Discussion of Papers on Recent State Reforms

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The papers in this session offer an interesting geographical and topical cross section of recent legislative efforts. Even this small sample of the 50 states considered most of the major areas of reform, from wage loss to rate-making to revamping the exclusive remedy doctrine. However, it seems to me that the session's most significant message transcends the specifics of any of the proposed changes. I think a crucial lesson resides in the collection of legislative stories related, that is, in the descriptions of the reform process itself.

One can hardly read the four papers together without imagining the legislative halls around the country as so many war zones. This impression is not much affected by the ultimate outcome—even successful efforts come with a struggle. I suppose that is the nature of our democratic process. Much as we may wish it were otherwise, it remains true that our system of collective rule-making is far from costless. But the production of legislation is subject to the same principles that apply to production of all goods we value. That includes the principle that a variety of recipes exist for producing any given final product. For any desired piece of legislation there exist a variety of strategies for transforming the basic idea to a final statute.

An economist would view the problem as one of finding the path of least resistance, the least-cost way of shepherding the proposed bill through the production process in state legislatures. Thus, *how* a bill is sold becomes nearly as important as *what* is being sold. The experience of recent years suggests that students and proponents of workers' compensation reform have paid too little heed to this proposition. I find this all the more curious since workers' compensation has been a statutory creature since its inception in the early 1900s. Participants in this area should be no strangers to political haggling and regulatory tinkering. Yet as Alan Tebb suggested of California, rather than master the vehicle which affects them, the real parties involved—employers and employees—"continue to abrogate their responsibility to participate in the establishment of public policy in the workers' compensation area." The events described in Michigan and Minnesota confirm this observation.

How can we minimize the confrontation politics that have plagued past efforts? Steve Keefe suggests that the usual political warfare over proposed reforms exaggerates the perception of an adversarial, employer versus employee relationship. Too often the image has been that one party gains from reform only at the other's expense. Labor interests have opposed reforms geared to reduce system costs because they expect the price tag will ultimately be a reduction in benefits. Of course, "reform" does not have to be a zero-sum game which precludes everyone from gaining. The practical problem in Minnesota (as everywhere else) was one of demonstrating that premiums could be lowered without cutting benefits. Certainly, premium reduction requires cost reduction, but *cost* is not synonymous with *benefits.* A major point of Keefe's paper is that proposed legislation was supported by studies that demonstrated just that. He suggests that the crucial key to successful reform effort is a thorough, objective examination of prior and existing

systems that illustrate how both business *and* labor interests can get a fair shake from reorganization.

The natural confrontational atmosphere that surrounds compensation bills is compounded when only anecdotal evidence can be offered in support. I think this session suggests that the prescription for defusing this confrontation in any given state is (1) to carefully research the state's existing administration to clearly define the problems, and (2) armed with these statistics, to educate the political participants. The experiences related by the participants reveal that without a concerted effort to research and educate, the initial perceptions of a zero-sum game are difficult to dispel, with political warfare as a result.

A related point deserves mention. The suggestions above primarily address a strategy for smoothing the process of getting legislation passed. It should go without saying that the proposed reform itself should be based on research into the state's own experience. Nevertheless, a major trend in compensation reform, the wage loss movement, has exhibited a remarkable propensity for generating a bandwagon effect. The approach has picked up national support among business leaders as the ultimate solution to the problems with permanent partial awards. Delaware's recent bout with the fever of reform provides an example.

Delaware has a full slate of scheduled awards as well as permanent partial awards for percentage loss of use *and* disfigurement. Benefits are paid through an agreement system, whereby both employer and employee must agree to the offered settlement before payment is made. An employee deals with the state's administrative personnel only in the event of a contested claim. One problem that has evolved is a relatively high incidence of contested cases and an average six-to-eight-month delay before initial administrative review. Of course, the greater the delay, or *threat* of delay, the

greater the incentive for the injured worker to settle for a smaller amount.

As seems to be the case everywhere, a special commission was appointed in 1979 to bring together labor, business and insurance interests in an effort to reach a compromise reform package. Its report revealed that labor representatives were concerned primarily with delays in benefit payments, the prolonged hearing process and the agreement system of payment. The level of benefits was not a major concern. The reform effort of 1982 grew out of the commission's recommendations. The thrust of the proposed legislation was to streamline the claim procedure in order to (1) speed payment, (2) reduce the potential for disagreement over awards and consequently the incentive to contest awards and (3) increase the predictability of the size of award and when the issue would be resolved. Of course, the hope was that in doing so premiums would fall.

I believe it is fair to say that the impetus for reform was the concern over the cumbersome administrative process and backlog of contested claims (with consequent higher costs). Change in the benefit structure was an issue only because of the presumption that the *type* of benefits (not the level) contributed greatly to the probability of contesting a claim. Although it is never clearly stated, I suspect the rationale behind the proposed solutions was the belief that abolition of permanent partial awards was a necessary sacrifice for streamlining the system, that effective administrative reform was operationally impossible under the existing benefit statutes. When framers of the proposed legislation were briefed on Florida's new "wage loss" bill, they enthusiastically seized the approach as the solution to Delaware's problems. Nevertheless, the rationale for the tradeoff was not effectively conveyed nor backed with statistical evidence from Delaware, or anywhere else. Instead, throughout the debate the image was that business was

extracting a price (in the form of reduced benefits) for reform.

Labor representatives had expressed dissatisfaction with the old administrative framework, but once the proposed legislation started moving toward a vote, this interest in streamlining the program took a back seat to the perceived benefit reduction. Opponents of the legislation were careful to construct numerical examples showing injured workers losing thousands of dollars in compensation under the wage loss approach. The distrust over the permanent partial removal overshadowed other dramatic changes, including a proposed increase in the cap on benefits to 125 percent SAWW.

The proposed changes failed to pass, due in no small way to lack of the research and education effort advocated above. But I also wonder if a careful examination of Delaware's claim experience would yield the same recommendations that were proposed? Such a study was never made. My point is that proponents of the move to wage loss in Delaware were easily convinced of the validity of Florida's legislation, without statistical support.

It has been suggested to me by several researchers that the gain from a shift to a wage loss approach varies depending upon prior state statutes, state workforce composition, and the accompanying administrative framework. Moreover (John Lewis' optimism notwithstanding), the papers in this session clearly demonstrate that the political road to a wage loss system is fraught with pitfalls and is potentially very costly. With the experience of several states unfolding, I would like to see a specific discussion of the feasibility of the approach relative to less politically volatile alternatives. I know of no published discussion at this time. Recognizing the constraints imposed by the political process of reform, I am wondering when the wage loss approach is the prescription for states grappling with their permanent partial statutes, and when is it not.