# Restructuring Workers' Compensation to Prevent Occupational Disease

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More than 15 years ago the Report of the National Commission on State Workmen's Compensation Laws identified prevention of injuries and illness as a second principal objective of the workers' compensation systems. But the goal of preventing occupational disease has yet to be realized. The workers' compensation systems are replete with structural impediments which undermine effective contributions toward the prevention of occupational disease. Barth and Hunt[1] have identified most of these problems and have made recommendations that might have a salutary impact.

In New York, a new focus on preventing occupational disease has emerged even as a recent estimate of its magnitude has added visibility to the issue in the public policy sphere and stimulated action by a coalition of the labor and public health communities.[2]

This paper discusses some of the presently existing barriers to the linking of the compensation system to the prevention of occupational disease as well as some promising recent efforts to link the state workers' compensation system to the prevention of occupational disease in New York State. The prospects for progress, while promising, are yet uncertain. The commitment of legislators and government policymakers to this hitherto neglected area of workers' compensation will only be sustained if a vigorous coalition campaign can be continued in the years ahead.

## DIMENSIONS OF THE PROBLEM

The gap between estimates of the incidence of occupational disease and the number of occupational disease cases being compensated reflects the fact that the costs of occupational disease are presently being borne by society rather than by employers, who have control over workplace conditions that produce illness. Thus, despite some assertions to the contrary, Barth and Hunt clearly are correct in their observation that, "[w]orkers' compensation creates no adequate incentive for improving health at the workplace to prevent long latent diseases" (Barth,[1] p. 260).

The recognition that the system, historically designed around "no fault" principles, has broken down in relation to occupational diseases is widely shared by diverse observers who have examined it.[3]

In New York, which is not atypical of what prevails nationally, of 112,828 compensated cases closed in 1979, only 1,391 or 1% were occupational disease cases; of this number, 29% were for hearing loss. Only 3% of all compensation awarded was for occupational disease.[4]

The cases that are being handled account for an inordinate amount of time and expense associated with the litigation of a range of issues about which varying degrees of medical and scientific uncertainty may exist. Indeed, the rate of controversions throughout the nation's states is markedly higher for occupational disease claims than for accidental injuries.

## CONTROVERSIONS AND DELAY: IDENTIFYING CAUSES AND FASHIONING REMEDIES

Until controversions and delays are effectively addressed, claims for occupational disease will continue to remain largely outside the workers' compensation system or will continue to be grossly undercompensated through the use of inadequate lump-sum payments often agreed to by financially hard-pressed workers facing medical costs without wage income.

As Shor[5] has pointed out, "the root of the problem is that the employer (or his insurer), and not a financially disinterested factfinder, makes the first determination of whether the claimant has sufficiently proven the exposure-disease link. . . . If a neutral party, neither the claimant nor defendant, were making the determination based on fact rather than on personal interest in the case, the burden of proof could be put on the party contesting the determination. Currently, the burden is one-sided."

As the Interim Report put it, "individual employer liability appears to provide a strong incentive for employers (or their agents) to adopt a defensive litigation strategy which results in extensive litigation within a no-fault system." That report made four important recommendations addressed to the state workers' compensation system's treatment of occupational disease claims (pp. 99–100):

1. Establish legal presumptions to reduce the difficulty of proving the cause of occupational disease.
2. Establish an employer- and/or producer-financed trust fund to pay benefits.
3. Eliminate artificial barriers to occupational disease claims in the law.
4. Establish a neutral administrative body to administer the compensation of occupational disease claims.

To these I would add the following provision: payment of medical expenses for controverted claims. To achieve a more equitable and expeditious payment of medical expenses incurred by individuals filing for worker's compensation benefits, a system should be developed in which health insurers are required initially to pay the cost of medical care for individuals seeking care for a suspected work-related illness or injury. If an individual's claim is sustained by the worker's compensation system, the health care insurer would be reimbursed at the time of settlement or award. If no award is made and the worker is not financially responsible, the insurer could be reimbursed through a special fund. This system would remedy the present situation in which often neither medical insurance nor worker's compensation coverage is available to pay the cost of health care for individuals. As a result of this lack of coverage, individuals often defer a much-needed medical evaluation, and secondary prevention interventions are often foregone.

In sum, steps must be taken to remove barriers to compensation that presently result in the failure to impose the real costs of occupational disease on employers who control workplace conditions. Increased costs may provide an incentive for the employer to clean up the workplace and eliminate hazards that cause disease. Providing knowledge to workers so that they and their unions may press for safer working conditions may also contribute to prevention.

## OCCUPATIONAL HEALTH AND EDUCATION TRAINING OF WORKERS FUNDED BY ASSESSMENTS ON WORKERS' COMPENSATION PREMIUMS

Barth and Hunt[6] recommended the dissemination of information on workplace hazards to both workers and employers as a means to contribute to the prevention of occupational disease. In New York, the state legislature, responding to an initiative of the New York Committee for Occupational Safety and Health (NYCOSH), established a $5 million grant program, funded by an assessment on workers' compensation premiums, to train workers concerning occupational hazards, right to know, and workers' compensation in 1985. NYCOSH led a coalition effort in which labor unions, COSH groups, and occupational health professionals strongly lobbied for the program.

