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Features

THE BATTLE OVER WORKERS' COMPENSATION

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ABSTRACT

Faced with lower profits and rapidly increasing premium costs in the 1980s, insurers and employer organizations cleverly parlayed the public perception of worker fraud and abuse in the workers' compensation system (that they helped to create) into massive legislative changes. Over the last decade, state legislators and governors, Republican and Democrat alike, have jumped on this bandwagon, one that workers and their allies have dubbed the workers' compensation "deform" movement. Alleging a "game plan" and a calculated campaign on the part of insurers and employers, the author looks at the major components of changes that were made, examines the elements of workers' compensation over which employers and insurers have gained control, and discusses Newt Gingrich's efforts to capitalize on employer and insurer fervor over the system. This campaign whistled through the country until it goaded the labor movement, injured workers, the trial bar, and others in Ohio in 1997 to organize themselves to stand up to employers by defeating the deform law through a ballot initiative. The article details that battle and suggests that similar voices can be achieved through a return to grassroots organizing and mobilization.

Gary Brummett was making \$35,000 a year doing heavy construction work in 1997. In August of that year, he suffered a serious on-the-job back injury. The injury was so bad that even after he was treated by the insurance company's doctor and physical therapist, he couldn't go back to his \$35,000-a-year construction job. Brummett, who had never finished high school, had excellent credit and owned a three-bedroom home in Stanford, Kentucky. Now Brummett is delivering pizzas for \$5.15 an hour. He has lost his home, his phone is disconnected, and he is living in a trailer.

Before 1996, injured workers in Kentucky were awarded disability benefits based on their prior work experience, age, education, and medical condition. But Governor Paul Patton called a special session of the legislature in late 1996 to “reform” the system. Patton, who had made millions as a coal operator, argued that workers’ compensation costs were too burdensome on business. Today, benefits are based on medical “guidelines” that take into account only the medical impairment the worker has suffered—and intentionally ignore the effect of the injury on the individual’s ability to work.

Before the law was changed in 1996, Brummett would have been eligible for \$187 week for 520 weeks or a lump sum of \$73,000. Today, thanks to the 1996 changes, Brummett is entitled to just \$22 a week for 425 weeks. If he decides to “settle” with the insurance company, he will get a one-time payment of \$7,400.

The last decade has seen enormous changes in workers’ compensation under the guise of “reform.” These changes, pushed by employers and the insurance industry, have resulted in benefit cuts, reduced coverage, lower quality medical care, and a stigmatization of injured workers. The results have been stark. The number of claims and the benefits paid to injured workers have dropped dramatically. According to the National Academy of Social Insurance, benefits have dropped 23 percent since 1992—from \$1.66 to \$1.28 per \$100 of payroll [1]. Meanwhile, employer premium costs are down nearly \$6 billion over the last three years and workers’ compensation has become the most profitable line of insurance in the entire property/casualty field [2]. This is the story of how these drastic changes, harmful to millions of workers, have been successfully imposed by employers and insurers in state after state. Successful, that is, until they ran head-long into the Ohio labor movement.

THE NATION’S FIRST SOCIAL INSURANCE SYSTEM

Imported from Bismarck’s Germany by way of England nearly a century ago, workers’ compensation was adopted by a vast majority of states in what seems, in retrospect, to be lightspeed. Between 1911 and 1920, a mere ten years, all but seven states enacted such laws to replace a system where a worker’s only remedy in seeking benefits, both medical and cash for job-related injuries and illnesses, was to sue the employer for negligence [3].

What gives pause to the often repeated shibboleth that workers’ compensation was a great compromise or trade-off between labor and management [4] is the fact that during its introduction the ability of unions to influence or move legislation was virtually nonexistent—for example, it was next to impossible to get state lawmakers to ban child labor, pass safety and health laws, or even regulate hours of work. The labor movement, after intense debate over the issue, acquiesced to the scheme. Samuel Gompers, however, warned of the dangers of social insurance—including workers’ compensation. He argued that it would have the effect of dividing people into groups or classes and that “control” would pass from workers

and their organizations to others with resulting “grave consequences.” He emphasized that

industrial freedom exists only when and where wage earners have complete control over their labor power. To delegate control over their labor power to an outside agency takes away from the economic power of those wage earners and creates another agency for power. Whoever has control of this new agency acquires some degree of control over the worker. There is nothing to guarantee control over that agency to employees. It may also be controlled by employers [5].

Whatever one views as the historical underpinnings of workers' compensation, the fact remains that it is the accepted method and process of taking care of those injured, diseased, or killed from circumstances arising out of and in the course of employment.

