

Workers' Compensation Reform: Does North Carolina Really Need It?

By Samuel A. Scudder

By the time this article gets to publication, business interests, led by the state Chamber of Commerce, will have already introduced a bill to reform the North Carolina Workers' Compensation Act. This bill is of particular interest to me because I am not only a small business owner that provides workers' compensation insurance for my employees, but I am also a Board Certified Specialist in Workers' Compensation Law who spends the primary part of my practice representing injured workers in their claims.

One of the most interesting ironies of this bill is the timing of the attempted reform. This bill will be debated by lawmakers on the heels of the 100th anniversary of the tragic Triangle Shirtwaist fire. This historic fire, which occurred on March 25, 1911, in New York City was the catalyst for worker protection laws in the United States. The fire resulted in the tragic deaths of 146 sewing factory workers in a factory with poor working conditions, no fire sprinklers, and inadequate emergency exits. This year also marks the 20th anniversary of North Carolina's own Hamlet chicken processing plant fire at the Imperial Foods plant on September 3, 1991, after a failure in a faulty modification to a hydraulic line. Twenty-five people were killed and fifty-four injured in the fire, as they were trapped behind locked fire doors.

The roots of our current workers' compensation system lie in the resulting labor movement of the early 20th century. This movement was motivated by the harsh working conditions, inadequate salaries, and preventable injuries often suffered by workers of the day. As the Industrial Revolution caused factories, mills, and corporate-run farms to spread across our country, severe workplace accidents became more and more common.

When these accidents occurred, workers rarely received any kind of compensation for their medical expenses or the wages they lost while unable to work. This negligence had repercussions in many areas: productivity was lost as people with severe injuries struggled to continue working, wounds that went untreated became much worse and even fatal, and many workers suffered psychological harm caused by stress, physical pain, and poverty.

Some victims of workplace accidents tried to receive the benefits they needed by filing lawsuits against their employers. However, these suits were often slow-moving, expensive, and unsuccessful. Plaintiffs in these cases were held to the standard of negligence, meaning they needed clear evidence that their employers had failed to take necessary safety precautions. This was often extremely difficult information for a low-level employee to obtain. States began to attempt to form comprehensive compensation systems for employees around that time, but many of them failed. The first successful state law ordering employers to cover their workers' health needs was passed in Wisconsin in 1911.

North Carolina was one of the last states to adopt a workers' compensation system. It was not until after the Coal Glen mine disaster in Chatham County in 1925 in which fifty-three miners died that workers' conditions and protection from workplace injury in North Carolina improved. Our legislature passed The North Carolina Workers' Compensation Act (the Act) in

1929. The Act was modeled after others that were passed during this time period throughout the United States. The keystone of these acts was a bargained-for exchange: Business agreed to a no fault system of liability in exchange for extremely limited benefits. Industry agreed to pay for its carnage, but damages were limited to just medical care and a percentage of lost wages. There were no consequential damages, no pain and suffering damages, and no punitive damages. This system, with minor changes over the years, has continued to work well for the both employers and employees in North Carolina. Approximately 50,000 to 60,000 new injury workplace claims are reported in North Carolina every year. The vast majority of these claims are not disputed by the employers or their insurance carriers and are not litigated before the Industrial Commission, the state agency with jurisdiction over these claims.

According to the North Carolina Chamber of Commerce's website, "Systemic reform is necessary in our state to bring our workers' compensation program back to its original purpose – a no-fault system which provides fair and reliable benefits for injured employees, mitigates risks for employers and contributes to a stable and competitive environment that continues to attract and grow good jobs for all North Carolinians." As such, the bill will be promoted as a jobs bill.

Forbes 2010 ranking of "The Best States for Business and Careers," a ranking that heavily weighs business costs, listed North Carolina at number three, up from number five in 2009. Similarly, in the CNBC special report, "America's Top States for Doing Business 2010," North Carolina was ranked number four. In the 2009 report, North Carolina was ranked number nine. One of the factors in the CNBC determination is the cost of workers' compensation insurance for the workforce. The Chamber's own website bears out our competitive workers' compensation costs and acknowledges that North Carolina's workers' compensation insurance rates have been relatively stable in recent years and have even shown rate decreases.

After the introduction of the reform bill, business interests will have their business and insurance industry funded Workers' Compensation Research Institute (WCRI) present their study to the legislative committee assigned to the bill. This study compares North Carolina to sixteen other states. According the study, the sixteen states were not chosen at random, but, in part, because they were geographically diverse. It is unclear what other criteria for selection were utilized in choosing these states. Based on the study, North Carolina has less or average litigation costs associated with workers' compensation claims, but the costs per claim have increased over time, with the increase being driven primarily by higher medical costs. Medical costs rose 9% during the last study year. This is a modest increase considering that health insurance rates are experiencing double digit increases each year.

The WCRI study, in comparing North Carolina to the other chosen states, provides no information which would allow the reader to determine where these states ranked in the "Best States for Business" rankings, ready workforces, or the present unemployment rate of those states. By using this study, Business appears to just be comparing dollar figures in its promotion of a race to the bottom.

As pointed out by the WCRI study, the primary driver of workers' compensation costs are the medical expenses. However, the proposed legislation does nothing to directly attack these rising costs. There is no reform of the procedure costs paid to medical providers. Instead,

the bill will allow complete access to the medical providers by the insurance companies and their adjusters and attorneys, without the consent and knowledge of the injured patient. This is designed so the medically untrained adjusters and attorneys may tell the physicians how to treat the injured workers.

