



PENNSYLVANIA BAR ASSOCIATION
WORKERS' COMPENSATION LAW SECTION

NATIONAL COMMISSION REPORT-AT-50 PROJECT
January 2022

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3. *Supplemental Studies for the National Commission on State Workmen's Compensation Laws* (1973)

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2. Peter S. Barth, *Some Reflections on the National Commission and its Legacy*, WORKERS' COMPENSATION POLICY REVIEW 21 (July/August 2004), <http://workerscompresources.com/wp-content/uploads/2012/11/JA04.pdf>.

3. Observations of Peter S. Barth, *The Twentieth Anniversary of the National Commission on State Workmen's Compensation Laws: A Symposium*, I-180, at I-188, in 1994 WORKERS' COMPENSATION YEAR BOOK (LRP Publications 1994) (on file with DBT).

1. John F. Burton, Jr., *Should There be a 21st Century National Commission on State Workers' Compensation Laws?*, Address, American Bar Association Workers' Compensation Sections Conference (Coral Gables, FL, March 13, 2013) (on file with DBT),
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2. John F. Burton, Jr., *The National Commission Thirty-Three Years Later: What Have We Learned? (Part 1)*, 42 IAIABC JOURNAL 21 (Fall 2005) (on file with DBT).

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https://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/workers_compensation_committeemidwinterseminarandmeeting/reflections_burton.authcheckdam.pdf.

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6. John F. Burton & Monroe Berkowitz, *A Paean to an Active Workers' Compensation Agency*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR 1 (Sept.-Oct. 1989), <http://workerscompresources.com/wp-content/uploads/2013/07/WC-Monitor-Vol-2-No-7-Paean.pdf>.

> James Chelius, *Current Issues in Workers' Compensation* (W.E. Upjohn Institute for Employment Research 1986) (an anthology, based on papers presented at a conference, treating issues then current in workers' compensation, and imbued with references to the National Commission and the intervening fourteen years; **Chelius** leading with a brief account of the intervening years' increased costs, and noting that the program is an "increasingly important and changing aspect of the labor market regulatory environment," and remarking on the phenomenon that not only are states varied as to their programs, but so is the nature and rate of change of the same); **Hunt** noting that the Governor of Michigan, in response to Report, convened his own (quite unsuccessful) reform commission; **Worrall** noting that, for decades, workers' compensation pricing and costs were stable, but 1970's inflation, and changes wrought by the National Commission, changed the status quo – while also making the task of forecasting during the period difficult; **Elisburg** remarking that while occupational disease (O.D.) was not a focus of Commission, it did commission papers for its Supplemental Studies (explaining also why O.D. was not a Commission focus, and remarking on why, for O.D., federal regulation/compensation would be ideal, especially as to uniformity); **Spatz** noting positively that some states reformed their O.D. limitation of actions law to allow for more recoveries; and **Barth**, remarking on the origins of the Commission and opining, at length, on why reform, and continued lack of federal action, had been encountered; and cautioning, ironically, that federal administration of a workers' compensation law is hardly guaranteed to be superior to that of states).

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Research References (Part 3)
ARTICLES (ANNOTATED) WITH SIGNIFICANT REFERENCES
TO THE NATIONAL COMMISSION AND ITS 1972 REPORT

1. James Anderson, *50 Years of Hiding from the Report of the National Commission on State Workmen's Compensation Laws*, COLLEGE OF WORKERS' COMPENSATION NEWSLETTER, p.8 (Fall 2021) ((1) introduction to the Report, with a critique of what author believes was, and is, an unsatisfactory response by Mississippi; (2) challenging lawyer-readers, as well, "to see how your state has done"; and (3) making recommendations for Mississippi: (a) medical guidelines should be promulgated to control notorious over-treaters; (b) medical disputes should first go to expert medical reviewers, not litigation; (c) creation, as in other states, of an uninsured employers guaranty fund); and (d) a focus on the goal of return-to-work of injured workers).
2. John R. Boyd & Steve Embry, *WILG Holds 40th Anniversary Symposium on the Status of Workers' Compensation in the United States*, WORKERS' FIRST WATCH 21 (Fall 2012) (detailing the nature of the Commission and the *current* need for injured workers' lawyers to pursue justice for workers on an individual basis in the absence of reform), <https://www.wilg.org/?pg=Publications>.
3. Bob Burke, *The Evolution of Workers' Compensation Law in Oklahoma: Is the Grand Bargain Still Alive?*, 41 OKLAHOMA CITY UNIVERSITY LAW REVIEW 337 (2016) (noting National Commission Report and detailing Oklahoma's response to the same) (also noting, "the National Commission determined that Oklahoma was one of fifteen states that protected less than 70% of its workers under its workers' compensation laws. ... That was a direct result of Oklahoma's legislature employing the decades-old hazardous-employment factions that did not cover injuries to schoolteachers, retail workers, and most government workers..."); also noting that Governor Boren, in 1974, "appointed a committee of legislators, business leaders, and worker advocates to survey other states' recent reforms in light of criticism from the National Commission..."), <https://law.okcu.edu/wp-content/uploads/2018/09/OCULREV-Vol.-41-3-Winter-2016-Burke-337-423.pdf>.
4. Chancy Croft, *Something More Important Than Money – Vocational Rehabilitation in Workers' Compensation Cases*, 3 ALASKA LAW REVIEW 49 (1986) (in an article advocating the importance of vocational rehabilitation in workers' compensation, author notes the National Commission "found that workers' compensation provides neither adequate nor timely rehabilitation services.").
5. Harry W. Dahl, *The Iowa Second Injury Fund – Time For a Change*, 39 DRAKE LAW REVIEW 101 (1989-1990) (discussing National Commission's recommendations that all states "establish a

second injury fund with broad coverage of pre-existing impairments,” and noting that a revised Council of State Governments Model Law had a fund proviso based on the National Commission Report).

