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The 1982 Changes in California

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Background

It is my pleasure to discuss the 1982 amendments to the California workers' compensation law. The planning committee has asked that I summarize those changes and describe why the law was amended, the short term results of the legislated changes, and the potential long-range consequences of that action.

It is inappropriate, however, to characterize the 1982 legislative changes in California as "reform," the central theme of this conference. There were changes in the California law—indeed, massive changes—but with minor exceptions, the 1982 amendments did little to make the California compensation program more equitable, effective, or efficient. Instead, my remarks might more properly be labeled, "The Political Realities of Workers' Compensation Reform," an object lesson in what happens when employees and employers abrogate their responsibility to participate in the establishment of public policy in the workers' compensation arena.

By way of background, the California law extends to about 600,000 employers employing 11 million covered

workers. Compensable injuries approximate 1.3 million annually, of which 375,000 are “disabling,” i.e., one or more days lost time, and of that latter number perhaps 70,000 work injuries result in permanent residual impairment. The state agency’s role has been essentially passive, in large part limited to adjudication after a dispute has developed, and the bulk of its \$30 million-plus budget pays for 120 referee teams resident in 23 offices throughout the state. Given this emphasis, litigation is pervasive in the California workers’ compensation system, marked by a high degree of involvement by attorneys and forensic physicians.

California Workers’ Compensation Institute research studies establish that the costs of workers’ compensation litigation in California exceeded \$350 million in 1981. That total includes attorneys’ fees for employee and employer, expenses of medical testimony and other direct out-of-pocket costs incident to the litigation, but excludes benefits paid to workers. My purpose in mentioning this is to underscore the interests of other players when workers’ compensation reform is considered, and the difficulty in making any changes that are perceived to affect these interests.

The 1982 Amendments

The 1982 amendments to the California workers’ compensation law were the first substantive changes in 10 years. There had been some procedural modifications during this period, but attempts at major revision were frustrated by the balance of power among the special interest groups. The practical effect was that organized labor’s drive for higher benefits could be stalled by the employer lobby unless labor accepted the employers’ demand for a *quid pro quo*, which labor was unwilling to do. Similarly, changes sought by the employer community were not possible without including a substantial benefit package, and the dominant employer

groups thought the price too high. Both labor and management had veto power and exercised it.

The balance shifted in 1982, due more to the entry of some additional players, specifically, the trial bar, than any change in political power, and the result was enactment of a workers' compensation benefit-reform package. The most visible feature of the package is a sharp increase in benefits. Over a two-year period, benefit levels will rise \$660 million, while costs to employers will increase by nearly \$1 billion. That represents the largest benefit increase in California history, if not the largest benefit increase in the history of workers' compensation.

I have no particular problem with the size of the benefit increase, but I do have concerns with its distribution. More than 90 percent of the new benefit dollars will increase indemnity levels for permanent partial disability—the benefit sector most fraught with litigation and, accordingly, most fruitful for trial attorneys and forensic doctors—while leaving maximum weekly benefits for total disability, both temporary and permanent, woefully inadequate (i.e., less than 60 percent of the statewide average wage). The 1982 benefit increases magnify the maldistribution of California workers' compensation benefits, a maldistribution I feel confident in predicting will require wrenching change within the current decade.

The reform part of the package—the *quid pro quo* for the employer community—included enactment of a provision requiring factual issues in litigated claims to be determined by a preponderance of the evidence. Trial judges and the appellate courts over time had accepted the liberal construction imperative too literally in the view of many employer observers, and this change was an attempt to restore balance. The law still must be construed liberally, but the facts must be determined by a preponderance of evidence.

Second, the legislation provided a statute of limitations on the vocational rehabilitation benefit. In 1974 California became the first state to adopt mandatory vocational rehabilitation as part of its workers' compensation law. The 1974 enactment, however, was something less than a paragon of clarity, and there was a substantial question as to whether the benefit was open-ended or had to be exercised within a specific period of time after the injury. The benefit-reform package opted for certainty.

