

Statement on
Workers Compensation:
Recent Developments in Illinois and in the Nation

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I. Introduction

Speaker Madigan, Minority Leader Durkin, and Members of the Illinois House of Representatives. Thank you for the opportunity to testify about “Workers’ Compensation: Recent Developments in Illinois and in the Nation.”

I am an Emeritus Professor at Rutgers University and at Cornell University. I previously was a Professor in the Graduate School of Business at the University of Chicago. I was the Chairman of the National Commission on State Workmen’s Compensation Laws, which submitted its *Report* to Congress and to President Richard Nixon in 1972. I have conducted research and served as a consultant on workers’ compensation throughout my career.

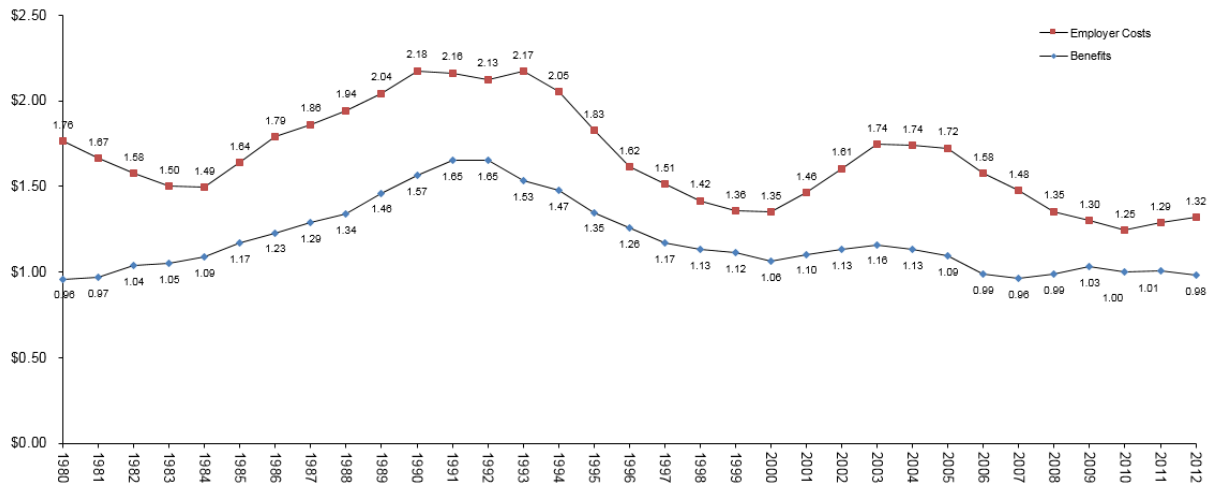
II. Workers’ Compensation: National Developments

Each state has a workers’ compensation program that provides cash benefits, medical care, and rehabilitation benefits to workers who are disabled by work-related injuries and diseases as well as survivors’ benefits to families of workers who experience workplace fatalities. There are also several federal workers’ compensation programs. However, there are no federal standards for state workers’ compensation programs, and there are considerable differences among the states in the level of benefits, the coverage of employers and employees, and the rules used to determine which disabled workers are eligible for benefits.

The initial state workers’ compensation programs were enacted in 1911, which makes workmen’s compensation (as the program was known until the 1970s) the oldest social insurance program in the U.S. Over the last 100 years, workers’ compensation programs have experienced periods of reform and regression. Workers’ compensation programs have varied over time in the benefits paid to workers and the costs for employers. Figure 1 indicates that benefits per \$100 of covered wages increased from 1980 (the earliest year with comparable data) to the early 1990s, declined rapidly during

the 1990s, and then generally declined slowly from 2000 until 2013. Costs fluctuated very roughly in tandem with benefits: costs declined from 1980 to the mid-1980s, then increased until the early 1990s, followed by steep declines in the balances of the 1990s, followed by increases for several years in the early 2000s, and then generally declining until 2012. In recent years, both benefits and costs as a percent of payroll have been near their low points for the period since 1980.

