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Maryland's Workers' Compensation System — Out of Control

by Representative
Martha S. Klima

The workers' compensation program in Maryland has been at the center of economic development and political controversy for at least the last four years and that controversy shows no signs of diminishing in the coming years. At the crux of the problem is the rapidly rising cost of workers' compensation to employers, which is made even more sensitive when the lower costs of surrounding states are compared to Maryland's.

Admittedly, workers' compensation costs are extremely difficult to analyze. Unless and until all states standardize their programs and upgrade reporting of costs, workers' compensation data will never be as accurate or predictable as unemployment insurance costs. However, we do have enough data to say with total certainty: A) that we have a serious problem, and B) where the problem is most acute. With that information, we are able to review how the system works and isolate the major causes of the higher costs for workers' compensation costs in Maryland. All of this has a different implication depending upon your point of view. As a legislator, I'm concerned about the effect of high workers' compensation costs on employment stability in my area, Baltimore County, which is heavily dependent on manufacturing. The loss of manufacturing in Maryland is well known, but manufacturing employment in Maryland has declined by 70,000 jobs or 25% in the last twenty years and by 9,000 jobs in the last year alone. Keep in mind that most of the loss of manufacturing employment in Maryland occurred in the Baltimore metropolitan area of which my district is a part. I believe we cannot underestimate the significance of these losses. While it may be true that our economy is predominantly service oriented,

much of the service employment is derived from the needs of manufacturing and the related economic opportunity that manufacturing creates.

When large manufacturers leave or expand their operations out of state, as many have already done, or simply die a slow and painful death due to competition from sunbelt states or low cost foreign competition, as have many others, everyone in Maryland suffers.

I do not want to leave you with the impression that only manufacturing employment is affected by high workers' compensation costs. Manufacturers are the most sensitive, but all employers in Maryland are adversely affected. Any business that must compete for customers and/or investment with businesses in other states or foreign countries will suffer a substantial economic loss. Even those that do not compete with other businesses, such as utilities, are forced to pass the higher cost, hundreds of millions of dollars per year, to their customers; and consequently, we all lose the economic benefit that those funds could have provided if they could be put to productive use.

As organizations go, unions probably suffer the most because so much of their membership is employed in manufacturing. The statistics certainly bear this out, showing union membership dropping, not only in relative terms, such as percentage of total work force, but also in real numbers such as total union members.

While many are quick to state that manufacturing is passe and that the future is in high tech, which also requires manufacturing and information, reason tells us that our nation is poorer for the loss of its leading role in manufacturing.

In the past decade I've watched as we

have become a consuming nation, taking in more than we produce, a fact which our balance of trade and national deficit confirm.

I realize that Maryland is an excellent job market for scientists and engineers, but I'm not concerned about their future because they'll do just fine no matter what happens.

Maryland's rising youth and minority unemployment rate, at a time when the total unemployment is falling to the lowest rate in seven years, is what concerns me and it's telling us that something is terribly wrong.

The rising dominance of Virginia and other sunbelt states confirms our destiny; and unless we take corrective action immediately, many people in Maryland will suffer extensive economic harm.

While reducing workers' compensation costs alone may not be the remedy to all our economic development problems, it is definitely a problem that we need to resolve if our economic development is to continue. Higher workers' compensation costs are cited by every employer and professional economic development authority that has ever been consulted. If we are to assure Maryland's future economic growth and stability, workers' compensation costs must be made competitive with other areas of the nation, certainly with neighboring states like Virginia where the per employee cost is one-half that of Maryland's.

To understand the problem, we need to look at the comparison of workers' compensation costs between Maryland and other states. A number of studies are available, each demonstrating the seriousness of Maryland's dilemma.

The nation's leading expert on comparison of workers' compensation costs is Dr. John L. Burton, a professor at Cornell

University, who pioneered this area of study for the federal commission that studied workers' compensation in the mid-70's. Dr. Burton's comparison of average weekly costs of workers' compensation per employee shows Maryland's cost as 5th highest in the nation, exceeded only by Alaska, Hawaii, Washington, D.C., and California, all of which have begun the process of revising their workers' compensation programs to reduce costs.

According to Dr. Burton, Maryland's cost for workers' compensation is nearly 40% above the national average, having increased 54% in the four years between 1978 to 1983 and which are continuing to increase at an alarming rate.

Confirming Dr. Burton's comparisons are studies done by the Maryland Department of Economic and Community Development (DECD) and the National Conference on Compensation Insurance (NCCI).

