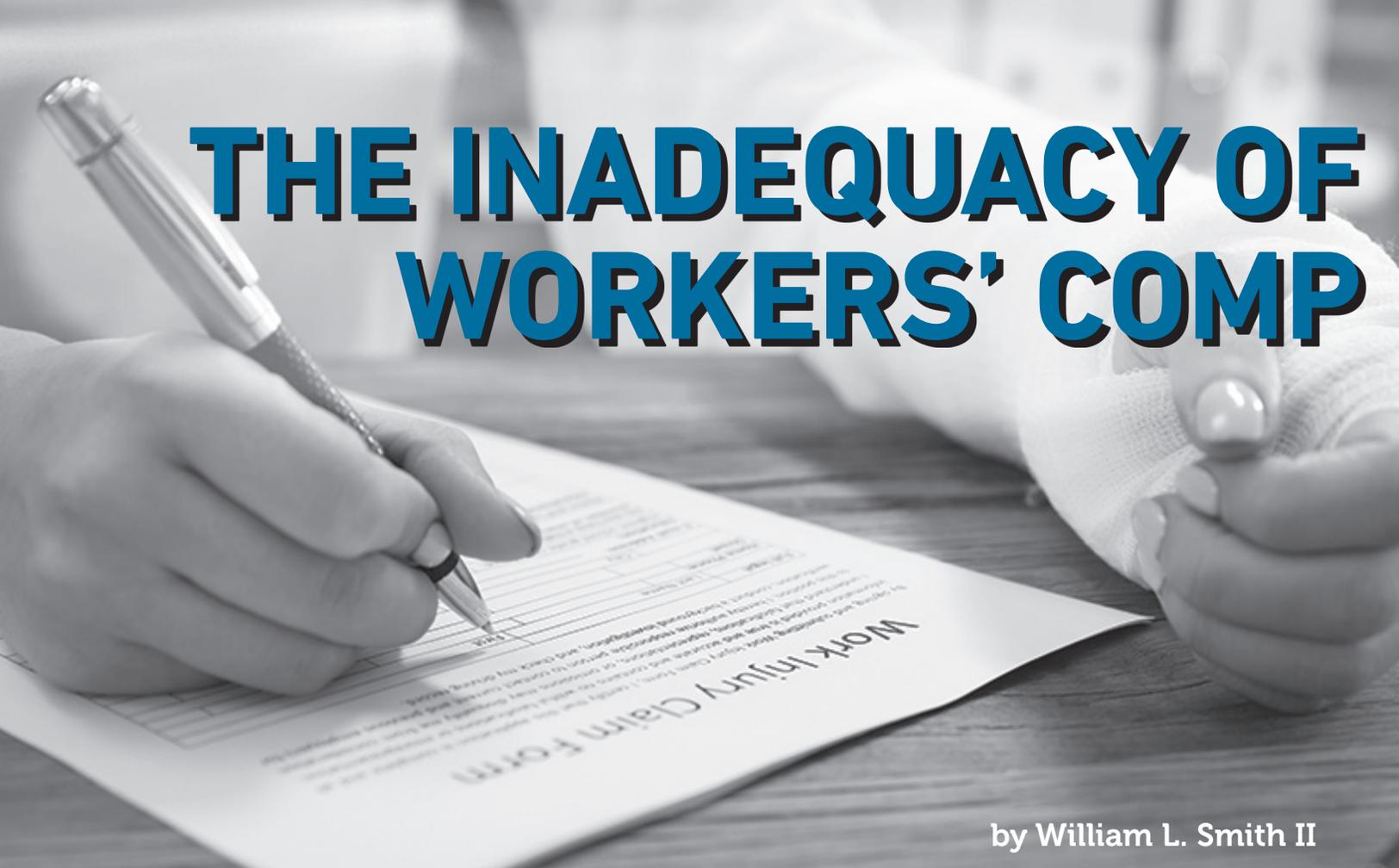


THE INADEQUACY OF WORKERS' COMP



by William L. Smith II

I's called the clang. That moment in time when you are meeting with your injured worker client prior to a hearing or mediation that they finally realize that even a maximum recovery will not get them out of the hole in which they have been placed. This moment arrives despite all of the previous meetings where you have explained the process, rights, and remedies and tried to minimize expectations. It happens no matter how great of a lawyer you may be, how hard you fight, and regardless of how much risk your client and you are willing to take at trial. The recovery might resolve a momentary crisis but it won't take care of all of their future medical needs, make up for their total inability to work or permanent wage loss, provide for any pain and suffering, loss of enjoyment of life, loss of job, loss of health insurance, loss of contributions to their 401K, not to mention the loss of self-worth, identity, and dignity of your client. A hardworking employee who, the day before the injury, was the epitome of the American worker: proud, productive, supporting of their family and a pillar of their community. Give "the man" a day's work; receive a fair wage. If you are injured on the job, the "company" will take care of you. Well, that's the way it was and that's the way it should be, but something happened to the Grand Bargain along the way.

To be honest, not all of those types of remedies were ever meant to be part of a recovery when the Grand Bargain was first imagined. The Grand Bargain, of course, is the term that describes the evolution of state workers' compensation systems. The injured worker gave up their right to sue in tort in exchange for a system of compensation for work related injuries for lesser damages without having to prove fault. The worker was to receive medical care and compensation while the employer/workers' compensation insurance carrier paid a schedule of capped statutory benefits. This shift was to make the recoveries and exposures more predictable. It was never intended to shift the burden from the employer to the employee or shift the burden from the private sector to the public sector. The Grand Bargain intended for employers to take care of their injured employees, but as rights and remedies have eroded, the shift has been from employers and their insuring companies meeting their responsibilities to social programs such as Medicare, Medicaid, and Social Security disability absorbing the burden. While employers pay less and less for coverage and insurance companies make record profits, injured workers are relegated to beg for medical care and assistance to support their families. Simply put, benefits have been cut so low in state after state in the race to the bottom that we no longer have a bargain – much less a grand bargain. How did we get here?