Figure 1
Workers' Compensation Benefits and Costs per \$100 of Covered Wages, 1980–2012



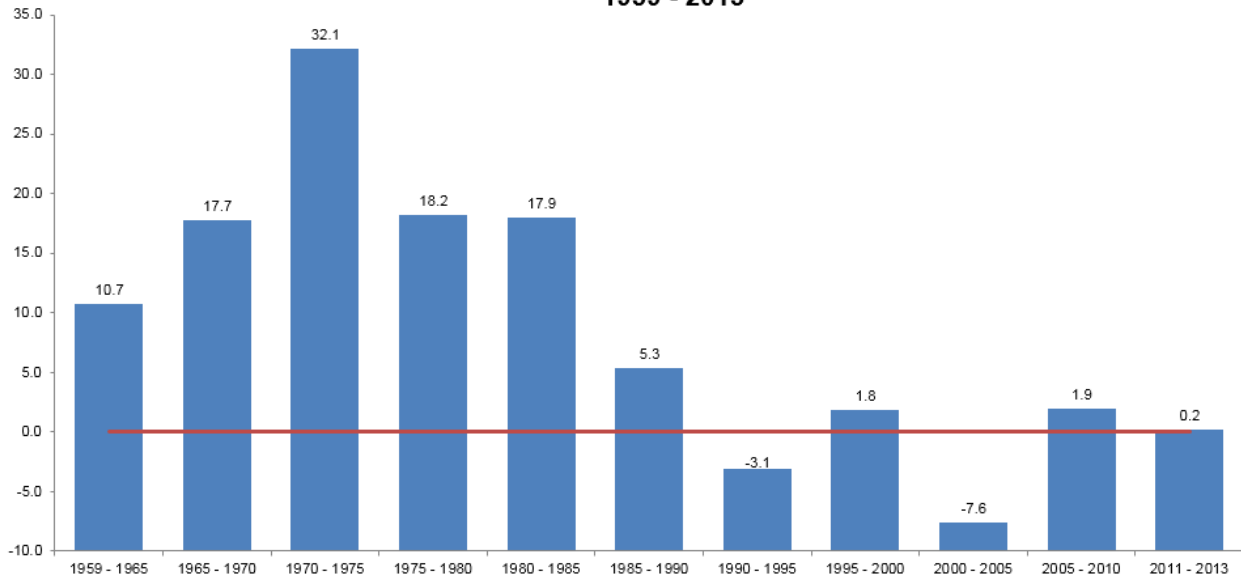
Source: Sengupta, Baldwin, and Reno 2014, Figure 1

The changes in benefits and costs per \$100 of covered wages since 1980 are explained in part by the changes in state workers' compensation statutes. The National Council on Compensation Insurance (NCCI) provides advisory ratemaking and statistical services for the workers' compensation programs in 35 states (including the District of Columbia) (NCCI 2014, 7). The NCCI publishes an *Annual Statistical Bulletin* (ASB), which includes data on these 35 states plus data from all other states except those with exclusive state funds. The NCCI publishes state and countrywide data on adjustments in premium level due to several factors, including benefit change, which "refers to adjustments in premium level to account for benefit changes adopted by the various state legislatures, as well as medical fee and hospital rate changes (NCCI 2014, Exhibit 1)." Figure 2 shows the changes in statutory benefits for the five year intervals from 1959 (when the NCCI data series began) to 2013.

- **The 1960s.** Statutory benefits increase by more than 28 percent.
- **The 1970s.** Statutory benefits increased by more than 50 percent.
- **The 1980s.** Statutory benefits increased varied over the decade: up 18 percent in the first five years but only 5 percent in the last five years. 1985.
- **The 1990s.** For the first time since at least the 1950s, statutory benefits declined during the decade, although the decline was only one percent.

- **The 2000s.** Statutory benefits declined over five percent during the decade.
- **The 2010s.** Statutory benefits have been essentially been flat.