In examining the cause of higher workers' compensation costs, the 1985 report by DECD, entitled "Workers' Compensation in Maryland," identified higher benefit costs as a major contributing factor to the higher cost of workers' compensation in Maryland. What stood out as the extreme in this study was permanent partial benefits. While permanent partial benefits constitute only 5% of total claims, they account for 54% of the claims cost. The number of permanent partial claims in Maryland is 20% higher than the average of the other states in the study. Permanent partial claims costs are 30% higher than the other states compared.

A comparison of costs between Maryland, Virginia, and North Carolina, conducted by the National Conference on Compensation Insurance at the request of the Constitutional and Administrative Law Committee to the Maryland House of Delegates, indicated the following:

Maryland's frequency of claims is higher in all industries and that the contracting industry is the highest of the three industries (contracting, manufacturing, all other industries). Maryland's contracting industry recorded 43% more claims per 100,000 workers than Virginia's and 111% more than North Carolina's, while "death" and "Permanent Total" claims are not significantly higher in Maryland, the much more common "Permanent Partial" and "Temporary Total" are raising the overall frequency in Maryland.

In each industry, Maryland is significantly higher, for cost of benefits per covered worker, ranging from 92% . . . in all other industries to 202% higher in manufacturing. The com-

bination of higher cost per claim in most cases and higher frequency in all industries lead to a much greater cost of workers' compensation benefits in Maryland, than in either North Carolina or Virginia.

In the past few years, I have sponsored legislation that attempted to control higher costs of workers' compensation benefits with a three pronged approach: 1) controlling permanent partial benefit costs, 2) implementation of objective standards for the evaluation of permanent impairments, and 3) improving the administration of claims, and reducing unwarranted attorney involvement.

Permanent Partial Disability Costs and Evaluation of Permanent Impairment

Given the fact that 54% of Maryland's workers' compensation benefit dollar goes to permanent partial disability cases, this aspect of the compensation system must be our first concern. In reaching conclusions as to how to deal equitably with these benefits, several aspects of the problems source deserve attention. First, on the basis of data reported to NCCI, Maryland

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has a much lower than average accident rate. However, the permanent partial frequency is at the national average, meaning that a significantly greater proportion of Maryland cases reach permanent partial status. In addition, the average cost of a permanent partial disability claim in Maryland is approximately \$1,600 higher than average, despite the fact that the maximum weekly benefit for permanent partial cases, other than serious cases, is far lower than in most states.

Maryland's current permanent partial disability benefit structure suffers from at

least two inherent problems. To the extent that such awards are controlled by impairment ratings, there are no standards against which a doctor's evaluation are to be made. As a result, doctors are free to use their own criteria in the rating process. This encourages the use of a select number of doctors in each case, primarily for the purposes of establishing the upper and lower boundaries of the eventual award. This situation is exacerbated by the fact that the commissioners are also free to make their own determinations, with only vague limits established by the statutory and case law, and not necessarily controlled by the doctor's ratings.

The second problem compounds the first. Many awards are based upon industrial loss or loss of wage earning ability. These concepts are incapable of precise definition, and virtually require the use of lawyers and the litigation process if an individual is to realize the maximum recovery, or even the correct recovery from an industrial injury.

These two problems also provide clues for curing uncertainty, unnecessary lawyer involvement and litigation. Any benefit structure that relies upon impairment ratings must be limited through some type of mandatory guidelines, such as the American Medical Association's *Guide to the Evaluation of Permanent Impairment* (AMA Guide). This makes it more likely that all the doctors and commissioners involved are talking about the same thing when they deal with impairment.

In addition, efforts can and should be made to eliminate from the rating process, those practitioners whose judgment is less than neutral. These goals have been accomplished in some other states through statutory and rule-making efforts, as well as through everyday practice by boards and commissions. It appears that the Maryland Workers' Compensation Commission has the ability to adopt either, expressly or impliedly, a rating schedule, and certainly has the ability to communicate to carriers and attorneys the position that it will no longer rely upon doctors whom they do not trust. The bad apples are well known to all involved in any compensation system, including Maryland's, but for numerous reasons, systems continue to permit and sometimes encourage their use.

It may be naive to expect the administrative process to respond to either situation; and as a result, it may be necessary to adopt statutory language providing or requiring the development of a rating schedule. Similarly, consideration should be given to requiring the use of a limited list of acceptable practitioners to perform rating evaluations when controversy exists,

and for their opinions to be as binding as is constitutionally permissible. Despite the problems leading to a demise of the old medical board, a better evaluation mechanism can be developed which will minimize impairment rating disputes. A pure impairment-based system is not an equitable mechanism for dealing with permanent partial disability, since it ignores the different economic effects impairments will have on individuals. Maryland law already recognizes this fact by providing the concept of industrial loss, and by assuming that serious impairments will have a more than proportional effect on people, increasing the weekly benefit rate for those cases.