6. Michael C. Duff, *How the U.S. Supreme Court Deemed the Workers’ Compensation Grand Bargain “Adequate” Without Defining Adequacy*, 54 TULSA LAW REVIEW 375 (2019) (among other things, citing Burton comment about National Commission’s findings that in 1972, a minority of states did not pay Permanent Total Disability for life), <https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=3156&context=tlr>.

7. Michael Grabell & Howard Berkes, *The Demolition of Workers’ Comp*, ProPublica (March 4, 2015) (referencing the National Commission, noting that many states have failed to provide adequate benefits, and providing horror stories of workers impoverished from claim denials), <https://www.propublica.org/article/the-demolition-of-workers-compensation>. (Unpaginated.)

8. Dean J. Haas, *Falling Down on the Job: Workers’ Compensation Shifts From a No-Fault to a Worker-Fault Paradigm*, 79 NORTH DAKOTA LAW REVIEW 203 (2003) (summarizing the report, comparing current North Dakota law to report recommendations, and concluding that North Dakota law is unsatisfactory in this light; remarking, also, “the recommendations of the National Commission remain a worthy goal.”), <https://commons.und.edu/ndlr/vol79/iss2/1/>.

9. Lawrence Joseph, *The Causation Issue in Workers’ Compensation Mental Disability Cases: An Analysis, Solutions, and A Perspective*, 36 VANDERBILT LAW REVIEW 263 (1983) (author, in broadly discussing mental-mental cases, identifies National Commission Supplemental Studies addressing economic basis of the system, apportionment, vocational rehabilitation, and cardiac claims).

This article also cites a manuscript of Professor Burton. The author quotes Professor Burton as follows: “The halcyon days are gone for workers’ compensation and occupational diseases. Less than a decade ago the National Commission on State Workmen’s Compensation Laws issued its report that devoted only two pages to the topic of work-related diseases. It is unimaginable that a similar report issued in the 1980’s could deal with occupational diseases in such a facile fashion because of three interrelated developments that have occurred in the last decade: first, a growing awareness that the magnitude of the work-related disease problem is substantially greater than previously recognized; second, increasing concern about how the workers’ compensation program can deal with occupational diseases; and third, increasing discussion of programs other than workers’ compensation that could protect workers afflicted by occupational diseases.” The author also cites the manuscript for the proposition that Professor Burton flirted with the idea of a “Workers’ Disease Protection Act.” Such a law would “resolve the problems that the ‘multiple causation’ dimension of occupational diseases of unknown etiology creates....”

10. Joe LaDou, *Workers’ Compensation Reform*, 18 INTERNATIONAL JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL HEALTH 92 (2012) (occupational health physician harshly criticizing U.S. system and noting that Commission’s suggestions had not been heeded, and remarking, also, that, after Commission rejected the idea of federalization, “The coalition of

employers, insurers, and state agencies that had come together to support federal standards became silent....”),
<https://www.tandfonline.com/doi/full/10.1179/1077352512Z.00000000023>.

11. Gordon H. Libman & Terry Morehead Dworkin, *Time Limitations Under State Occupational Disease Acts*, 36 HASTINGS LAW JOURNAL 287 (1985) (arguing for broad coverage of work-related diseases by workers’ compensation laws, authors express support for the National Commission idea to establish national standards: “Uniformity in state law provisos such as statutes of limitations should be encouraged.”).

The authors state, specifically, “although we do not favor the federalization of workers’ compensation, uniformity in state law provisions such as statutes of limitations should be encouraged. Recommendations of the National Commission on State Workmen’s Compensation Laws ... led in the 1970’s to greater alignment of benefits and other standards ... and that mission should continue. This Commission, or a similar one, should coordinate ... the occupational disease policies of the tort, welfare, Social Security, and hospitalization insurance systems.... Greater uniformity in workers’ compensation statutes is necessary for effective coordination with the other social support systems....”

This article also notes the post-Report efforts in Congress to pass a law. Senators Williams and Javits stated in Senate Bill 420, “the results of this Bill will be to shift some of the current costs of industrial accidents and diseases to our workers’ compensation system, and away from the Social Security system, the welfare system, the Medicare system, the employer health benefits plan systems, and from the private savings of the victims of industrial accidents and diseases.”

12. Martha McCluskey, *The Illusion of Efficiency in Workers’ Compensation “Reform,”* 50 RUTGERS LAW REVIEW 657 (1998) (in this epic article, published near the end of the 1980’s/1990’s cost crises, author identifies and summarizes the Commission and Report; notes that Report, via an insurance industry study, did foreshadow an increase in the payroll burden of workers’ compensation insurance; opined that TTD levels were inadequate as of 1998; and that progress of improvement of state laws, overall, had slowed; states that the National Commission recognized the cost internalization of the program; acquiesced in the idea that most states covered all diseases, but pointed out that many limitations on the same existed; identified the fact that the National Commission recommended that the “accident” requirement be dropped and that coverage be provided whenever a work factor or factors were a significant cause of the disability; pointed out that from 1940 to 1972 maximum benefit levels in most states actually decreased; pointed out that the “spendable earnings approach” of disability payment levels was not included as an “essential” recommendation; and pointed out that the National Commission did not make hard recommendations with regard to PPD).