Now in its third year, the program in its first year elicited worker-training proposals totaling more than $11 million, attesting to both the need for such training and the strong interest on the part of unions, COSH groups, employers, and health professionals in the academic sphere.

Training courses and curricula, films, and other resource materials specifically targeted to worker populations at risk of occupational disease have been produced and disseminated. Such programs constitute an approach to the prevention of occupational disease that follows up on the right-to-know movement of the early 1980s.

A mere legal "right to know" can hardly make a substantial contribution to preventing workplace exposures and illnesses, without the training that educates workers to the hazards they face and the means to protect themselves. The program is likely also to have an important educational impact on employers, particularly smaller employers, who as Barth points out, "[i]n some instances . . . know little more than their employees about the hazards to which they are exposed."

## OCCUPATIONAL DISEASE DIAGNOSIS AND PREVENTION CENTERS FUNDED IN PART BY WORKERS' COMPENSATION REIMBURSEMENT FOR OCCUPATIONAL DISEASE SCREENINGS

According to a recent estimate by Landrigan[7] of Mount Sinai Medical Center in New York, "[o]ccupational exposures are responsible each year for more than 35,000 new cases of disease and for an estimated 5,000–7,000 deaths in New York State. The majority of these cases are not recognized as work related by physicians in conventional medical settings. Consequently, diagnoses of occupational disease are frequently not made, and appropriate specific medical intervention is typically not undertaken. Although total cost of occupational diseases in New York State is not known, a partial estimate of only five occupational diseases is placed conservatively at $600 million (in 1985 dollars) per annum.[8] Because of the widespread underdiagnosis of occupational disease, these costs are generally not borne by the workers' compensation system, but instead are transferred to workers and their families, to third-party payers, and to social programs funded by general revenue sources.

Landrigan went on to state that a "new agenda for occupational health is urgently needed in New York State." A central element of this agenda, more fully delineated in the report, is the establishment of a statewide network of fixed and mobile occupational clinics staffed by doctors, nurses, industrial hygienists, and

other professionals trained to evaluate the connection between work and disease. Such a clinic network will permit early diagnosis and rapid intervention, and ultimately will contribute to the prevention of occupational illness in New York State.

Under New York law, however, the workers' compensation system does not pay the medical costs of occupational disease screenings unless such screening results in a positive diagnosis of an occupational illness. Even if an individual or group of workers has clearly been exposed to dangerous levels of toxic substances in the workplace and a screening is medically indicated, no compensation for the costs of such evaluations will be made.

The clinic network is seen as a promising effort toward the prevention of occupational illness, and it seems eminently reasonable that the law be amended to require that the workers' compensation system contribute toward the cost of such efforts through payment for occupational disease screenings for workplace exposures associated with disease.

## INTEGRATING WORKERS' COMPENSATION CLAIMS INFORMATION INTO HAZARD SURVEILLANCE AND PREVENTION EFFORTS

An ancillary and closely related element in New York's approach to preventing occupational illness will be the development of a statewide data collection system incorporating workers' compensation claims' information to identify hazardous occupational exposures and diseases and thereby target enforcement and preventive efforts toward hazardous industries with worker populations at high risk.

## CONCLUSION

Barth has observed that as we implement reforms that have the effect of really compensating workers with occupational diseases, we are likely to see, in the short term, some substantial increases in the costs of compensating occupational disease. But he also observes that "[t]he costs to society, and to employers, of occupational diseases are already being borne even if they are not being compensated."

Accordingly, it seems reasonable to infer that increases in compensation costs will provide real visibility to the problem and provide a stimulus to employers and society to undertake serious efforts at improving health and safety in the workplace. To suggest that we cannot afford reforms of the system fails to consider that we already bear the losses associated with occupational exposures and illness, and the real issue, as Barth notes, is "who will suffer the direct and immediate burden for them." It is unjust for workers and their families to suffer the twin failures of our present legal regime either to prevent illness or to compensate sick workers.

### NOTES AND REFERENCES

1. BARTH, P. & H. HUNT 1980. Workers' Compensation and Work-Related Illnesses and Diseases: 257–274. M.I.T. Press. at Cambridge, MA.
2. LANDRIGAN, P., S. MARKOWITZ, *et al.* Occupational Disease in New York State, Report to the New York State Legislature, February 1987. Unpublished.

3. See, "An Interim Report to Congress on Occupational Diseases," submitted to Congress by the U.S. Dept. of Labor, 1980: 54–78; Barth and Hunt, *ibid;* APHA Policy Statement No. 8329 (PP): Compensation for and Prevention of Occupational Disease. APHA Public Policy Statements 1948–present, cumulative. Washington D.C. APHA, current volume; reprinted in Am. J. Public Health (March 1984) **74** (3) 292; see also the report of the Crum & Forster Insurance Company's Task Force on Occupational Disease, released in June, 1983; reported on by S. Tarnoff in *Business Insurance* (August 1983).
4. Compensated Cases Closed in 1979. Research & Statistics Bulletin No. 40 (March 1983).
5. SHOR, G. 1980. Workers' compensation: Subsidies for occupational disease. J. Public Health Policy: 333.
6. BARTH & HUNT, *ibid.*: 262, 265.
7. LANDRIGAN, *ibid*: 6.
8. *Idem*: 38–51.