Figure 2
Workers Compensation Statutory Benefits Changes
Percentage Changes in Subperiods
1959 - 2013



Source: Calculations by John Burton based on NCCI (2014 and earlier editions)

The declines since 1990 have been due to several factors. In some jurisdictions the weekly benefit amounts or the durations of some types of benefits have been reduced. Of particular importance to this factor are the changes in permanent partial disability (PPD) benefits, which accounted for 62.0 percent of all incurred cash benefits in 2009 (Sengupta, Baldwin, and Reno 2014, Figure 4). The adequacy of PPD benefits has been examined in several important studies. Hunt (2004) provides a comprehensive survey of the meaning of adequacy of benefits in the workers' compensation program. The generally accepted standard is that workers' compensation benefits should replace two-thirds of the wages lost because of the work injuries. However, Boden, Reville, and Biddle (2005) found that in the five jurisdictions they examined (California, New Mexico, Oregon, Washington, and Wisconsin) permanent partial disability benefits only replaced between 16 and 26 percent of earnings losses in the ten years after the workers' were injured, which meant the "replacement rates do not approach the 2/3 benchmark for adequacy." The data from California used by Boden, Reville, and Biddle involved workers injured in 1994 and subsequent changes in the PPD benefits in California have probably made the benefits even less adequate.

While the reductions in the statutory amounts and duration of benefits explain some of the decline in benefits since 1990 shown in Figures 1 and 2, a less obvious set of changes that limit access for disabled workers to the workers' compensation programs may be more important (Guo and Burton 2010; Spieler and Burton 2012). These changes include limiting the compensability of claims involving particular medical diagnoses, such

as stress claims; limits on coverage when the injury aggravates a pre-existing condition; and procedural and evidentiary changes, such as requiring “objective” medical evidence and imposing a stricter burden of proof on workers.

An example of the effects of restricting eligibility on workers is provided by Oregon, where Thomason and Burton (2001) estimate that a series of legislative provisions resulted in benefits (and costs) being about 25 percent below the amounts they would have been in the absence of the more restrictive eligibility standards. The legislative provisions included a requirement that the work injury be the major contributing cause (MCC) of the worker’s disability in order for the worker to be eligible for any workers’ compensation benefits. This requirement contrasts with the traditional approach in workers’ compensation in which a worker is eligible for benefits so long as the work injury is a nontrivial source of his or her disability.

One consequence of the reduction in permanent disability benefits and the tightening of eligibility standards in workers’ compensation is that some disabled workers are turning to the Social Security Disability Insurance (SSDI) program for financial support. Guo and Burton (2012) examined the increase in SSDI applications between the 1980s and 1990s and found that most of the increase in applications was due to aging of the population and women’s increasing workforce participation, but that changes in state workers’ compensation programs during the 1990s resulted in a modest increase in SSDI applications during that period.

While the SSDI program is providing some relief to workers adversely affected by changes in state workers’ compensation programs, many if not most workers affected by these changes will not qualify for SSDI benefits because SSDI benefits are only provided to workers with a significant work history (unlike workers’ compensation, where workers are eligible from the first day of employment). In addition, SSDI benefits are only provided to workers with permanent and total disabilities.¹ In contrast, workers’ compensation benefits are provided for both permanent total and permanent partial disability. The most important type of workers’ compensation benefits in terms of the amount of cash benefits is PPD benefits, which account for 62.0 percent of all cash benefits. Although some of the workers’ receiving PPD benefits may qualify for SSDI benefits, many will not because of an inadequate work history in jobs covered by the Social Security program and because of injuries that are permanent but not totally disabling. These workers thus will experience extra financial burdens as a result of the reduction in workers’ compensation benefits.

III. Workers Compensation in Illinois: Recent Developments

Illinois made several changes in its workers’ compensation statute in House Bill 1698, which was enacted in 2011. These included (1) adding a requirement that the injured worker has the burden of proof, to be shown by a preponderance of the evidence, that the worker sustained an accident arising out of and in the course of employment; (2) limitations on the choice of treating physician; (3) revisions in the medical fee schedule; (4) limitations on the awards for carpal tunnel syndrome; and (5) requiring the use of the American Medical Association *Guides to the Evaluation of Permanent Impairment* to determine impairment ratings for permanent partial disability benefits;.