In describing how states “typically capped ... temporary disability benefit levels at a maximum amount based on a percentage of the state’s average weekly wage,” author also remarks: “an explanation for this ceiling on wage replacement is that it is a means to correct excessive compensation caused by the use of gross, rather than net, wages as the basis for calculating wage loss. Another rationale for the caps is that they recognize that high-wage

earners can purchase third-party private disability insurance to cover their lost income.”

Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=139583 (Part 1).

Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735469 (Part 2).

13. Edward J. O’Connell, *Intentional Misconduct and Pennsylvania’s Exclusive Remedy Rules After Poyser v. Newman & Co.: A Proposal for Legislative Reform*, 49 UNIVERSITY OF PITTSBURGH LAW REVIEW 1127 (1988) (noting that Pennsylvania changes of the early 1970’s were motivated by the National Commission, but finding no evidence in Commission’s Report that legislature had any intention of recommending *against* an intentional injury exception to immunity).

14. Emily A. Spieler, *(Re)assessing The Grand Bargain: Compensation for Work Injuries in the United States 1900-2017*, 69 RUTGERS UNIVERSITY LAW REVIEW 891 (2017) (noting genesis of the National Commission and summarizing the nature of its recommendations, noting also many states’ failure to comply and changes which have unfolded over the years, contrary to the essential recommendations: stating, specifically, “the rate of compliance with the recommendations is declining.”).

Note 160 of this article contains references to an interview by the author with Professor Burton. Among other things, this long footnote talks about the Council of States Governments various versions of a Model Act.

Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079871.

15. Emily A Spieler, *Perpetuating Risk? Workers’ Compensation and the Persistence of Occupational Injuries*, 31 HOUSTON LAW REVIEW 119 (1994) (noting Commission Report, its purpose, and identifying five general objectives of a modern workers’ compensation system; and referring to the possible reconvening of a commission (*see* n.75); also providing an account of the post-Report cost increases – and setting forth criticism of the reactions: “The aggregate cost of the program and its rate of increase have met with rising hysteria”) (also remarking, “interstate variability [in costs] has grown over the past two decades, despite the efforts of the National Commission ... to establish greater uniformity.”), <https://repository.library.northeastern.edu/files/neu:332668/fulltext.pdf>.

16. David B. Torrey, *A Symposium on the 40th Anniversary of the Report of the National Commission on State Workmen’s Compensation Laws*, WORKERS’ FIRST WATCH 21 (Fall 2012) (summarizing the four panels presented at the symposium, and remarking, “The first panel was perhaps the most interesting, as it was made up of three critical players on the original Commission. These were John F. Burton, Jr., Peter S. Barth, and John H. Lewis. Professor Burton was the Chairman of the National Commission; Professor Barth was the Executive Director; and Mr. Lewis, a distinguished Florida claimants’ lawyer, was general Counsel.”), <https://www.wilg.org/?pg=Publications>.

17. David B. Torrey, *Master or Chancellor? The Workers’ Compensation Judge and Adjudicatory Power*, 32 NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDICIARY JOURNAL

21 (2012) (noting Commission Report and its recommendations for administration of workers' compensation programs by agencies, not courts; and noting lack of Report emphasis on whether to make the trial judge or hearing officer, as opposed to an appellate board or court, the final fact-finder; but recommending that deference be provided to the hearing office and that, in any event, an automatic stay on appeal from Judge to Board *be disallowed*), <https://digitalcommons.pepperdine.edu/naalj/vol32/iss1/2/>.

18. David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice, and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199 (2007) (noting that social scientists evaluating the adequacy and effectiveness of workers' compensation systems have, over the decades, undertaken comparative analyses of compromise settlement laws, author states: "Such a comprehensive effort, to the author's knowledge, has not been embarked upon since the early 1970's, when the National Commission ... studied, among other things, settlement laws and practices and published its findings and recommendations. Those recommendations [as discussed in detail below], in general caution *against* the indiscriminate approval of compromise settlements....") (author referring at length to Supplemental Study by Louise Russell of past and current practices surrounding compromise settlements. Author, among other things, quoting in their entirety the three key recommendations surrounding compromise settlements: "We recommend that the workmen's compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen's compensation agency and approval by the agency[;] we recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits; and we also recommend that lump-sum settlements, even in the absence of a compromise and release agreement, be permitted only with agency approval."), <https://heinonline.org/HOL/LandingPage?handle=hein.journals/wjpl16&div=14&id=&page=> (also on file with DBT).

19. David B. Torrey, *Immunity and Subrogation in Pennsylvania Workmen's Compensation After Heckendorn v. Consolidated Rail Corp.: Too Absolute a Victory for the Employer?*, 23 DUQUESNE LAW REVIEW 131 (1984) (noting that the Pennsylvania Superior Court had cited the National Commission admonition that workers' compensation was to be the employer's exclusive remedy in the course of ruling that the 1974 amendments to the Act barred a third party in a tort action from joining the employer as an additional defendant) (author also suggesting that the intent of the National Commission to bar such third party actions "over" against the employer is *not* necessarily clear from recommendations 2.18 and 2.19).