Instead of reforming the rising medical costs, the proposed legislation proposes a limit to the number of weeks wage replacement benefits will be paid, regardless of the degree of disability. Presently, the injured worker is allowed benefits for as long as they are disabled and unable to regain their wage-earning capacity.

The proposed legislation also attempts to change the understanding of suitable employment. Presently, in order to terminate indemnity payments, a worker must be able to find work in the local labor market that allows the worker to at least approach the worker's prior wage-earning capacity. The proposal would have the effect of placing a prior high wage earner in a job flipping burgers at minimum wage, at which time his workers' compensation payments would be reduced and the worker and the worker's family would simply have to make out the best they could financially.

Additionally, contrary to the Chamber's desire to return the Act to its original intent of a no-fault system, the Chamber has also proposed a fault-based defense into the bill.

The major flaw in the proposed legislation that may escape the attention of the legislators is that, while they can legislate away workers' compensation benefits in this state, they cannot legislate away the workplace injuries. As mentioned above, there are tens of thousands of workplace injuries annually. The result of the continued injuries and the proposed reduced benefits is that someone will have to pick up the slack. This someone will be the welfare programs of the counties, state, and federal government. Instead of Business taking care of injuries that occur on their own premises to their own employees, and using the insurance they have paid premiums for to the insurance industry, ultimately it will be the taxpayers that pay for these injured workers if this bill passes. The Federal government warned of this attempt at insurance cost shifting in the House of Representatives' December 17, 2010, letter to the General Accounting Office. In essence, the workers' compensation reform bill is yet another government bail-out of the insurance companies. Our great state cannot afford such cost shifting measures.

It goes further than just a taxpayer bailout of the insurance companies. When the injuries continue, but the benefits stop; bankruptcy is soon to follow. Local business and banks will feel the bite of the injured workers' bankruptcy filings, as out-of-state insurance carriers carry even more of our local dollars across the border as they increase profits.

While draconian overall reform is unwarranted, the system could use a few well-placed tweaks, such as the following:

1. Presently, the Act allows for the workers' compensation insurance carriers to be given a credit for unemployment benefits paid to injured workers by the Employment Security Commission of North Carolina. In this time of state government financial crisis, this should be

changed so that the Employment Security Commission is paid back for these benefits instead of the out-of-state carriers receiving a windfall;

2. The minimum amount payable should be increased from the present amount of \$30.00 weekly to something that would put the injured worker above the poverty level. The present minimum severely impacts part-time workers, students, and persons working positions such as teaching assistants. This is especially harmful in situations when a worker is working more than one job and is injured at the lower paying job and unable to return to any employment. It has been decades since the minimum amount was raised;

3. The amounts allowed for damage to important bodily organs and disfigurement should be increased to reflect present economic reality. For example, if a worker severely lacerates his or her liver (or any other important organ) in a workplace accident, the most they may recover for the damaged organ is \$20,000.00. If a worker is badly burned below the neck, the most they may recover for the disfigurement is \$10,000.00. It has also been decades since these amounts were raised; and

4. There should be annual cost of living adjustments to the weekly compensation rate. Presently, if a worker was rendered disabled by quadriplegia from an injury at work in 1982 and qualified for the maximum compensation rate of \$228.00 per week, that is the same rate that the worker is still being paid, as it is not adjusted for inflation.

As a small business owner, I am very concerned about the costs of doing business and agree that any costs that are reduced, whether they are for workers' compensation, rent, marketing, employer-paid payroll taxes, wages, or health insurance, will improve the bottom line, at least in the short run. However, our workers' compensation premium has stayed constant and is miniscule compared to our employer-paid payroll taxes, wages, marketing, rent, and health insurance costs. In fact, our firm's annual workers' compensation premium is less than our individual monthly expenses for any of the other costs listed above. Understandably, some businesses with poor safety records have higher premiums, just as bad drivers have higher auto insurance rates. If the driving force behind the reform bill is the cost of doing business, why has reform not been proposed in these other higher cost areas? The facts tend to bear out that the workers' compensation system is a fair and cost-effective system that is not broken.

As a workers' compensation law practitioner, I am reminded that everyday our workers are injured in North Carolina. Even with our progress, our workers still suffer from tragedies such as the West Pharmaceutical explosion in Kinston on January 29, 2003, and the ConAgra explosion in Garner on June 9, 2009. At the Kinston explosion, six people were killed and thirty-six people were injured when a large explosion ripped through the facility. Two firefighters were also injured in the subsequent blaze. The Garner plant was rocked by an explosion that resulted in the collapse of a section of the facility's roof and wall. Four workers were killed while over forty others, including three firefighters, were hospitalized for burns and other injuries.

The current workplace protections are a product of 100 years of efforts to ensure that when people go to work in the morning, they can be reasonably assured that they will return

home safely to their families. Workers' compensation currently provides a very minimal safety net for all working people of North Carolina, in the event that a tragic workplace injury suddenly renders them unable to work. The currently proposed reform bill does not promise progress, but instead would be a terrible burden for both disabled workers and government assistance programs in the current economic climate.

Samuel A. Scudder is the managing member of Scudder & Hedrick, PLLC, a 1990 Campbell School of Law graduate, and has been a Board Certified Specialist in Workers' Compensation Law since the certification test was first administered in North Carolina in 2001.