Because most workers' compensation statutory changes only apply to injuries that occur after the effective date of the act and because cases with serious injuries often take years to resolve, the effects of House Bill 1698 are still working their way through the system. The National Council on Compensation Insurance (NCCI 2014, Exhibit 2) estimated the effect of HB 1698 would reduce workers' compensation premiums by 8.8 percent on September 1, 2011 (the effective date of the bill). Subsequently, the NCCI calculated that experience with the Illinois law warranted a 3.7 percent increase in premiums as of January 1, 2012 (shortly after the law went into effect), followed by 5.1 percent and 6.0 percent declines in premiums due to the experience with the Illinois law on January 1 of 2013 and 2014.

The National Academy of Social Insurance (NASI) also reported decline in Illinois workers' compensation benefits that suggest that HB 1699 is resulting in lower payments of benefits. From 2008 to 2010, total workers' compensation benefits increased by 1.0 percent in Illinois, followed by a 10.1 percent decline from 2010 to 2012 (Sengupta, Baldwin, and Reno 2014, Table 9). For the five years from 2008 to 2012, total workers' compensation benefits declined by 9.3 percent in Illinois, which meant that Illinois ranked 44 out of 51 jurisdictions in the five-year percent increase in total payment of workers' compensation benefits.

In another NASI measure of benefits (Ishita, Baldwin, and Reno 2014, Table 12), namely workers' compensation paid benefits per \$100 of covered wages, Illinois increased by \$0.06 between 2008 and 2012, followed by a decline of \$0.19 per \$100 of wages between 2010 and 2012. (Nationally, benefits per \$100 of payroll increased by \$0.02 between 2008 and 2010 and declined by \$0.02 between 2010 and 2012.) For the five years from 2008 to 2012, workers' compensation benefits per \$100 of payroll declined by \$0.13 in Illinois. Illinois ranked 45 out of 51 jurisdictions in the five-year changes in workers' compensation benefits per \$100 of payroll.

NASI also provides information on workers' compensation costs to employers per \$100 of payroll (Sengupta, Baldwin, and Reno 2014, Table 14). Workers' compensation costs declined by \$0.07 between 2008 and 2010, followed by a \$0.02 decline from 2010 to 2012. Between 2008 and 2012, employers' costs declined by \$0.11 in Illinois compared to a national average decline of \$0.03. Illinois ranked 26 out of 51 jurisdictions in the five-year changes in workers' compensation benefits per \$100 of payroll.

Workers' compensation costs per \$100 of payroll remain above the national average in the NASI data. However, the gap has narrowed from 12 percent above the national average in 2010 (\$1.37/\$1.22) to 4 percent above the national average in 2012 (\$1.34/\$1.29). More recent data compiled by the Oregon Department of Consumer and Business Services (2015, Table 1) indicates that workers' compensation premium rates in Illinois ranked 4th in the country in 2012 and dropped to 7th in 2014. The Oregon study (2015, Figure 5) also reported that Illinois experienced a 12.7 percent decline in net five-year voluntary premium level change from 2010 to 2014, which was the 11th largest decline among the 47 jurisdictions in the study.

A final component of the Illinois workers' compensation system with relevant data is the workers' compensation insurance industry. The latest data from the National Association of Insurance Commissioners (2014, 129-130) indicates that private carriers

in Illinois had an underwriting profit of 4.0 percent of premium in 2013 (which is roughly equivalent to a 96.0 combined ratio). (The national average for underwriting profit in the workers' compensation industry was 1.6 percent of premium in 2012). After adding the effects of investment gains and taxes on transactions, the profits on insurance transactions were 9.1 percent of premium in Illinois in 2013 (roughly equivalent to an overall operating ratio of 90.9). (The national average the profits on insurance transaction in the workers' compensation insurance industry was 9.4 percent of premium.)²

The essence of this review is that subsequent to the 2011 amendments to the Illinois workers' compensation statute, benefits for workers and costs for employers have declined relative to benefits and costs in other states, while the profitability of the Illinois workers' compensation insurance industry is close to the national average.