History

Workers' compensation acts were adopted in state after state in the 1910's '20's and '30's. Mississippi, in 1948, was the last of the 48 states existing at the time to adopt a workers' compensation act. South Carolina adopted its act in 1935. The purpose of workers' compensation was to provide a sure and stable recovery, not based on a fault system, while giving employers limited liability.

The then unnamed Grand Bargain was described by Professor Emily Spieler thusly:

In the end, arguably all parties won – on average in the ultimate bargain. But the bargain itself – now sometimes called “the grand bargain” – may be viewed as minimalist from the stand point of benefit adequacy, at least as we understand the meaning of adequacy today. Employers gained predictability, a fully insurable risk (now reduced to actuarial assessment of aggregated risks), a level playing field, and immunity from any tort liability.

Although their insurance costs rose, the costs could be passed on to consumers (the popular view at the time) or to workers (particularly those without unions) in the form of lower wages (the dominant economists' view). Insurance companies acquired a large new market. Injured workers and their families theoretically gained guaranteed though limited benefits for obvious traumatic injuries (or deaths) that would otherwise lead to destitution. Benefits were to be measured based on partial replacement of losses associated with reduced earnings or earning capacity only – eliminating the possibility of larger damages based on pain and suffering or other non-economic losses. Perhaps the biggest losers were the small number of workers' who would have successfully obtained relatively large jury awards in tort litigation. Everyone – insurance companies, employers, workers, and unions – had a stake in the adoption of the litigation.”¹

So, the Grand Bargain – even though not originally so titled – was born in the early 1900's. The injured worker gave up their very valuable right to sue for damages in exchange for reasonable but limited benefits in a no-fault or strict liability system. However, benefits paid under workers' compensation systems were generally thought of as inadequate with workers shouldering more than half of the wage loss due to industrial injuries.²

As the years passed and benefit adequacy concerns heightened, Congress passed the Occupational Health and Safety Act in 1970. That Act also created the National Commission on State Workers' Compensation Laws, chaired by Professor John F. Burton, Jr. As Professor Spieler noted, “the Commission was charged to report back to Congress no later than July 31, 1972, after undertaking a comprehensive study and evaluation of state workers' compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation.”³