20. David B. Torrey, *The Opt-out of Workers' Compensation Legislation: A Critical Briefing and the Vasquez v. Dillard's Case*, 52 AMERICAN BAR ASSOCIATION TORT, TRIAL & INSURANCE PRACTICE LAW JOURNAL 39 (2017). This article notes:

[T]he National Commission on State Workmen's Compensation Laws, created by the Occupational Safety and Health Act, succeeded in promulgating a series of nineteen essential recommendations for state laws in 1972.... Despite the passage of time, most of these admirable recommendations, which focused on expansiveness of coverage and efficient benefit delivery systems, are still viable.

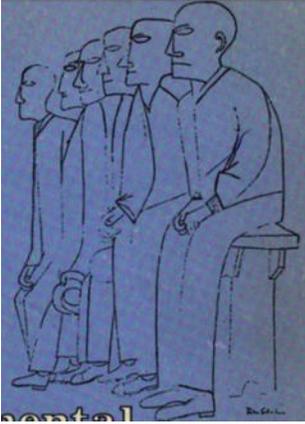
They stand for the proposition that an effective, modern state system should provide no-fault insurance for wage loss and medical benefits to as many workers as possible and cover comprehensively the injuries and diseases they sustain....

A key recommendation treated an old issue--whether compliance with a state's workers' compensation law should be mandatory or elective. To avoid constitutional challenges, most state legislatures created their statutes to be a matter of election. Technically, employers were free to opt out of the system, although to do so would expose them to tort liability and deprive them of traditional affirmative defenses.... The National Commission, in any event, recommended that this relic of past constitutional thinking should be abolished and that workers' compensation should be mandatory.... A related key recommendation, consistent with the Commission's desire for the most inclusive coverage possible, was that no exceptions to the mandate should be allowed.... That workers' compensation should be mandatory and pervasive has now (with the notable exception of Texas) been an article of faith for decades.

This equanimity was shaken in 2013 when the Oklahoma legislature, as part of a dramatic, business-friendly amendment to its workers' compensation law, allowed employers to opt out of the law if they established a plan (presumably ERISA-governed) of their own design and governance....

21. David B. Torrey, *The Federalization/Federal Standards Issue: A Short History Before and After NFIB v. Sebelius* (U.S. 2012), Seminar Paper, March 16, 2012 (ABA TTIPS Coral Gables, FL, 2013) (recounting history of National Commission, with focus on the national-standards enforcement mechanism, and also noting, *inter alia*, the Williams-Javits Bill, the 1979 Standards Bill, and Carter Administration activity; author concluding that Congress could, if it wished, still undertake federalization or impose federal standards), www.davetorrey.info.

22. United States Department of Labor, *Does the Workers' Compensation System Fulfill its Obligations to Injured Workers?* (2016) (highly publicized report discussing National Commission Report and backsliding of many states – also suggesting reform actions), <https://www.dol.gov/sites/dolgov/files/OASP/files/WorkersCompensationSystemReport.pdf>.



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1. Peter S. Barth, "Workers' Compensation Before and After 1983", in *Workers' Compensation: Where Have We Come From? Where Are We Going?* (WCRI 2010) (discussing the circumstances leading up to the Commission, the findings of the Commission, and the perhaps immediate unhappy aftermath – including how the Nixon and Ford Administrations convened the follow-up Interdepartmental Task Force).

2. John F. Burton, Jr., ed., *New Perspectives in Workers' Compensation* (ILR Press 1988). This book is a collection of essays based on speeches at a 1984 conference. In the Introduction, Professor Burton reflects on compliance as of 1988 with the 19 essential recommendations. In 1972, the base year, compliance was 6.9. In 1988, 12.2. He notes that compliance had already peaked and there was recidivism by 1988.

He believed that Arthur Larson (who contributed a chapter to the book), was optimistic with regard to prospective state compliance. Larson, in this book, in "Tensions of the Next Decade," noted benefit level improvements since the time of the National Commission Report. Mashaw, finally, in a chapter called, "Lessons from the SSDI Program," noted the fact that the National Commission was *against* C&R agreements.

3. James Chelius, *Current Issues in Workers' Compensation* (W.E. Upjohn Institute for Employment Research 1986) (an anthology, based on papers presented at a conference, treating issues then current in workers' compensation, and imbued with references to the National Commission and the intervening fourteen years; **Chelius** leading with a brief account of the intervening years' increased costs, and noting that the program is an "increasingly important and changing aspect of the labor market regulatory environment," and remarking on the phenomenon that not only are states varied as to their programs, but so is the nature and rate of change of the same); **Hunt** noting that the Governor of Michigan, in response to Report, convened his own (quite unsuccessful) reform commission; **Worrall** noting that, for decades, workers' compensation pricing and costs were stable, but 1970's inflation, and changes wrought by the National Commission, changed the status quo – while also making the task of forecasting during the period difficult; **Elisburg** remarking that while occupational disease (O.D.) was not a focus of Commission, it did commission papers for its Supplemental Studies (explaining also why O.D. was not a Commission focus, and remarking on why, for O.D., federal regulation/compensation would be ideal, especially as to uniformity); **Spatz** noting positively that some states reformed their O.D. limitation of actions law to allow for more recoveries; and **Barth**, remarking on the origins of the Commission and opining, at length, on why reform, and continued lack of federal

action, had been encountered; and cautioning, ironically, that federal administration of a workers' compensation law is hardly guaranteed to be superior to that of states).