III. Workers' Compensation in Illinois: Proposed Changes

Governor Rauner (Rauner 2015) has made several proposals for changes in the Illinois workers' compensation program, including a fee schedule reduction, a narrowing of what constitutes travel for purposes of workers' compensation coverage, change in the factors that can be used to determine the extent of PPD to allow sole reliance on the AMA Guides, and a change in the causation standard. The proposed change in the causation standard is:

The causation standard should be raised from an "any cause" standard to a "major contributing cause" standard. The accident at work must be more than 50% responsible for the injury compared to all other causes.

The Governor's discussion of this proposed standard indicates that several states have recently passed laws requiring the workplace to be "the *primary* cause for workers' compensation to be compensable," and indicates that "Florida's major contributing cause standard is identical to the one we are proposing."

The Governor's history of the major contributing cause (MDD) standard is truncated. The MCC requirement was introduced into the Oregon workers' compensation statute in 1993. Thomason and Burton (2001) estimates that a series of legislative provisions (including the MCC provision) resulted in Oregon benefits (and costs) being about 25 percent below the amounts they would have been in the absence of the more restrictive eligibility standard. The purpose of Governor Rauner's proposal is to improve the competitive environment in Illinois by reducing workers' compensation costs, but this can only be accomplished by reducing benefits paid to injured workers.

There is another aspect of the MCC proposal that is also not mentioned in the Governor's document, namely the possibility that the MCC provision may jeopardize the exclusive remedy provision in workers' compensation. A brief review of the history of workers' compensation may be helpful.

Prior to the enactment of workers' compensation statutes, workers had the right to bring negligence (tort) suits against their employers for work-related injuries. Negligent employers had several special defenses (such as contributory negligence), but employees were increasingly successful in the negligence suits in the early 20th century. For this and other reasons, states began to pass workers' compensation laws around

1910. These laws had provisions of benefit to workers: they were no-fault laws (the employer is liable for workers' compensation benefits even if the employer is not negligent, and the employer can no longer use the special defenses). These laws also had features of benefit to employers: workers' compensation statutes provide cash benefits that are less than the potential recovery under tort suits. And workers' compensation is the exclusive remedy of the employee against the employer, which means that the employee cannot bring a tort suit against the employer (even if the employer is negligent). Needless to say, this is a short summary of a complicated topic, but I hope it is sufficient for this presentation.

Given this historical features of the workers compensation principle, a current issue is: Can a workers' compensation statute both (1) contain requirements that make it impossible for a worker to qualify for workers' compensation benefits and (2) contain provisions that preclude the worker from bringing a tort suit by stating that workers' compensation is the exclusive remedy for a workplace injury? In essence, can there be a dual denial of both workers' compensation and tort remedies?

The Oregon legislature passed legislation in 1993 denying workers' compensation benefits unless the worker could prove that work exposure was the major contributing cause (MCC) of an occupational disease. A worker who experienced a work-related disease that did not meet the MCC requirement was denied workers' compensation benefits. The Oregon Supreme Court, in *Errand v. Cascade Steel Rolling Mills, Inc.*, 888 P.2d 544 (Or.1955), relying on a statutory interpretation of the Oregon workers' compensation law, held that exclusive remedy provision did not preclude the worker from bringing a tort suit against the employer. In response to *Errand*, the Oregon legislature amended the workers' compensation statute in 1995 to provide that workers' compensation was the exclusive remedy for work-related injuries and diseases, even if the condition was not compensable under workers' compensation because the work exposure was not the major contributing cause. In essence, the Oregon legislature said: when we say dual denial for diseases for which the workplace is not the MCC, we mean it. In *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (2001), the Oregon Supreme Court responded by holding that the Oregon constitution did not allow the legislature to eliminate both the workers' compensation remedy and a tort remedy when the employment is not the major contributing cause of the condition.