The most important of the reform elements was a buttressing of the exclusive remedy doctrine. A series of court decisions held that the employment relationship did not shield an employer from civil liability if the employee's injury was attributable to the employer's other "capacity," e.g., as a manufacturer. Thus, a California employee injured in the course of employment by a defective product produced by the employer was entitled to workers' compensation benefits and, additionally, could bring a civil action for damages against the employer as a manufacturer. The 1982 legislation overturned these holdings, restoring the reciprocal concessions of employees and employers to their original balance—and, according to one estimate, saving employers \$1 billion in additional costs over the next five years.

That in general was the package. It resulted from the interplay of a number of factors:

- No significant benefit increases in 10 years;
- A series of adverse appellate decisions;
- The growing political influence of the trial bar;
- The decline in the legislative muscle of the employer community and, to a lesser degree, statewide labor;
- Sharp differences in the priorities of the principal players and an inability to resolve the differences.

It was an interesting exercise in pragmatic politics, albeit one which requires looking backward.

The Politics of Workers' Compensation

In 1971, the dominant employer organization and the insurance industry were instrumental in negotiating a significant revision to the California workers' compensation system through an "agreed bill" that granted substantial benefit increases in exchange for major concessions by organized labor. Five years later, in 1976, another modest reform package was enacted, but this time the negotiating parties were limited to organized labor and the insurance industry. No employer group was actively involved in the effort—not because employers didn't have a stake, but mainly because of a collective inability to agree upon any pressing reforms in exchange for increased benefit levels.

What had happened in that five-year period? At the risk of oversimplifying, the major change was the end of involvement by chief executive officers and other senior management types representing employers. For whatever reason, responsibility for social insurance issues was transferred to middle level managers and, ultimately, the entire subject was left in the hands of the institutional employer organizations. At the same time employers who had been legislatively active (and their trade associations) lost their senior professional lobbyists to death and retirement and thus lost their input to legislative leaders.

Organized labor's role also underwent a change with the legislative emergence of local unions. Many of the locals relied heavily upon the advice of local compensation claimants' attorneys whose interests, vis-a-vis labor's, were not always consonant in workers' compensation issues. Statewide labor was still a force, but its positions were increasingly muted or neutralized by what local unions were telling legislators.

Some indication of the shifting in relative strength came in 1977 when the insurance industry secured passage of controversial legislation that altered the allocation of liability among multiple defendants in cumulative injury and occupational disease claims over the *combined* opposition of the employer community and organized labor. The key to its enactment may have been that the economic interests of the trial bar were unaffected.

By the 1980 session, the employer community had become inflexible. In theory, employers continued to adhere to the strategy of no benefit increases without commensurate reform. In reality, however, they had become entrenched around a policy of no change whatsoever. So the insurance industry and statewide labor, with the governor's office as marriage broker, began discussions leading to a major overhaul of the compensation system. The package included substantial benefit increases (totaling only about half the cost of the 1982 bill) in exchange for building more certainty and objectivity into the determination of permanent partial disability, and thereby sharply curtailed the system's dependence upon lawyers and forensic doctors. It was a game but unsuccessful effort because the trial bar, working through local union officials, was able to present the appearance of a divided labor camp; because employers were unwilling to pay higher benefits; and because of the unreconstructed egos of some of the parties.

Nevertheless, the pressure continued to build. The courts began to respond to benefit inadequacy through a series of decisions eroding the exclusivity of workers' compensation. During the 1981 legislative session, the employer and insurer lobby introduced a measure to restrict the courts' expanded definition of the "dual capacity" doctrine. It passed the Senate, but the Assembly Speaker would not permit its passage without a large increase in benefits, a price

employers were unwilling to pay. In November, after the session recessed, the Supreme Court handed down its decision in *Bell vs. Industrial Vangas*, 30 Cal 3d 268, which transmuted dual capacity into double jeopardy for employers.

As the 1982 session opened, the real parties weren't talking. Organized labor refused to consider an amendment to the dual capacity issue "because that's not a comp issue." Employers were reluctant to negotiate with labor without dual capacity being considered, and were unwilling to negotiate directly with the trial bar because of the magnitude of the benefit increases being advanced. That left the insurance industry and the trial bar as the only players with an ostensible community of interest, so their discussions began.