The National Commission agreed on five basic objectives for workers' compensation programs: broad coverage of employees and work-related injuries and diseases; substantial protection against interruption of income; provision of sufficient medical care and rehabilitation services; encouragement of safety; and an effective system for delivery of the benefits and services. Using these objectives as a starting point, the bipartisan National Commission members unanimously concluded that “the protection furnished by workers' compensation

to American workers presently is, in general, inadequate and inequitable.” They then endorsed 84 recommendations, including 19 recommendations that they regarded as “essential.”⁴

These 19 essential recommendations were thought of as the bare minimums as to what state systems should do to protect injured workers. Based on the work of the National Commission and, perhaps, fear of federal takeover, states began to improve their workers’ compensation systems during the 1970’s and 1980’s. The U.S. Department of Labor tracked compliance with the 19 essential recommendations annually until 2004.

However, this focus on benefit adequacy did not continue. By 1990, the focus turned to cutting costs for employers. A U.S. Department of Labor report noted, “the political focus on reducing costs for employers grew, and by the early 1990’s, benefits came under attack. Various new legislative changes were championed as reforms. It was a race to the bottom: as each state compared its statute with those of neighboring states, found areas of greater generosity, and moved to change those provisions of its law.”⁵ In state after state, legislatures chose to promote business friendly climates, i.e., enact employer friendly workers’ compensation laws, rather than protecting injured workers.

It seems that any time there is a workers’ compensation insurance rate increase to employers in a state, a cry for benefit “reform” rings out. The argument is that higher workers’ compensation premiums deter businesses from locating in a state. However, studies do not support this theory and there is evidence that this theory is simply not true.⁶

This argument was used to reform the workers’ compensation law in South Carolina in 2007. The National Council on Compensation Insurance (NCCI), the licensed rating organization in South Carolina since 1947, recommended a 32.9% loss costs increase within the state. Originally, the Department of Insurance argued for a lower rate. The Consumer Advocate opposed the drastic increase and the South Carolina Small Business Chamber of Commerce intervened. Kevin Holmes and I represented the Small Business Chamber of Commerce. During trial, the Department of Insurance actually reversed their position and argued for a higher increase. At trial, we were able to significantly reduce the proposed increases to 18.4%. Nevertheless, the business and insurance lobby were able to convince the legislature

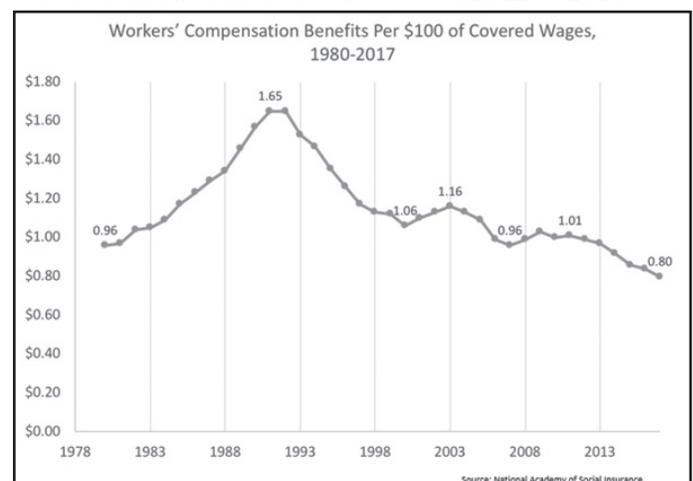
to make cuts to the rights and benefits to injured workers in South Carolina. In fact, South Carolina is not alone in this nationally orchestrated insurance industry incentive to increase profits by reducing benefits. This pattern has continued throughout the country for the last thirty-five years.

Where are We Now?