SETTING THE STAGE FOR THE “CRISIS”

In response to widespread dissatisfaction with the inadequate and inequitable coverage and benefits provided by state workers' compensation, Congress added a provision to the 1970 Occupational Safety and Health Act directing the President to appoint a National Commission to

undertake a comprehensive study and evaluation of State workmen's compensation laws in order to determine if such laws provide an adequate, prompt, and equitable system of compensation [6].

The Nixon-appointed Commission, comprised of representatives of employers, labor, insurers, and scholars, made eighty-four recommendations—adopted unanimously in 1972—to improve the system. Nineteen of the recommendations were said to be “essential” to the future of the state-based system and, the Commission warned, unless adopted, the Federal Government should ensure compliance with national standards [7]. The results were both remarkable and vastly disappointing. While both coverage and benefits were improved in most states, compliance with the “19 Essentials” was far short of the minimal expectations of the Commission.

Insurers, using the modest improvements in the law to justify increasingly larger and larger rate increases for workers' compensation coverage, began to run into opposition from regulators and employers. Sensing the opportunity to divert attention from the number and severity of work injuries and illness, insurers and their employer allies declared the system “in crisis,” citing rising insurance premium costs.

The game plan was, in reality, quite simple: use the “crisis” in workers' compensation to obfuscate the hazards and practices resulting in injuries at work and then get policymakers to reduce benefits and restrict coverage. Texas and Oregon were among the first states where the workers' comp “crisis” led to these

changes—changes that were to have enormous influence on developments that would take place later.

TEXAS

In Texas, it was alleged that premiums had “risen 148 percent in the last three years” [8] even though (according to the National Council on Compensation Insurance) they had really gone up 61.6 percent. The business community was primed however. Their representative on the Industrial Accident Board, in urging employers to lobby for changes in the law, claimed that the recent increase in premium rates “was fueled by employees trying to make quick bucks from on-the-job injuries and doctors and lawyers who were eager to help them” [9].

The Republican Governor, Bill Clements, had already called two special sessions of the legislature to address workers’ compensation. In early December 1989, he called them in for a third time. This was the legislative session made infamous by the chicken king of Texas, Lonnie “Bo” Pilgrim, who stood on the floor of the state Senate handing out \$10,000 checks to legislators supporting workers’ compensation reform [10].

Among the many sweeping changes enacted (which went into effect in January 1991) were two central features that would dramatically reduce compensation to injured workers. The first involved the way in which permanent partial disabilities would be compensated. Under the old law, a number of factors (age, education, experience, and so forth) were taken into account in an attempt to determine the extent of “loss of wage-earning capacity” suffered by the worker. Under the new law, such determinations would be based solely on the second edition of the American Medical Association’s (AMA) *Guides to the Evaluation of Permanent Impairment*.

Additionally, there would be two levels of benefits. At the first level, for each degree of impairment according to the *Guides*, the injured worker would be entitled to three weeks of income benefits. The second level, so-called “supplemental” benefits, would kick in only if the injured worker had an impairment rating according to the *Guides* of 15 percent or greater and had made a “good faith” effort to obtain employment and had not been able to return to work, or had returned to work but was earning 20 percent less than previously—as a direct result of the impairment. The impact was dramatic—in 1993, just 2 percent of all injured workers qualified for supplemental benefits [11].

The second feature involved an effort to make it more difficult for injured workers to get legal representation. This was accomplished by changing the manner by which attorneys were compensated, making it less attractive for them to take workers’ compensation cases. Here again the results were dramatic—workers were increasingly unrepresented while insurance companies were much more likely to have attorney representation [12].

The Texas AFL-CIO challenged the constitutionality of the new law in a lawsuit. A trial court issued a temporary injunction in December 1990 and State District Judge Rey Perez upheld the original findings in a ruling issued May 9, 1991. Among other findings, Perez found the law's use of the *AMA Guides* unreasonable and arbitrary and that the law was intended to discourage attorneys from representing injured workers while doing nothing to discourage employers and insurance carriers from using counsel. The Texas Court of Appeals for the Fourth District also declared the entire act unconstitutional (the law was allowed to remain in effect during all these proceedings). But, in late December 1994, the Texas Supreme Court reversed the previous rulings and upheld the validity of the 1989 Act.

Joe Gunn, President of the Texas AFL-CIO, said the court only took into account "the bottom lines of insurance companies and businesses" and noted that the number of reported injuries had risen since the law took full effect, while the amount of claims paid had dropped in half. Gunn pointed out that Texas had created an illusion that its workers' compensation system was efficient, "but efficiency in this case can ruin lives" [13].

