

**VENERABLE CALIFORNIA RESEARCHER RECOMMENDS  
THAT WORKERS' COMPENSATION BE ELIMINATED ...  
BUT THE PLAN ISN'T READY FOR ROLLOUT**



by David B. Torrey

Frank Neuhauser, *The Myth of Workplace Injuries: or Why We Should Eliminate Workers' Compensation for 90% of Workers and Employers*, p.16, IAIABC PERSPECTIVES (April 2016).

In college I took a course that treated economics from a libertarian point of view. It exposed me to all sorts of counterintuitive ideas. The most memorable was that the interests and wants of workers and the labor movement should be discounted in favor of those of entrepreneurs and capitalists. After all, were it not for the initiatives of the latter groups, workers would not be provided with good jobs and lifestyles but would, instead, be engaged in primitive labor, dressed in animal skins and tilling the soil with sharp sticks.

Hearing this was a shock to my sensibilities. I had been raised by liberals who exposed me to Dorothy Day and the Catholic Worker Movement; and to the encyclical of Pope Leo XIII, *Rerum Novarum* – which emphasized the dignity of the poor and working classes. And my father was a vocal admirer of George Meany. I guess you know which side I was on.

And now: a similarly provocative thesis, addressing labor, is found in the pages of the new IAIABC magazine *Perspectives*. Its counterintuitive logic goes like this: (1) accident statistics show that work is actually *safer* than home and play, (2) thus, work actually *protects us* from injuries and disease; and (3) employers should not, at least for most jobs in the present day, be obliged to insure their employees via workers' compensation.

The author, Frank Neuhauser, is a distinguished member of the research faculty of University of California-Berkeley and a renowned workers' compensation expert. He cites statistics showing that the incurrence of workplace injuries has fallen dramatically over the decades, and particularly over the last twenty years. Injuries suffered outside of work, on the other hand, have not decreased. In the end, time-adjusted statistics show that a person is 10.3 times more likely to be fatally injured on one's own time than at work.

Neuhauser further asserts that, as a result, workers' compensation is unnecessary for the vast majority of workers, to wit, those who labor in occupations that other statistics show are not hazardous. In his view, workers' compensation is a "relic of the early industrial age ...."

This hardly means that Neuhauser is in favor of allowing employers to opt out, as in Texas or under the cunning new Oklahoma machination. To the contrary, he explicitly states that he is against opt-out. Instead, he would have those who do not labor in hazardous industry be covered by their health insurance, as now mandated by the Affordable Care Act, and for wage-loss to be satisfied with short-term and long-term disability plans.

The thesis is thought-provoking, the vision humane (insurance for everybody!), but, in the present day, it's a proposition for academic use only.

First, while it may be that modern work gives rise, statistically, to fewer injuries and deaths, work nevertheless constitutes a significant period of time in our daily lives when some other entity has control over our circumstances. In an age where collective bargaining has declined, where only desultory enforcement of workplace environmental regulations exists, and where the difficult-to-regulate contingent workforce is on the rise, employers who enjoy control over workers should still be expected to maintain no-fault accident insurance for all their employees.

The work environment and the employer control it implicates has legal and, indeed, constitutional dimensions as well. Employers are usually conceived of as having a duty of care to the workers who are under their dominion. An employee who is injured, yet is excluded from compensation, will likely have a tort cause of action against his employer. An employer's private disability policy will not afford an employer tort immunity. This is certainly so in Pennsylvania, where the state constitution guarantees a right of action for personal injury in some forum. Do employers really want to be liable in personal injury civil actions, even those occasional ones brought by employees who have somehow sustained injuries in less dangerous jobs?

Beyond the rights and remedies issue, individuals are supposed to enjoy equal protection under the law. And while Neuhauser has found a rational basis for treating individuals differently, it is still unfair to provide generous benefits for one type of worker who has sustained a serious injury, but to deny the same for another with precisely the same injury.

Second, most employees do not, in fact, enjoy coverage by STD or LTD plans. Neuhauser cites the Bureau of Labor Statistics for the proposition that 40% of private industry workers have access to STD and 35% have access to LTD. That's unimpressive in the first place, but it's surely lower in the class of workers who appear in disputed workers' compensation cases. The bulk of these individuals are members of the working class or are the working poor. Many, if not most, have been living paycheck to paycheck even before their injury. It would be facetious to inquire of most whether they can survive on their LTD plan while the lawyers duke it out.

In an unsubstantiated assertion, Neuhauser declares that STD and LTD programs "are much more practical and efficient" than workers' compensation. Perhaps this perception exists because such plans are typically not regulated by an agency. (If there is

no agency for oversight, there is necessarily less friction cost.) Hence, among other things, disability plans do not feature enforced protections like a 21-day accept or deny rule (as in Pennsylvania) which is designed to prompt effective delivery of benefits. Non-payment and other disputes under such ERISA-governed plans are not subject to quick resolution and can end in federal court litigation. Is this where employers, employees, and society at large want to go?

Third, while the welcome enactment of the Affordable Care Act has brought group health insurance to many more workers, a significant portion of the population still has no health insurance coverage. Pennsylvania workers tell this to workers' compensation judges every day of the week. They may lose their coverage when laid off and have no money to buy their own plan, they may have simply decided to "self-insure" and take a possible hit at tax-time, or they may have simply ignored the law altogether.

Like many an offering intended to provoke, Neuhauser's article features an alarming title which, in the end, isn't really borne out. Workplace injuries are certainly not a "myth" in historical perspective, and he doesn't so claim. His real point, beyond the rhetoric, is that, in the present day, when considered next to the risk of injury outside the workplace, work injuries no longer constitute a grave crisis.

Yet his further conclusion that workers' compensation can be eliminated for all but the hazardous occupations, with everyone else safe in the promise of coverage by private disability and group health plans, is unviable in the present day for the reasons set forth above.

Workers' compensation could conceivably be so restricted only when our country has adopted a commitment to social welfare and wrap-around social insurance programs such as are current in Europe. And, it is worth remembering that, in Europe, workers' compensation has endured as a program for *all* workers, not just those in hazardous employments.

In any event, such an American commitment doesn't exist today. Our society, rightly or wrongly, persists in its refusal to afford all working citizens access to insurance. Indeed, as I write, one candidate for president is promising to repeal the Affordable Care Act – and he enjoys significant popularity.

We can be pleased that work is now a safer place. That hardly means that, in the current environment, it is either practical, legal, or just, to eliminate no-fault insurance for those injuries that persist.

I posited above that the author's vision was humane. Indeed, he proposes new mandatory laws which are the polar opposites of opt-out "ripper" legislation. In this regard, we learn at the end of the article that his plan actually constitutes not just an alteration of the present order, but overthrow of the current system and *replacement* with a new one:

How will workers fare if workers' compensation is eliminated for low to medium risk employers? Overall, I'd say workers will potentially do much better! Most important, economic analysis suggests that the cost of workers' compensation is partially or entirely shifted to workers in the form of lower wages .... Legislation eliminating workers' compensation could 1) require employers to offer short-term disability insurance, 2) adopt a universal, state disability insurance program, like California, or 3) allow workers to buy disability insurance with the higher wages that would develop over time. Overall health costs would certainly be lower, disability insurance would be cheaper and workers would be more broadly covered from wage loss related to disability.

It is questionable whether these suggestions are either wise or legally and politically cognizable. They are under-examined propositions for wholesale change that are plainly not ready for rollout. For now, workers' compensation is the best way of comprehensively covering individuals while they are at work, under someone else's control, and sustain injury.

As for workers' compensation being a "relic," some relics are *sacred*.