In 2016, the Department of Labor issued their report entitled, “Does the Workers’ Compensation System Fulfill Its Obligation to Injured Workers?” The conclusion was a resounding NO! It said, “working people are at great risk of falling into poverty as a result of workplace injuries and the failure of state workers’ compensation systems to provide them with adequate benefits. Despite the sizable cost of workers’ compensation, only a small portion of the overall costs of occupational injury and illness is borne by employers. Costs are instead shifted away from employers, often to workers, their families, and communities.”⁷

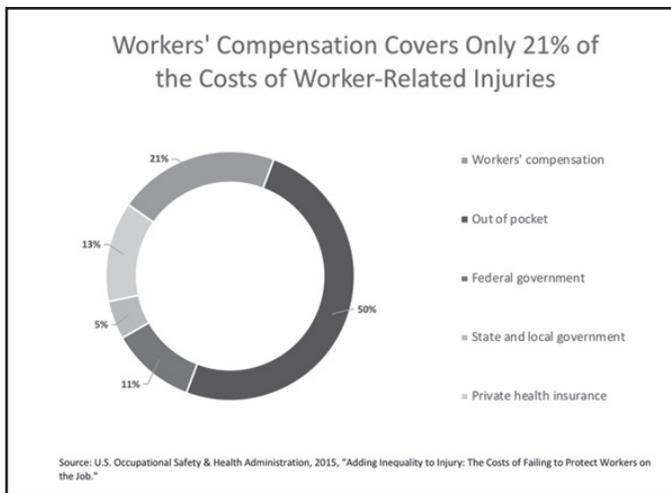
Do recent statistics support this conclusion? Definitely! Let’s look at what has happened to injured workers, employers, and workers’ compensation insurance carriers over the last few years.

Injured workers – According to the National Academy of Social Insurance, workers compensation benefits paid to injured workers dropped to 80 cents per \$100 of covered wages in 2017.⁸ That number is the lowest amount of benefits paid per \$100 of covered wages since at least 1980. In 1980 that number was 96 cents per \$100 of covered wages. In 1990 and 1991, benefits were paid at \$1.65 per \$100 of covered wages. Twenty years before 2017, in 1997, benefits were paid at \$1.17 per \$100 of covered wages. Benefits have decreased by 32% since 1997. That same report shows that benefits paid to injured workers declined in 46 states from 2012 – 2016.



The U.S. Occupational Safety and Health Administration issued a report in 2015 finding that “state legislatures and courts have made it increasingly difficult for injured workers to receive the payments for lost wages and medical expenses that they deserve.”¹⁰ The report goes on to find that only 21% of the cost of a work injury is paid for by a workers’ compensation system – just 21%! 50% now comes out of the pocket of the injured worker or their family. The remaining percentages fall to social benefit programs such as social security disability, Medicare, Medicaid, the Affordable Care Act or health insurance. The study went on to conclude in part, “...the failure of the broken workers’ compensation system to ensure that workers do not bear the costs of their injuries and illness, are truly adding inequality to injury.”

These numbers are almost unfathomable. The amount per \$100 of payroll paid to injured workers today is less than half of what it was in 1990 and even lower than it has been at least going back to 1980. Further, we have a system that costs employers \$97 billion per year and yet it only pays injured workers 21% of the cost of an occupational injury.



Employers – Statistics paint a much rosier picture for employers. Returning to the NASI report, employer costs per \$100 of payroll decreased in 45 of 51 jurisdictions and fell to \$1.21 per \$100 of covered wages in 2017.¹² That same number had been \$2.17 in 1993 and \$1.74 in 2003.

An even more startling picture appears when you examine workers’ compensation insurance loss cost rates which form the basis for premiums paid by employers. As stated earlier, business

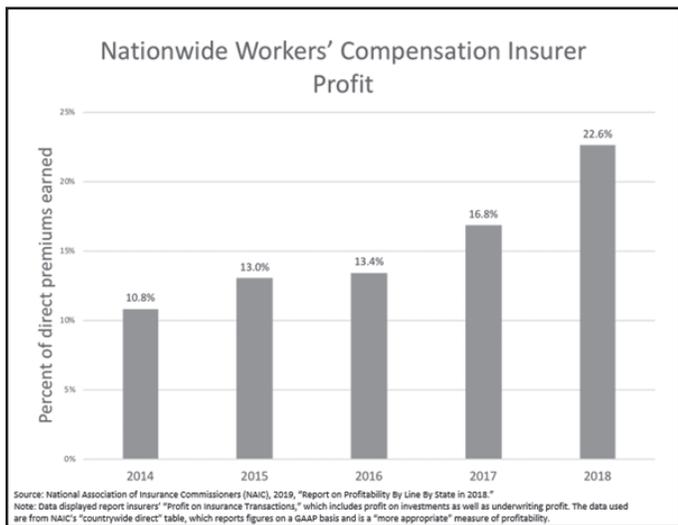
and insurance groups seek to decrease benefits to injured workers in times of increasing rates. In the period from 2014 to 2018, there was an average rate decrease across all fifty states of 20%. Forty-three states saw rate decreases for three consecutive years.¹³ Four other states don’t even count because they are monopolistic states without private insurance. Yet, even those monopolistic states (Ohio, Washington, Wyoming, and North Dakota) showed decreases.