There are a number of methods which can be used to bring economic reality into the rating process, without the inherent problems of the Maryland system. However, each of the alternatives has its own problems and compromises which may, in given circumstances, result in under- or over-payment of benefits to individual recipients. Some of the more important alternatives are as follows:

1) Recognize that more severe impairments have significantly greater economic impact by increasing the value of awards through a stairstep approach. For example, rate all impairments through the *AMA Guide's* relating them to the body as a whole, and providing 5 weeks of benefits for each point from 1%-15%, 10 weeks for each point from 16%-25%, etc.

2) Recognize economic impact by starting the rating process with impairment evaluation, and modifying the rating to reflect the impact of extremely limited and objective set of factors, such as age, education, physical nature of job, etc.

3) Permit the use of the loss of wage earning ability concept, despite its inherent litigious nature, but only in those cases in which the injured worker cannot return to the same or similar employment or earnings. This type of system has been used to some extent in Wisconsin, with apparent success.

None of these choices is ideal, and there are obviously other combinations which can be used. From a standpoint of a compromise between equity and administrative ease, the modified income replacement approach is of value, but from the standpoint of political reality and the avoidance of some of the potential problems of income replacement systems, the approach in (1) may be our best choice.

Administration

There is a tendency to confuse or com-

bine the concept of administration with that of adjudication. The former deals primarily with routine control of the day-to-day operations of the workers' compensation system and the avoidance or reduction of problems, dispute, and confrontation. The latter comes into play, or should, only when all other alternatives have failed and actual confrontational mechanisms must be utilized. The Maryland workers' compensation system, by design, structure and apparent direction, deals primarily with situations which have already become problems requiring or inviting the use of lawyers. Despite a few contrary opinions, there is almost unanimous agreement that the current system is in the business of adjudication and not administration.

Although proposals have been previously

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discussed in Maryland, which would make the commission somewhat more administrative, a number of considerations should again be highlighted. There is a substantial net benefit to be obtained from active administrative oversight and enforcement of workers' compensation programs. Halfway efforts in this area are of little or no use.

The first issue is the scope of any proposed administration. A completely administrative program that would have the greatest potential for decreased litigation and decreased utilization of benefits would consist of the following:

1) A well publicized program of generalized assistance to all participants in the compensation system through public advertising, brochures, and telephone access. The adequacy of the current program appears to be questionable.

2) Elimination of the requirement that a claim be filed before temporary, total disability payments begin and permit payments to be made automati-

cally by the employer/carrier within a limited period of time after the employer obtains knowledge of the injury and compensable loss of time. Based on the experiences of other states, particularly those utilizing systems which require affirmative written action by the claimant, and on studies identifying the sources of conflict in workers' compensation, the claim requirement almost certainly drives a great number of claimants to lawyers, believing that they are not competent to deal with a legal document which may cause them to lose benefits. Note that there is language on the claim form used in Maryland which warns about possible delay of benefits.

The suggested method of payment, direct pay, is presently utilized in most states and is clearly superior to the system currently in place in Maryland.

3) Review and modification of the existing reporting requirements for benefit payments, to establish a system whereby the administration is provided with timely notice of any change in benefit payment status, i.e., initial payment, modification and termination. This reporting must be coordinated with a data processing program which permits immediate access to case information, and a penalty system which ensures documents are filed as required, and payments made as set forth in the law. Unless employers and carriers are willing to accept responsibility for carrying out mandatory provisions of the law, and providing for administrative oversight of their actions, there is little reason to expect that the perceived need for attorneys and litigation will decrease.

4) Provide injured workers with immediate access to experienced claims personnel within the administration, who in turn have immediate access to the employees claim file on computer, and who have the authority and obligation to try to resolve problems between employee and employer/carrier. Without this type of assistance, claimants have only the legal profession to turn to. Similar programs in other states have been demonstrably valuable in reducing litigation and attorney involvement, particularly when used in conjunction with other programs.

5) Require that every issue, for which a hearing is requested first go through a prompt and highly informal attempt at resolution. Similar systems have been successful in reducing the need

for hearings by 50% in states in which they have been utilized.