Online: https://research.upjohn.org/cgi/viewcontent.cgi?article=1208&context=up_press.

4. James Chelius, *Workplace Safety and Health: The Role of Workers' Compensation* (American Enterprise Institute 1977) (National Commission staff member undertaking a free-market-style critique of the suspected effects on workplace safety of the Commission's call for significantly enhanced disability benefits).

5. Donald T. DeCarlo & Roger Thompson, *Workers' Compensation: The First 100 Years* (AMCOMP 2012) (Second Edition). In this book, the National Commission Report is treated in the authors' introduction, with a discussion of the genesis of the Commission and the experience over the succeeding decades.

6. Donald T. DeCarlo & Martin Minkowitz, *Workers' Compensation Insurance and Law Practice: The Next Generation* (LRP Publications 1989) (listing, and commenting upon, the 19 essential recommendations).

7. Falaris et al., *Causes of Litigation in Workers' Compensation Programs* (1995) (book, *inter alia*, adopting as a given National Commission's program evaluative factors of adequacy, equity, promotion of safety, and administrative efficiency).

8. Judith Greenwood & Alfred Taricco, *Workers' Compensation Health Care Cost Containment* (LRP Publications 1992) (noting that reform of workers' compensation laws, perceived as needed by Larson even in the 1950s, was "too much for the political process" – hence, the National Commission was formed; noting that the Commission was more concerned about disability benefit adequacy than medical coverage – an item of cost which took off only after 1972; noting that the IAIABC followed up the Report with revised standards of its own; recognizing that a goal of the Commission was for benefit levels to be *higher*, by 1981, than 2/3 of the worker's wages; noting that the National Commission believed that agencies should have medical directors; and noting also the recidivism among states by 1992 – identifying Colorado in particular (p.246)).

9. Christopher Howard, *The Welfare State Nobody Knows: Debunking Myths About U.S. Social Policy* (Princeton University Press 2007) (in the course of harshly criticizing workers' compensation, author notes the work of the Commission, but concludes that the "Commission was ineffective overall because of a lack of aggressive follow-through.").

10. H. Allan Hunt, *Adequacy of Earnings Replacement in Workers' Compensation Programs* (National Academy of Social Insurance 2004) (noting, among other things, that the Revised Model Law of the Council of State Governments incorporated 1972 National Commission Report recommendations)

11. H. Allan Hunt & Marcus Dillender, *Workers' Compensation: Analysis for Its Second Century* (Upjohn Institute 2017) (noting, among other things, the National Commission's

characterizations of how workers' compensation programs can promote safety), https://research.upjohn.org/up_press/244/.

12. Orin Kramer & Richard Brissault, *Workers' Compensation: Strengthening the Social Compact* (I.I.I. Press 1991) (remarking, among other things, that "the pace of change accelerated markedly following the publication of the Report of the National Commission on State Workmen's Compensation Laws in 1972...." A principal passage: "The pace of [liberalizing change] accelerated markedly following the publication of the Report of the National Commission on State Workmen's Compensation Laws in 1972 and the increased attention in the 1970's and early 1980's to the problems of occupational disease. Nor has the rate of change slackened significantly since the 1970's...."

The authors add, "many of these changes have advanced the societal goal of fair and adequate compensation for injured workers. But these changes have also added markedly to the costs of state workers' compensation systems...."

The authors also discuss, without critique, how more workers have become covered since the Report; progress, in their view, has been made. At page 20, the authors seem to overstate their case when they say that since the Commission Report, "all fifty states now provide workers' compensation for any work-caused illness." In any event, the authors recount the employer/carrier view of how a liberalized definition of injury leads to many more claims and much litigation. They also note the Commission's admonition that states should raise the benefit rate to two-thirds of the average weekly wage, up to a maximum. The authors give an account of how workers' compensation costs have been increasing as a matter of percentage of payroll.

13. Gregory C. Krohm, ed., *Workers' Compensation Centennial Commemorative Volume, 1911-2011: Reflections on the History and Development of Workers' Compensation in the United States* (IAIABC 2011). Authors Mealy and Ayres in this text pen a chapter called "History of Rate Regulations in Workers' Compensation." This chapter features another account of how premium increases, post-National Commission Report, caused a cost crisis. Jennifer Fox, writing on workers' compensation systems analysis, notes that National Commission and its call for the compiling and duplication of comparable data. And in this same book, authors Pika and Widen have a short chapter, "Workers' Compensation in Illinois." The authors remark that Illinois responded to the National Commission Report in nine different ways. In the conclusion of the book, IAIABC chief Gregory Krohm remarks that Nebraska "has complied with more of the 19 'essential' recommendations made by the 1972 National Commission Report than any other state."

14. Robert J. Malooly, "Workers' Compensation Insurance Markets and the Role of State Funds", in *Workers' Compensation: Where Have We Come From? Where Are We Going?* (WCRI 2010) (noting that "while the National Commission recommended much needed reforms, in some cases the subsequent state implementation was poorly designed and lacked adequate controls. The result was that costs escalated rapidly in some states, private insurance carriers ceased to write workers' compensation and some carriers went out of business entirely.").