These decreases continued on into 2019 with another 10% drop expected.¹⁴ The cumulative average decrease since 2003 has now reached almost 40%. Massachusetts, Florida, Virginia, Washington, and New Jersey have already announced rate cuts for 2020. The trend continues.

South Carolina is one of the three states that did not have three consecutive years of loss costs decreases from 2014-2018. However, don’t let that fool you. South Carolina loss costs filings have seen an aggregate drop of 28.63% since 2009 with a 7.0% decrease in 2018 and 9.2% decrease in 2019.¹⁵ An additional 10.5% decrease is currently proposed by NCCI for 2020. As further evidence of how good the market is in the state, eleven new carriers entered the South Carolina market during 2018.¹⁶

Employers are paying the least per \$100 of payroll than ever reported and are getting huge decreases in workers’ compensation insurance premiums. One would expect that as insurance rates go down for employers, benefits for injured workers would rise. Not so fast – that has not been the case.

Insurance carriers - If you think the employers have it good, just wait until you hear how things are for the workers’ compensation carriers. The National Association of Insurance Commissioners (NAIC) issued a report showing a steady increase in workers’ compensation profit from a healthy 7.4% of direct premiums written at the start of the decade in 2011 after the slump of the Great Recession to a whopping 22.6% in 2018. The increase from 2017 to 2018 was the largest in any of the past five years.¹⁷ The increase over the six year period is over 100%!



This profit explosion led one workers' compensation insurer CEO to say, "Today workers' comp is literally propping up the profitability of the business."¹⁸ Sales of workers' compensation insurance policies have become the most profitable line of business for property and casualty companies.

So what does all of this mean? It is pretty clear that benefits paid to injured workers is lower than any time since 1980 and represents only 21% of the cost of the injury. At the same time insurance rates have been in freefall for employers while insurance carriers enjoy skyrocketing profits. It has now been 48 years since the National Commission issued their nineteen essential recommendations. Workers are hardly any better off today than they were in 1972 and are certainly worse off today than they were in the 1980's. WILG—the Workers' Injury Law & Advocacy Group—completed a study in 2018 that concluded that states on average complied with less than 13 of the National Commission's 19 essential recommendations. If we haven't reached the bottom in the race to the bottom, surely we can see it from here.

This begs the question - if increasing rates are grounds to cut benefits, why aren't decreasing rates grounds for increasing benefits to maintain the balance of the Grand Bargain? But, still there has been no cry for workers' compensation "reform" across the country to protect workers. Instead, we face legislative fights across the country over classifying employees as independent contractors so as to remove them from coverage; limiting access to medical care through drug formularies, utilization reviews, and medical treatment guidelines; reductions in numbers of claims

through prevailing cause standards, restricting total disability benefits, and limiting repetitive trauma and psychological claims.

Over all these years, injured workers have not been hit by one knockout blow. Rather, injured workers have seen their rights and benefits wane by death through a thousand cuts. ProPublica and NPR described it this way: Over the past decade, state after state has been dismantling America's workers' comp system with disastrous consequences for many of the hundreds of thousands of people who suffer serious injuries at work each year, a ProPublica and NPR Investigation has found. The cutbacks have been so drastic in some places that they virtually guarantee injured workers will plummet into poverty. Workers often battle insurance companies for years to get surgeries, prescriptions, and basic help their doctors recommend... The changes often passed under the banner of "reform" have been pushed by big businesses and insurance companies on the false premise that costs are out of control. In fact, employers are paying the lowest rates for workers' comp insurance since the 1970's. And in 2013, insurance carriers had their most profitable year in over a decade, bringing in a hefty 18 percent return."¹⁹

Workers' compensation lawyers have undergone a metamorphosis to become constitutional lawyers to protect injured workers. Constitutional victories have been won in at least ten states striking down "reform" laws on due process, equal protection, and separation of powers grounds. These victories were genius work done by dedicated and talented lawyers. However, the fact that the situation for injured workers had gotten so out of whack, so unbalanced that constitutional victories were possible, just goes to show you how skewed our system has become.