OREGON

In the four years prior to 1990, Oregon experienced premium rate increases of more than 60 percent. Complaining of a "crisis" in workers' compensation, Democratic Governor Neil Goldschmidt convened a special one-day session of the legislature in May 1990 to push through a "reform" package that had been approved by a labor-management committee. That committee, meeting in the Governor's mansion (Mahonia Hall), produced a bill that radically beefed-up the Oregon State OSHA plan—adding staff, increasing inspections and penalties, and requiring safety plans and committees in workplaces with eleven or more employees. The Mahonia Hall bill also drastically changed workers' compensation [14].

While many of the changes to Oregon's comp law were similar to those instituted in Texas, there were two changes that were to have a profound impact on injured workers and their ability to get compensated for work-related injuries and illnesses.

The first was a change in the definition of what constituted a compensable injury. The new law excluded pre-existing conditions from coverage and was to become a "model" for other state workers' compensation reform efforts [15].

This change struck at the heart of the so-called "compromise" that created the no-fault workers' compensation system. Heretofore, compensability of a condition rested on work connection rather than fault. The test of compensability was not the relation of an individual's personal quality (pre-existing condition or fault) to an event, but the relationship of an event to an employment. It is this "social protection" feature of workers' compensation that separates it from strict tort

liability. So, instead of the time-honored principle “that the employer takes the employee as it finds him or her so far as the employee’s internal weaknesses are concerned” [16], employers and insurers were invited to raise the issue of pre-existing conditions to escape liability for work injury and illness. This, of course, is not unrelated to the growing (and scurrilous) practice of screening job applicants for previous job injuries and, if the worker is unfortunate enough to suffer an injury and bold enough to file a claim, demanding access to a worker’s entire medical history [17].

Oregon has traditionally been an employee-choice state. In other words, injured workers had the right to choose which doctor would treat their injury. The second momentous change to come out of the Mahonia Hall agreement was also to set a “standard” for other reform-minded states. Oregon law would still, ostensibly, provide that workers could choose their own physicians—but only if the employer or insurer had not provided care through a managed care organization. Managed care, as will be shown below, is important not so much for cost containment or quality-of-care issues; managed care is important as a method of control over access to the system and how well workers would fare.

Employers (and insurers) were quick to avail themselves of this option. By early 1994, 43 percent of Oregon’s employers had enrolled 33 percent of the state’s workers in managed care for workers’ compensation. By October of 1998, nearly two-thirds of the employer community had opted for managed care, covering 62 percent of the labor force.

Employers and insurers are now in the position of both selecting the managed care provider and issuing payments for their services. This has given many workers the impression that employers and insurers are using their power to keep the medical community under their thumb in order to influence and control important decisions that they make.

STIGMATIZING INJURED WORKERS

Part of the employer/insurer campaigns in both Texas and Oregon involved an effort to plant the idea that a lot of workers’ compensation claims were questionable. An important component of this campaign was to focus the attention of policy-makers on the monetary costs of these “suspect” claims and use the resulting uproar to force legal changes that would both restrict coverage and costs and strengthen their control over the operation of the system.

Critical to this strategy was the effort to paint workers’ compensation claimants as frauds, cheats, and malingerers. Doing so, it was hoped, would create a “stigma” that would attach itself to all workers claiming benefits under workers’ compensation—perhaps making them reluctant to assert their rights under the law.

In what was a truly amazing “coincidence” of media focus over a ten-day period at the end of 1991 and early in 1992, six articles or stories appeared in major

newspapers or on television shows alleging cheating and blatant abuse of the system by workers. The front page of *The New York Times* on December 29, 1991 declared a “Vast Amount of Fraud Discovered in Workers’ Compensation.” One allegation in the piece came from the director of the insurance industry-funded Workers Compensation Research Institute (WCRI), Richard Victor, who implied that many people without legitimate injuries use workers’ compensation in hard times to replace lost wages and job benefits.

