STRESS FRACTURES

The workers' comp 'grand bargain' comes under attack.

by Kate Smith

Each year, for its annual meeting, the National Council on Compensation Insurance picks one word to describe the condition of the workers' compensation systems nationally. This past year, the organization chose the word "calm." But it also added a warning.

"The current condition is calm," said Peter M. Burton, senior division executive for state relations at the NCCI. "But there are enough storm clouds on the horizon that we need to be very vigilant."

While workers' comp rates largely have dropped and losses are down—underscoring the NCCI's assessment of a calm market—several looming issues are challenging, if not threatening, the market.

Workers' comp insurers are caught in the middle of a debate over medical marijuana usage, declining investment income is putting tremendous pressure on their underwriting results, they're trying to drive administrative costs out of the system and they're facing the potential of lost premium if the opt-out movement grows.

Issue at Odds

But the greatest concern is that the exclusive remedy provision, which is the crux of workers' comp, is under attack.

Workers' compensation was predicated on compromise—employers agreed to take care of injured workers in exchange for injured workers giving up the right to sue their employer. But the pendulum of compromise is always swinging, experts say, and as a result there is an ongoing tug-of-war between labor and business.

"There's no doubt the system is being tested," said Liz Haar, president and CEO of AF Group, formerly Accident Fund Holdings. "One of things about the work comp system is that it needs to stay in balance. There needs to be a balance between protecting employee rights and injured worker rights, while also making it fair to employers. And it's hard to keep things in balance."

Both business and labor are crying foul, arguing the system is out of balance and the "grand bargain" is no longer a fair deal.

Despite the overall decline in rates, employers contend workers' compensation costs are still too high. Lobbyists are quick to use that sentiment in their push for reforms, telling lawmakers that businesses will leave their state

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if costs aren't reduced. Whether the threat of an exodus is real or not, it has prompted states to re-evaluate their systems, consider opt-out programs and, in many cases, reduce benefits for injured workers.

Employee advocates, on the other hand, say benefits for injured workers have been whittled away as a result of reform measures. A 2015 series of articles by NPR and ProPublica, a nonprofit news organization dedicated to investigative journalism in the public interest, supported that claim, painting workers' compensation as a one-sided system that fails to protect injured workers.

"If you've read the ProPublica articles, you'll see there are a lot of folks who think the current workers' compensation system is inadequate—that the benefit levels are not up to par, that the compensability standards are not sufficient," Burton said. "There are critiques from some quarters that the workers' compensation systems have degenerated, so to speak, and aren't living up to their mission of years ago. Others will say you can always find outliers of some serious conditions that haven't been handled as well as one would want, but by and large workers' comp is a self-executing system. If people get injured, most cases are handled quickly and effectively, without litigation, and the system works as intended. So there are two views on every issue, but the ProPublica articles may give pause to some states as they review benefit levels and other workers' compensation standards."

Discontent with those standards has placed the exclusive remedy provision at risk. Labor representatives argue that subpar benefits and an inability to sue the employer leave injured workers handcuffed.

"From a labor perspective, indemnity has not kept pace with inflation and the prescription on medical care, principally the use of medical guidelines and utilization review, have taken away the availability of reasonable and necessary medical care," said David DePaolo, president, chief executive officer and editor-in-chief of WorkComp Central. "So labor is saying that what they originally thought they were getting 100 years ago isn't there anymore. That, by the way, was the argument of business 10 years ago, before reforms started in Texas, Florida, California, Illinois, etc. Back then business was saying it wasn't a grand bargain anymore because they were paying too much for problems that weren't all theirs.

"There's a blame game going on," he said.

John F. Burton Jr., an economist and professor who chaired the 1972 National Commission on State Workmen's Compensation Laws, pointed out that this isn't the first time the exclusive remedy provision has been challenged. For example, employers have argued the dual capacity doctrine, which allows a worker to sue if his injury was caused by a defective product manufactured by the employer, is inconsistent with the grand bargain.

"More recently, though, we have a dual denial doctrine," said Dr. Burton, who has a law degree and a doctorate in economics. "The issue coming up in some states is that they want to only compensate workers if the workplace incident is the major contributing cause (MCC). The kicker here is the parties pushing the MCC are saying if your workplace incident isn't the major contributing cause, you're not eligible for workers' comp. And you're not eligible to bring a tort suit. So they want the exclusive remedy provision to still be applicable even for cases that are not compensable. That's the thing that's being challenged.

"With dual denial, it's the employers and carriers who are bringing this on themselves. They're trying to have it both ways. They don't want to be responsible for workers' comp and they don't want to provide a remedy in tort suit. So that's the grand bargain breaking down in part because employers are trying to push this thing too hard in terms of avoiding any responsibility for work-related injuries."

Federal Intervention

Federal lawmakers are now looking to intervene. In October, 10 Democratic congressmen and senators, including presidential candidate Sen. Bernie Sanders, urged the U.S. Department of Labor to "improve oversight" of the state workers' compensation systems.

"You'll see periodically the thought that maybe the federal government should get involved," the NCCI's Burton said. "Obviously that raises red flags from those who feel it's a state's right to create its own workers' comp system.

"Back in 1972 [President] Nixon's federal commission looked at the state workers' compensation systems. There have been calls to establish another commission to look at each state's workers' compensation system and see if there are areas for improvement."

The 1972 commission concluded that states were in a "race to the bottom" and recommended federal standards if laws didn't improve within three years.

"We had 18 members, most of whom were Republican, and that was our unanimous recommendation," Dr. Burton, the commission chair, said. "In order to keep the states from having this runaway competition, we concluded the solution was to put federal standards on the program. Not to federalize the workers' compensation program. We went to great lengths to distinguish between a federal program and federal standards.

"I still believe in federal standards; that is, that states should need to have benefit levels at a certain level," he said. "The system is spiraling downward. I think we could come up with some federal standards that would help the state system remain viable. With the national commission back in '72, we considered ourselves conservatives trying to save the system from self-destruction, and our conservative solution was federal standards. But that was a tough sell even back in the '70s and even with a unanimous decision." BR

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