Each year the state of Oregon publishes the Oregon Workers' Compensation Premium Rate Ranking Summary. This survey is much ballyhooed among insurance industry executives and legislators. The study ranks premium rates among states with each state jockeying to have the lowest premium ranking and the median increasingly creeping lower by the year. No such annual study exists to rank delivery of benefits or adequacy of benefits paid to injured workers.

In the 2016 Department of Labor report, President Barack Obama was quoted as saying, "if you work hard in America, you have the right to a safe

workplace. And if you get hurt on the job, or become disabled or unemployed, you should be able to keep food on the table.”²⁰

As workers’ compensation practitioners most, if not all, of us believe:

- **Getting hurt at work should not mean that you fight every day to get the medical care you need;**
- **Getting hurt at work should not mean that you live below the poverty line;**
- **Getting hurt at work should not mean that you can’t send your kids to college;**
- **Getting hurt at work should not mean that you have to file for bankruptcy;**
- **Getting hurt at work should not mean that you lose your home.**
- **Getting hurt at work should not mean that you lose your dignity.**

Yet, no matter how hard we fight in our individual law practices, we see each of these things happen all too often. Some scholars have recommended a new National Commission on State Workers’ Compensation Laws and others have suggested a National Minimum Standards bill for workers’ compensation. I, for one, would applaud any move to improve the lives of injured workers and put the responsibility back on the insurance companies who have accepted premiums to cover the risk. America has always revered the ideals of hard work and family. Workers toil daily in service to their employers and for the purpose of supporting their families. Shouldn’t we also honor, revere, and protect our workers when they lose life or limb in support of those ideals?



William L. Smith II practices workers’ compensation with Chappell, Smith & Arden, P.A. in Columbia, South Carolina and presently the national President of WILG.

1. Emily Spieler, (Re) Assessing the Grand Bargain Compensation for Work Injuries United States. 1900-2017. Rutgers University Law Review, Vol. 69, 904-905.
2. Spieler, supra pp.. 922-923, quoting Arthur Reeda, Adequacy of Workers’ Compensation, at 225
3. Spieler, supra p 927.
4. Department of Labor Report, Does the Workers’ Compensation System Fulfill Its Obligation to Injured Workers?, p. 10.
5. Department of Labor Report, supra, p.13.
6. Department of Labor Report, supra, p. 21 and Bartik TJ Journal of Business & Economic Statistics 1985-3: 14-22.
7. Department of Labor Report, supra, p.1.
8. National Advocacy of Social Insurance, Workers’ Compensation: Benefits, Costs, and Coverage, October 2019, p. 36.
9. NASI report, supra, p. 36.
10. Occupational Safety and Health Administration, Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, 2019, p. 6.
11. OSHA report 2015, supra, p. 2.
12. NASI report, supra, p. 41.
13. Oregon Workers’ Compensation Premium Rate Ranking, 2018.
14. Rabb, William, 2019 Residual and Voluntary Net Premium Dropping, Reports Show, Work Comp Central, November 13, 2019.
15. South Carolina Department of Insurance Workers’ Compensation Insurance Coverage; The State of South Carolina Market, December 21, 2018, p. 10.
16. South Carolina Department of Insurance, supra, p. 4.
17. National Association of Insurance Commissioners, 2019, “Report on Profitability by Line by State in 2018.
18. Goodman, Elaine, Insurance Execs Express Caution on Comp Despite Record Profits, WorkCompCentral, September 16, 2019.
19. Michael Grabell & Howard Berkers, The Demolition of Workers’ Comp, ProPublica, March 4, 2015, p. 2.
20. Department of Labor Report, supra, p. 1.