15. Karen Roberts, John F. Burton, Jr., and Matthew M. Bodah, eds., *Injuries and Diseases: Prevention and Compensation, Essays in Honor of Terry Thomason* (2005). In a chapter by Les Boden, the author, in discussing “the adequacy of workers’ compensation cash benefits,” remarks, “There is no theoretical justification for a specific adequacy benchmark, but we have chosen two-thirds of pretax earnings as our measure. We justify it largely for historical reasons. Most states pay temporary total disability (TTD) benefits at two-thirds of pre-injury earnings as a maximum weekly amount, and indication of substantial agreement. ... This is also the standard used by the 1972 National Commission on State Workmen’s Compensation Laws for temporary total and permanent total disability benefits.” The author adds, “although there is no similar explicit standard for permanent partial disability (PPD) benefits, [others] suggest using the two-thirds standard for these benefits as well. In addition, greater coverage of small losses than of large losses is not generally an efficient use of insurance. So if two-thirds replacement is the standard for temporary disability, it is difficult to justify a lower standard for PPD.”

In John Burton’s chapter, “Permanent Partial Disability Benefits,” the author discusses at length the issue of the “specter of the vanishing employer.” He states that the problem is worse in the present day than it was in 1972.



PENNSYLVANIA BAR ASSOCIATION
WORKERS' COMPENSATION LAW SECTION

NATIONAL COMMISSION REPORT-AT-50 PROJECT
January 2022

NATIONAL COMMISSION
ON STATE WORKMEN'S COMPENSATION LAWS

ESSENTIAL RECOMMENDATIONS

[We recommend]:

CHAPTER 2 – SCOPE OF WORKMEN'S COMPENSATION

R.2.1. That coverage by workmen's compensation laws be compulsory and that no waivers be permitted.

R.2.2. That employers not be exempted from workmen's compensation coverage because of the number of their employees.

R.2.4. A two-stage approach to the coverage of farmworkers. The first, as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds \$1,000 be required to provide workmen's compensation coverage to all of his employees. As a second stage, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

R.2.5. That as of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

R.2.6. That workmen's compensation be mandatory for all government employees.

R.2.7. That there be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

R.2.11. That an employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred or where the employment was principally localized, or where the employee was hired.

R.2.13. That all states provide full coverage for work-related diseases.

CHAPTER 3 – THE INCOME MAINTENANCE OBJECTIVE

R.3.7. That, subject to the State's maximum weekly benefit, temporary total disability benefits be at least $66 \frac{2}{3}$ percent of the worker's gross weekly wage.

R.3.8. That as of July 1, 1973, the maximum weekly benefit for temporary total disability be at

least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R.3.11. That the definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, that our benefit proposals be applicable only to those cases which meet the test of permanent total disability used in most States.

R.3.12. That, subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R.3.15. That as of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R.3.17. That total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar or time.

R.3.21. That, subject to the State's maximum weekly benefit, death benefits be at least 66 2/3 percent of the worker's gross weekly wage.

R.3.23. That as of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R.3.25. That death benefits be paid to a widow or widower for life or until remarriage, and in the event of remarriage, two years' benefits be paid in a lump sum to the widow or widower; That benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or at least until age 25 if the child is enrolled as a full-time student in any accredited educational institution.

CHAPTER 4 – THE MEDICAL CARE AND REHABILITATION OBJECTIVE

R.4.2. That there be no statutory limits of time or dollar amounts for medical care or physical rehabilitation services for any work-related impairment.

R.4.4. That the right to medical and physical rehabilitation benefits not terminate by the mere passage of time.



PENNSYLVANIA BAR ASSOCIATION
WORKERS' COMPENSATION LAW SECTION

NATIONAL COMMISSION REPORT-AT-50 PROJECT
January 2022

NATIONAL COMMISSION
ON STATE WORKMEN'S COMPENSATION LAWS

NON-ESSENTIAL RECOMMENDATIONS*
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CHAPTER 2 – SCOPE OF WORKMEN'S COMPENSATION

R2.1 [E]

R2.2 [E]

R2.3 – We recommend that workmen's compensation coverage be extended to all occupations and industries, without regard to the degree of hazard of the occupation or industry.

R2.4 [E]

R2.5 [E]

R2.6 [E]

R2.7 [E]

R2.8 – We recommend that the term “employee” be defined as broadly as possible.

R2.9 – We recommend that workmen's compensation be made available on an optional basis for employers, partners, and self-employed persons.

R2.10 – We recommend that workers be eligible for workmen's compensation from the first moment of their employment.

R2.11 [E]

R2.12 – We recommend that the “accident” requirement be dropped as a test for compensability.

R2.13 [E]

* [R] = Essential Recommendation. The Report features 19 Essential Recommendations and 65 Non-Essential Recommendations.

R2.14 – We recommend that the “arising out of and in the course of the employment” test be used to determine coverage of injuries and diseases.

R2.15 – We recommend that the etiology of a disease, being a medical question, be determined by a disability evaluation unit under the control and supervision of the workmen’s compensation agency.

R2.16 – We further recommend that for deaths and impairment apparently caused by a combination of work-related and non-work-related sources, issues of causation be determined by the disability evaluation unit.

R2.17 – We recommend full workmen’s compensation benefits be paid for an impairment or death resulting from both work-related and non-work-related causes if the work-related factor was a significant cause of the impairment or death.

