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The Shrinking Remedy of Workers' Compensation

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In March, the shockingly decrepit state of workers' compensation systems across the land received significant national media exposure in a series of three articles by ProPublica, an independent, non-profit newsroom producing public interest investigative journalism. Articles written by journalists Michael Grabell of ProPublica and Howard Berkes of NPR shined a light on the ugly condition of the most important safety net for US workers. The full series of articles can be found at <http://www.propublica.org/series/workers-compensation>. Source material and references for these articles were in substantial measure contributed by WILG.

The principal article, entitled "The Demolition of Workers' Compensation," reveals how, under the banner of reforming a system described as suffering "out of control costs," the allied forces have drastically reduced coverage for injured workers over the past ten years, and have shifted the cost of workplace accident and illness from the responsible businesses and industries and on to the American taxpayer through Social Security disability insurance, Medicare and Medicaid, systems now under extreme pressure themselves.

The usual cited basis for these cutbacks and shrinking coverage -- "rising costs" of comp insurance -- has now been shown to be totally fraudulent. Employers are paying the lowest workers' comp rates since the 1970s, and insurers are enjoying their highest profits in a decade -- 18% in 2013.

Some other findings in this ProPublica article:

1. Since 2003, 33 states have passed laws reducing benefits or making qualifying for them more difficult.
2. Employers and insurers now largely determine medical decisions -- in 37 states workers cannot choose their doctor, and must choose from a restricted list.
3. Increasingly, benefits are terminated before workers have regained the ability to reenter employment.

In 1972, the Nixon commission report on workers' compensation advised Congress to mandate its recommendations as minimum federal standards if states did not bring their systems up to the level of the 19 essential recommendations. What has the federal government done lately? Nothing since 2004, after budget cuts eliminated funding for the feds to track and monitor what was happening in the states.

As the article points out, and as we all know, workers' comp in the states has become a "race to the bottom."

For context, ProPublica briefly refreshes the mostly-forgotten history of the origins of workers' comp -- the grand bargain arising out of the early age of industrialization that caused grisly, incapacitating injuries. The compromise reached was that workers surrendered their, often illusory, right to sue their employers in return for the limited but certain remedies of workers' compensation. 50 years after most states had enacted workers' comp laws, the 1972 Nixon commission reviewed the status of these laws,

found them “inadequate and inequitable,” and made an extensive list of recommendations. For a period of time the national state of workers’ comp laws improved, but about 20 years ago, the rising conservative political tide in the states engendered a new era of cutbacks to the point that, according to ProPublica, only **seven** states now follow at least 15 of the commission’s 19 essential recommendations.

This article details several shocking examples of how workers’ compensation, shrunken as a remedy by the chambers of commerce whose representatives often write the “reform” legislation in the various states, is failing the American worker. It cites a study by a University of California health economist who estimates that workers’ comp covered less than a third of injured workers’ medical costs and lost earnings in 2007.

Companion articles detail how absurdly variable benefits are from state to state, and how individual states have employed mechanisms to reduce coverage to even catastrophically injured workers. In a “tale of two arms” about two workers sustaining substantially the same injuries, one living in Alabama and one in Georgia, with only 75 miles and the state line between them, ProPublica compared the abysmal disparity between the benefits for loss of an arm in Alabama (\$48,840) to that in Georgia (\$118,125), together was substantially higher additional benefits in Georgia. Similar disparities exist between neighboring states in other areas of the country. The last article, a series of five case studies, demonstrates the expanding use of the other modes of reducing benefits and coverage. 22 states now set arbitrary time limits on how long an injured worker can receive temporary wage benefits. Since 2003 ten states have expanded the use of outside medical reviewers to override treatment recommendations of the primary care physician or opinions as to causality. In the same timeframe, ten states have increased the use of “pre-existing conditions” to limit or deny care following workplace injuries.

In August of 2014, a Florida judge ruled that the state’s workers’ comp benefits had been decimated to such an extent, and that the comp law had failed so miserably as to safety, health, welfare and morals, that it had become “unconstitutional” as the exclusive remedy for workplace injury. An appeals court heard argument over the judge’s ruling earlier this spring, and a decision is pending. If upheld, the Florida decision could open the door to the end of the “grand bargain” and the restoration of the right of workers to sue their employers. One hundred years after the enactment of the first workers’ comp laws, and at least fifty years after the failure of a majority of states to make workers’ compensation a viable remedy, we may be standing on the precipice of a new era of workers’ rights for the consequence of workplace injury and disease.