure that our injured copiers return to full productivity with a minimum of down time. Didn't our injured workers deserve at least as much as our injured copiers?

Therefore, a good part of the answer to the Massachusetts crisis could be found in the creation of sophisticated, workplace-based, and managed systems to care for injured workers. Executives needed to understand that

it was in their economic best interests to create unified and coherent systems within their companies. Supervisors as well as managers needed training. Devices to measure performance credibly and continuously needed to be developed. Finally, the medical community had to be educated in how to respond to and care for injured workers seeking their treatment.

With two partners, I built a consulting company, LynchRyan, to help employers take control of workers compensation in the workplace. Our results were immediate. In a sea of storms, employers who undertook the building of these systems remained largely unaffected by the rough weather.⁸ The message of the potential in employer-based programs eventually caught on and led to the creation of the Massachusetts Qualified Loss Management Program, an initiative that helped to pave the way for serious legislative proposals that culminated in the Reform Act of 1991. Subsequently, Massachusetts saw eight consecutive years of premium rate reductions, totaling 64 percent. Currently, premium rates in this major high-tech and manufacturing state are at the level of the early 1980s.

The Massachusetts reform of 1991 helped other states to undertake similar reforms and has led to a general reduction of premium rates across the nation. But not in California.

CALIFORNIA: PACESETTER OR ANOMALY?

All of this brings us back to California and to a central question. Is the tremendous crisis in California the tip of a national workers compensation iceberg, or is California an iceberg unto itself?

At this point, California seems to float alone. Most other states have controls, albeit some better than others, to rein in excessive medical utilization and attorney involvement. States such as Florida, Texas, and New York certainly bear watching, but their higher costs are nothing when compared to those of their neighbor to the west. However, we must always remember that just a few years ago, California, like most other states, had its workers compensation costs in fairly tight harness. A little inattention and some creative minds searching for economic opportunity were all it took for the nation's richest state to head into catastrophe.

Regardless of whether California is a disaster unto itself or the wave of the future for the rest of us, I suggest that, as in Massachusetts, the fundamental answer to its crisis lies in the education of the employer community. Every employer, every company, has the opportunity to make workers compensation a competitive advantage. How?

- First, by taking the time to learn how workers compensation actually works. A basic knowledge of the relevant law and insurance can go a long way towards helping an employer understand what is in its economic best interests.
- Second, by becoming committed to the principle of keeping injured workers in the bosom of the workplace. Modified duty is the best and quickest way to return injured workers to full productivity, and in nearly twenty years, I have yet to find a company that cannot accommodate injured workers temporarily.
- Third, by designing a program to manage and care for injured workers that is one with the culture of their particular company. Cookie-cutter approaches abound. They're cheap, but they don't work very well. On the other hand, they work better than no approach at all.
- Fourth, by training the entire work force, from line employees to supervisors to senior management, in the roles and responsibilities within the new system for each group.
- Fifth, by tracking how each level of the work force is performing within the new system through practical measurement devices.

Experience and history have shown that employers in California, as well as in the rest of the nation, have little control over the politics of the workers compensation debate, but near-total control over the management of workers compensation within their own companies.

Perhaps, notwithstanding recent legislation, what California really needs to do for its beleaguered employers is to return to the intent of those early 20th century visionaries and take the control from wherever it now lies — be it in the outstretched, palms-up hands of the medical, political, or legal communities — and put it back where it really belongs and where it will do the most good — in the workplace.

NOTES

1. According to John Garamendi, California's Insurance Commissioner, the legislation discussed in this article and signed into law by Governor Davis in the waning days of

his administration will most likely eliminate the need for this increase and could lead to a reduction in rates of 2.9 percent.

2. Average number of visits from a 12-state comparative study by the Workers Compensation Research Institute.
3. In contrast to California, Massachusetts is one of the best states in the nation in which to buy workers compensation coverage, due in part to its low medical reimbursement rate. In fact, studies by Actuarial and Technical Solutions, Inc. and the state of Oregon have shown that the per-employee cost of workers compensation in Massachusetts is at least 48 percent less than the national average.
4. Actually, California's reform legislation calls for the creation of a task force "to conduct a survey and evaluation of nationally recognized standards of care, including existing medical treatment utilization standards, including independent medical review, as used in other states, at the national level, and in other medical benefit systems, and to issue a report of its findings and recommendations to the administrative director of the Division of Workers Compensation, on or before October 1, 2004, for purposes of the adoption of a medical treatment utilization schedule." It will be interesting to see what follows (see Note 5, below).
5. One stark irony here is that workers compensation entered our society in 1911 at the crest of the great middle-class movement known as Progressivism, which the following year produced the presidential candidacies of Woodrow Wilson and Theodore Roosevelt. Remarkably, Progressivism found its purest expression in California under the governorship of Hiram Johnson, a maverick Republican, who succeeded in changing (in 1911) the California constitution to adopt the gubernatorial recall petition with which we are all so familiar today, as well as the public initiative and referendum which allow voters to pass and repeal laws.
6. Massachusetts is a good example. In late 1984, faced with rapidly rising costs, Governor Michael Dukakis formed a prestigious task force to examine the problem, take testimony from all interested parties, and present recommendations for legislative reform. This year-long investigation culminated on Dec 12, 1985, when Dukakis, to great fanfare, signed into law the biggest workers compensation legislative reform in the state's history. It proved a disaster and in 1991, to much less pomp and ceremony, the legislation was once again amended significantly, this time with far better results.
7. It appears that the California business community is decidedly pessimistic on this score. Recently, the *Sacramento Bee* reported that one Chamber of Commerce senior executive opined that the only way for California business to cut workers compensation costs is to cut payroll — just what a progressive CEO in charge of a growing company wants to hear!

8. For the first year or two, all of our clients asked at some point why nobody, particularly their insurers, had ever told them the things we told them; why nobody had ever helped them to design programs to manage injured workers. Not wanting to start pointless fights, I always replied, "I have no idea." After a while, I came to realize that people within the insurance community were so mired in the details of this overly complicated system that they were unable to step back, apply basic common sense, see the simplicity of the problem, and fix it. We, coming from outside the world of insurance, did not carry that baggage. To us, it was elemental Management 101.

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