The other major administrative issue involves the organization of the administrative body. Although most proposals deal with beefing up the existing agency, efforts should instead be directed towards separating the administrative and adjudicatory functions to the greatest extent possible. If possible, this includes establishing an entirely new administrative agency. It is unrealistic to expect that an adjudicatory body, which for all intents and purposes is a court, can carry on two totally divergent functions. Perhaps more importantly, there is little reason to believe that claimants will cooperate in an open manner with litigation reduction efforts, such as informal conferences, if the agency pursuing the informal remedy is the same body which will be adjudicating the matter should informal means fail. In fact, there may be constitutional problems inherent in a system on which the commission makes serious efforts to reduce litigation through mediation, informal opinions, advice and other methods, while at the same time being responsible for the resolution of formal litigation.

Adjudication

Assuming that steps are taken to separate the administrative function from the adjudication, it would become easier to deal with the actual problems of the litigation process. Despite numerous legislative attempts to control litigation through mandated hearings and similar techniques, there appears to be only one sure way to force a system to operate efficiently, and that is through information.

The primary reason for litigation problems, other than those directly involved in the benefit structure, is lack of knowledge about what is happening within the system. Prior to any legislatively mandated attempt at control, a statutory requirement that the commission maintain accurate records concerning each case coming into the litigation process and its progress until resolution should be enacted. This is neither time consuming nor expensive and will very quickly accomplish two goals. First, the system will operate more effectively because disclosure of problems would raise questions concerning those running the system. Second, remaining problems will be accurately described and appropriate action then taken either legislatively or through the rule-making process.

Attorney Involvement

There are substantially different stories told by knowledgeable people concerning the level of attorney involvement, with estimates reaching as high as 80% of all lost time cases, a phenomenally high level. Irrespective of whose estimate is accurate, the real issue is to what extent the current level is justified by the benefit structure, the current lack of administration, and the emphasis on adjudication. If administrative and benefit changes are implemented, the need for attorney involvement should also be reduced. In order to maximize this effect, the system should be further modified to permit payment of attorney fees only when the services rendered were necessary.

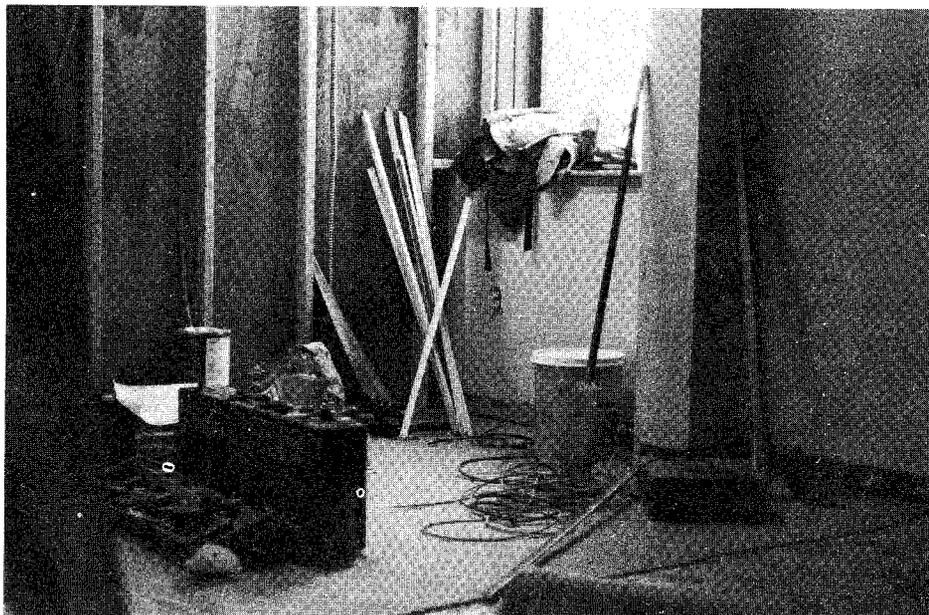
This means requiring early identification of issues in controversy and some realistic tie between fees and results. As is the case with other issues, the reports received as to

attorneys fees currently reflecting their need and value vary greatly.

As much as I might like to think my view of workers' compensation reform is the most reasonable, there is always room for disagreement and compromise. The past election will probably have the greatest influence on whether the workers' compensation law in Maryland is reformed. I am hopeful that new leadership in both the executive branch and legislative branch will argue well for reforming workers' compensation and improving Maryland's economic development efforts in the future.

The Honorable Martha S. Klima

was first elected to the Maryland House of Delegates for the 9th Legislative District in 1982. In 1983 Representative Klima was awarded the "Freshman of the Year Award" by the Speaker of the House, and an "Award of Merit for Outstanding Service to Baltimore County Chamber of Commerce. Representative Klima is presently a member of the House Appropriations Committee, the Subcommittee on Health and Environment, and the Womens Caucus.



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