While this case established a clear limitation on the exclusive remedy provision in Oregon, similar constitutional challenges in other states have not all been successful³. Nonetheless, adoption of the MCC provision in Illinois may lead to a challenge that this provision violates the state constitution and arguably also the U.S. Constitution.⁴

The challenge to the dual denial of both workers' compensation and tort remedies does not depend on a constitutional challenge. A recent Pennsylvania Supreme Court decision, *Tooev v. AK Steel Corp.*, 81 A.3d 851 (Pa. 2013), considered the statute of repose, which requires a disease to manifest within 300 weeks of the last exposure to the source of the disease.⁵ Two workers, Tooev and Landis, were exposed to asbestos and developed mesothelioma, but their last exposures were 1,300 and 780 weeks before the manifestation of their diseases. Because the claims did not meet the 300 week manifestation rule, they did not qualify for workers' compensation benefits. As a result,

the workers' brought tort actions against their employers, who invoked the exclusivity provision of the Pennsylvania workers' compensation act. The lower courts dismissed the cases, but the Supreme Court reversed the decision based on statutory construction:

It is inconceivable that the Legislature, in enacting a statute specifically designed to benefit employees, intended to leave a certain class of employees who had suffered the most serious of work-related injuries without any redress under the Act or at common law.

By basing the decision on the statutory construction of the Pennsylvania workers' compensation law, the Supreme Court avoided having to deal with constitutional challenges to the dual denial doctrine that were raised in the case.

The essence of this brief excursion into challenges to the dual denial doctrine is that there is in my opinion a significant risk that the adoption of this approach in Illinois will result in challenges to the exclusive remedy provision that will make Illinois employers susceptible to tort suits for work injuries that are no longer eligible for workers' compensation benefits.⁶ This surely qualifies as an unintended consequence of the effort to make Illinois "more competitive in order to increase jobs and grow the economy."

IV. Conclusions

Illinois made several significant changes in the state's workers' compensation program in 2011 which appear to be having their intended effect of lowering the benefits paid to workers and the costs to employers. As a result, the 2011 changes appear to have improved the competitive environment in the state.

Governor Rauner has nonetheless proposed several additional significant changes in the state's workers' compensation programs to further reduce benefits and lower costs. I focused my remarks on one of those proposals - the adoption of the Major Contributing Cause (MCC) standard for causation. The evidence from other states is that the MCC standard eliminates workers' compensation eligibility for many workers. While adoption of the MCC standard would unquestionably reduce costs of workers' compensation benefits for employers, adoption of the standard also poses a significant threat of increased costs for employers if the MCC provision is interpreted to allow tort suits by those workers excluded from the workers' compensation program by the standard.

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Endnotes

¹ “SSDI benefits are paid only to workers who have long-term impairments that preclude gainful employment in the labor market for which the worker is suited by virtue of training or experience.” (Sengupta, Baldwin, and Reno (2014, 45)).

² Burton (2014) discusses the various measures of profitability for the workers’ compensation insurance industry.

³ A successful challenge was *Automated Conveyor Sys. V. Hill*, 362 Ark. 215 (2005), in which the Arkansas Supreme Court stated that disallowing a tort suit for injuries not expressly covered by the workers’ compensation act “is not in line with its stated purpose and, in addition, would contravene . . . the Arkansas Constitution.” An unsuccessful constitutional challenges to the dual denial doctrine In Kentucky is discussed in Willborn et al. (2012, 901.)

⁴ The basis for a challenge to the dual denial doctrine under the U.S. Constitution is provided in Willborn et al. (2012, 901-902).

⁵ This discussion of *Tooey* is largely based on Torrey (2014).

⁶ There is another constitutional issue involving workers’ compensation reductions in benefits and tightening of eligibility rules that is currently being litigated. What if a worker still qualifies for some benefits under a new state law but those benefits are substantially less than the worker was entitled to under the state’s previous workers’ compensation law or that the worker would be entitled to under a workers’ compensation statute with adequate benefits? Can the state still deny the worker the right to bring a tort suit against the employer? Florida Judge Jorge Cueto said no in *Florida Workers’ Advocates v. State of Florida* (generally referred to as the *Padgett* case) (Fla. 11th Cir. Ct., 2014). The case was reheard by the 11th circuit en banc on March 30, 2015 and a decision is pending.

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