R2.18 – We recommend that workmen’s compensation be the exclusive liability of an employer when an employee is impaired or dies because of a work-related injury or disease.

R2.19 – We recommend that suits by employees against negligent third parties generally be permitted. Immunity from negligence actions should be extended to any third party performing the normal functions of the employer.

CHAPTER 3 – THE INCOME MAINTENANCE OBJECTIVE

R3.1 – We recommend that, subject to the State’s maximum weekly benefit, a worker’s benefit be at least 80% of his spendable weekly earnings.

R3.2 – We recommend that, subject to the State’s maximum weekly benefit, a worker’s weekly benefit be at least $66 \frac{2}{3}$ percent of his gross weekly wage.

R3.3 – We recommend that, if our recommended benefit increases for workmen’s compensation are adopted, the benefits of other public insurance programs should be coordinated with workmen’s compensation benefits. In general, workmen’s compensation should be the primary source of benefits for work-related injuries and diseases.

R3.4 – We recommend that workmen’s compensation benefits not be reduced by the amount of any payments from a welfare program or other program based on need.

R3.5 – We recommend that the waiting period for benefits be no more than three days and that a period of no more than 14 days be required to qualify for retroactive benefits for days lost.

R3.6 – We recommend that, subject to the State’s maximum weekly benefit, temporary total disability benefits be at least 80 percent of the worker’s spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100 percent of the State’s average weekly wage.

R3.7 [E]

R3.8 [E]

R3.9 – We recommend that as of July 1, 1977, the maximum weekly benefit for temporary total disability be at least $133 \frac{1}{3}$ percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least $166 \frac{2}{3}$ percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

R3.10 – We recommend that, for all maximum weekly benefits, the maximum be linked to the State's average weekly wage of the latest available year as determined by the agency administering the State employment security program.

R3.11 [E]

R3.12 [E]

R3.13 – We recommend that, subject to the State's maximum weekly benefit, permanent total disability benefits be at least 80 percent of the worker's spendable earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in the State exceeds 100 percent of the State's average weekly wage.

R3.14 – We recommend that beneficiaries in permanent total disability cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage.

R3.15 [E]

R3.16 – We recommend that as of July 1, 1977, the maximum weekly benefit for permanent total disability be at least $133 \frac{1}{3}$ percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least $166 \frac{2}{3}$ percent of the State's average weekly wage; and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

R3.17 [E]

R3.18 – We recommend that, provided our other recommendations for permanently [sic] total disability benefits are adopted by the States, the Disability Insurance program of Social Security continue to reduce payments for those workers receiving workmen's compensation benefits.

R3.19 – We recommend that each State undertake a thorough examination of permanent partial benefits and that the Federal government sponsor a comprehensive review of present and potential approaches to permanent partial benefits.

R3.20 – We recommend that, subject to the State's maximum weekly benefit, death benefits be at least 80 percent of the worker's spendable weekly earnings. This formula should be used as soon as feasible or, in any case, as soon as the maximum weekly benefit in a State exceeds 100

percent of the State's average weekly wage.

R3.21 [E]

R3.22 – We recommend that beneficiaries in death cases have their benefits increased through time in the same proportion as increases in the State's average weekly wage.

R3.23 [E]

R3.24 – We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133 1/3 percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

R3.25 [E]

R3.26 – We recommend that the minimum weekly benefit for death cases be at least 50 percent of the State's average weekly wage.

R3.27 – We recommend that workmen's compensation death benefits be reduced by the amount of any payments received from Social Security by the deceased worker's family.

CHAPTER 4 – THE MEDICAL CARE AND REHABILITATION OBJECTIVE

R4.1 – We recommend that the worker be permitted the initial selection of his physician, either from among all licensed physicians in the State or from a panel of physicians selected or approved by the workmen's compensation agency.

R4.2 [E]

R4.3 – We recommend that the workmen's compensation agency have discretion to determine the appropriate medical and rehabilitation services in each case. There should be no arbitrary limits by regulation or statute on the types of medical service or licensed health care facilities which can be authorized by the agency.

R4.4 [E]

R4.5 – We recommend that each workmen's compensation agency establish a medical-rehabilitation division, with authority to effectively supervise medical care and rehabilitation services.

R4.6 – We recommend that every employer or carrier acting as employer's agent be required to cooperate with the medical-rehabilitation division in every instance when an employee may need rehabilitation services.

R4.7 – We recommend that the medical-rehabilitation division be given the specific

responsibility of assuring that every worker who could benefit from vocational rehabilitation services be offered those services.

R4.8 – We also recommend that the employer pay all costs of vocational rehabilitation necessary to return a worker to suitable employment and authorized by the workmen’s compensation agency.

R4.9 – We recommend that the workmen’s compensation agency be authorized to provide special maintenance benefits for a worker during the period of his rehabilitation. The maintenance benefits would be in addition to the worker’s other benefits.

R4.10 – We recommend that each State establish a second-injury fund with broad coverage of pre-existing impairments.

R4.11 – We recommend that the second-injury fund be financed by charges against all carriers, State funds, and self-insuring employers in proportion to the benefits paid by each, or by appropriations from general revenue, or by both sources.

R4.12 – We recommend that workmen’s compensation agencies publicize second-injury funds to employees and employers and interpret eligibility requirements for the funds liberally in order to encourage employment of the physically handicapped.