Originally the insurer representatives functioned as surrogates for the employer groups, keeping them informed of developments while attempting to convince them of the need for movement, given the Assembly Speaker's commitment to pass a benefit bill—with or without other reforms. Over time, however, the insurer-employer relationship broke down because of a series of economic decisions made by the employer association:

- First, a decision not to support the permanent partial disability reforms proposed by the insurance industry (and bitterly resisted by the trial bar) because the expected savings couldn't be quantified. Throughout, the thinking seemed to be, "If benefits are increased by X million dollars, we need Y million back in reforms."
- Second, a decision to forego legislative repeal of the dual capacity doctrine and wait until the next session when the political climate might be more favorable, a wistful vision that never came to pass. This approach conflicted with the priorities of compensation insurers which felt, I think correctly, that the real reason for

backing off was the high price tag associated with dual capacity repeal.

- And, finally, the employer trade associations were limited in the amount to be included in the benefit package. They couldn't make the ante. And in politics, as in poker, the rules dictate that when you fold your hand, you don't get any more cards.

With employers dropping out of the game, a series of amendments were drafted by the remaining principals, incorporated into an Assembly-passed bill in the Senate, and enacted into law within two weeks after surfacing.

The Impact of the Amendments

The immediate results—good news or bad news, depending upon your perspective—include containment of the dual capacity doctrine and removal of a threat to the legal underpinnings of the workers' compensation system, a change that will result in significant savings in loss and legal costs. The limitation on the vocational rehabilitation benefit similarly will save some unnecessary expense and permit insurers and employers to close files. Binding the trier of fact to a preponderance of evidence test has the potential to make workers' compensation more professional by introducing a standard of judicial objectivity where one didn't exist before. And the upgrading of disability benefits may convince the civil courts that it isn't necessary to create legal fictions to accomplish substantial justice for injured workers.

On the other hand, California employers are faced with escalating costs, upwards of 30 percent, without any meaningful substantive change in the workers' compensation law. More litigation, fueled by higher benefit levels, can be expected. Minimum weekly benefits were adjusted dramatically and the result may be longer periods of disability for the

low wage earner. Moreover, the higher benefits may signal a change in benefit utilization and an acceleration in the assertion of so-called “stress” claims once the economic recovery is achieved.

The long term consequences of the 1982 legislation are more difficult to divine. All I can do is speculate, but I believe there will be at least two observable effects—or noneffects, as the case may be.

- First, no real changes in the California workers’ compensation system in the immediate future, despite the extant inequities, leakages and waste. Legislators have an excuse—“we dealt with comp last year”—and many find compensation legislation politically unattractive. Absent an agreed bill, comp is a “bad” vote for one or more of a legislator’s constituencies. Legislators generally would prefer to avoid the issue unless they’re pushed, and there’s no one pushing them—which brings me to my second, equally dour projection.
- There will be no meaningful changes until the real stakeholders—organized labor and employers—initiate the movement.

Organized labor, in many instances, has permitted its role to be co-opted by attorneys. The complexities of workers’ compensation are little understood by labor leaders, particularly at the local union level, and there is a tendency in what appears to be a highly legalistic system to yield to the “expert,” that is, a lawyer. The interests of organized labor in workers’ compensation legislation are not always consonant with the interests of claimants’ attorneys, protestations of the latter to the contrary notwithstanding. Unfortunately, the dichotomy hasn’t been recognized, much less acknowledged.

The other factor in the formula, the employer community, is at least as troubling. Today employers complain about being frozen out of the legislative negotiations, but the truth is that they voluntarily isolated themselves. Unless they demonstrate a willingness to participate in the political arena where the workers' compensation policy decisions are made, the legislative decisions will continue to be dictated by the scorekeepers and linesmen.

Conclusion

Obviously, my remarks are pertinent only to California. I suggest, however, that the 1982 experience in California may have application to other jurisdictions, and the differences are more of degree than substance.

If there is a lesson, it is that workers' compensation is a statutory creature. Changes, no matter how well-reasoned and researched, cannot be accomplished in academe, by studies, or by the imprimatur of blue ribbon commissions. Real change requires *legislative* action in a *political* environment. Until that lesson is accepted, reform—that is, improvement—of the workers' compensation system cannot be realized.