CHAPTER 5 – THE SAFETY OBJECTIVE

R5.1 – We recommend that a standard workmen’s compensation reporting system be devised which will mesh with the forms required by the Occupational Safety and Health Act of 1970 and permit the exchange of information among Federal and State safety agencies and State workmen’s compensation agencies.

R5.2 – We recommend that insurance carriers be required to provide loss prevention services and that the workmen’s compensation agency carefully audit the services. The agency should insure that all carriers doing business in the State furnish effective loss prevention services to all employers and, in particular, should determine that reasonable efforts are devoted to safety programs for smaller firms. State-operated workmen’s compensation funds should provide similar accident prevention services under independent audit procedures, where practicable. Self-insuring employers should likewise be subject to audit with respect to the adequacy of their safety programs.

R5.3 – We recommend that, subject to sound actuarial standards, the experience rating principle be extended to as many employers as practicable.

R5.4 – We recommend that, subject to sound actuarial standards, the relationship between an employer’s favorable experience relative to the experience of other employers in its insurance classification be more equitably reflected in the employer’s insurance charges.

CHAPTER 6 – THE EFFECTIVE DELIVERY OBJECTIVE

R6.1 – We recommend that each State utilize a workmen’s compensation agency to fulfill the administrative obligations of a modern workmen’s compensation program.

R6.2 – We recommend that in those States where the chief administrator is a member of the appeals board, the Governor have the authority to select which member of the appeals board or commission will be the chief administrator. In those States where the administrator is not a member of the appeals board or commission, his term of office should either be indefinite (where he serve[s] at the pleasure of the Governor) or be for a limited term, short enough to insure that a Governor will, sometime during his term of office, have the opportunity to select the chief administrator.

R6.3 – We recommend that the members of the appeals board or commission be appointed for substantial terms.

R6.4 – We also recommend that agency employees be given civil service status or similar protection.

R6.5 – We recommend that the members of the appeals board or commission and the chief administrator be selected by the Governor subject to confirmation by the legislature or other confirming body. The other employees of the agency should be appointed by the chief administrator or selected in accordance with the State’s civil service procedure. Insofar as practical, all employees of the agency should be full-time, with no outside employment. Salaries should be commensurate with this full-time status.

R6.6 – We recommend that an advisory committee in each State conduct a thorough examination of the State’s workmen’s compensation law in the light of our Report.

R6.7 – We recommend that the workmen’s compensation agency be adequately financed by an assessment on insurance companies or benefits paid plus an equivalent assessment against self-insurers.

R6.8 – We recommend that the workmen’s compensation agency develop a continuing program to inform employees and employers about the salient features of the State’s workmen’s compensation program.

R6.9 – We recommend that the employee or his surviving dependents be required to give notice as soon as practical to the employer concerning the work-related impairment or death. This notice requirement would be met if the employer or his agent, such as the insurance carrier, has actual knowledge of the impairment or death, or if oral or written notice is given to the employer.

R6.10 – We recommend that employers be required to report to the agency all work-related injuries or disease which result in death, in time lost beyond the shift or working day in which the impairment affects the worker, or in permanent impairment to the worker.

R6.11 – We recommend that, for those injuries and diseases which must be reported to the workmen’s compensation agency, the period allowed for employees to file claims not begin to run until the employer’s notice of the work-related impairment is filed with the workmen’s compensation agency.

R6.12 – We recommend that the administrator of the workmen’s compensation agency have discretion under his rulemaking authority to decide which reports are needed in uncontested cases.

R6.13 – We recommend that the time limit for initiating a claim be three years after the date the claimant knows or, by exercise of reasonable diligence should have known, of the existence of the impairment and its possible relationship to his employment, or within three years after the employee first experiences a loss of wages which the employee knows or, by exercise of reasonable diligence should have known, was because of the work-related impairment. If benefits have previously been provided, the claim period should begin on the date benefits were last furnished.

R6.14 – We recommend that where there is an appellate level within the workmen’s compensation agency, the decisions of the workmen’s compensation agency be reviewed by the courts only on questions of law.

R6.15 – We recommend that attorneys’ fees for all parties be reported for each case, and that the fees be regulated under the rule-making authority of the workmen’s compensation administrator.

R6.16 – We recommend that the workmen’s compensation agency permit compromise and release agreements only rarely and only after a conference or hearing before the workmen’s compensation agency and approval by the agency.

R6.17 – We recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits.

R6.18 – We also recommend that lump-sum payments, even in the absence of a compromise and release agreement, be permitted only with agency approval.

R6.19 – We recommend that the administrator have the authority to prescribe the reports which must be submitted by employers, employees, attorneys, doctors, carriers, and other parties involved in the workmen’s compensation delivery system.

R6.20 – We recommend that the States be free to continue to permit their present insurance arrangements or to permit private insurance, self-insurance, and State funds where any of these types of insurance are now excluded.

R6.21 – We recommend that procedures be established in each State to provide benefits to employees whose benefits are endangered because of an insolvent carrier or employer or because an employer fails to comply with the law mandating the purchase of workmen’s compensation insurance.

R6.22 – We recommend that because inflation had adversely affected the payments of those claimants whose benefits began when benefits were not at their current levels, a workmen’s compensation retroactive benefit fund be established to increase benefits to current levels for those claimants still entitled to compensation.