The next day, *The Times* ran another lengthy piece on Oregon alleging that “workers’ compensation is riddled with fraud” and detailing one insurer’s crackdown on “abuse.” *The Wall Street Journal*, on New Year’s Eve, wrote of skyrocketing workers’ compensation costs and noted that Richard Victor of the WCRI attributed some of the increase to workers getting workers’ compensation benefits after their unemployment benefits expired. On New Year’s Day, *The Los Angeles Times* ran a full-page ad claiming that billions in workers’ compensation is being “stolen” and that “fraud has become one of the leading causes of higher workers’ compensation costs.” ABC’s *20/20* followed two days later with a special feature on comp fraud entitled “Leeching the System.” *The Sacramento Bee* followed with a column called “Workers’ comp abuse: A looter’s mentality” in which the writer alleged that the system “has been turned into a parking lot for the lazy and dishonest.” Two days later, *The Bee* editorialized that fraud “may account for one-fourth or more of the inflated cost of workers’ compensation” [18].

Predictably, anti-worker legislators jumped into the fray. In early January, a few days after the media onslaught, a state legislator in Colorado introduced a bill to permit businesses to shift up to 15 percent of the cost of workers’ compensation insurance to workers—based on the theory that this would encourage employees to turn in fellow workers who make “fraudulent” workers’ compensation claims.

While any fraud, whether committed by insurers, providers, employers, or workers, is harmful and should be punished, the focus of the campaign was almost entirely on workers. This was true despite clear evidence that, in terms of dollars, employers and insurance carriers were responsible for more fraud than workers [19]. As states began to set up fraud investigation units, they started to find little evidence of “massive” instances of worker fraud. In fact, one study in California showed claimant fraud to be three-tenths of 1 percent; another, in Wisconsin, found worker fraud to be six-tenths of 1 percent [20].

Not surprisingly, the fraud campaign has had its desired effect. Recent research has revealed that a large percentage of some workers who are clearly eligible for workers’ compensation (75 percent in this study) chose not to file. Fear was cited as a major factor for not filing—including concerns that workers and supervisors would think that the injury was being faked or exaggerated, concerns about being fired or losing promotional opportunities, and even anxiety over whether health care providers would want to “treat” a workers’ compensation case [21].

GOMPERS' FEAR; EMPLOYER CONTROL

But the fraud campaign was merely the wedge to open the door to a deliberate and calculated campaign to give employers and insurers control over critical details of the state workers' compensation systems. This assault, already begun in Texas and Oregon, included some or all of the following:

Gain Control Over Choice of Physician

Doctors, of course, are essential to the provision of proper medical benefits and treatment. But they also serve as “gatekeepers” to the benefits—both medical and cash benefits—that are essential to those injured at work. All systems rely on determinations of “work-relatedness” to open the door to benefits and look to doctors for that decision. Doctors also are relied upon to make judgments as to the degree of impairment, or disability, suffered by the worker in cases involving permanent, but not total, disability. Additionally, doctors determine when, and under what restrictions, injured workers can return to work. Hence the importance of who chooses the doctor plays much more than a minor role in whether workers are judged eligible for benefits. Historically, state laws give the right of choice to either the worker or the employer. Roughly half of the states give the right of selection to the injured worker and half to the employer (or to the employer's insurer). Beginning in the late 1980s, employers and insurers began a campaign to convince lawmakers to “direct” injured workers—especially in employee-choice states—to managed care arrangements if selected by the employer or insurer.

Gain Control Over How Impairments are Rated

The evaluation of permanent partial impairments has always been a controversial issue in workers' compensation. The majority of states have “impairment”-based systems, as opposed to wage-loss or loss of wage-earning capacity systems. Impairment ratings that are adjusted by factors like age, occupation, education, labor market factors, and so forth allow for some element of fairness and equity in dealing with real-life situations. But, insurers and employers began pressing for sole reliance on the AMA's *Guides to the Evaluation of Permanent Impairment* for the determination of cash benefits for permanent partial disability. This was done despite the specific and clear warnings of the AMA that “*it must be emphasized and clearly understood that impairment percentages derived according to Guides criteria should not be used to make direct financial awards or direct estimates of disabilities*” (emphasis in the original) [22].

Gain Control Over What Constitutes a Compensable Condition Under Workers' Compensation Law

Employers and insurers began to convince policy-makers that the law was “too liberal” or that its construction too often favored injured workers. Changes were sought to eliminate coverage for “stress”-related claims. Efforts were made to cut back or restrict coverage for repetitive motion injuries. Coverage, they argued, should not include so-called pre-existing conditions or injuries or illnesses or those that could occur in non-occupational circumstances or were the result of the “normal” aging process [23].

Gain Control Over the Legal Process

Employers and insurers sought changes in the “burden of proof” required to show that there was evidence of a connection between the injury and employment. Rather than being required to show competent evidence to establish a claim for benefits, workers would have to prove by “clear and convincing” or even a “preponderance of evidence” that their condition occurred because of their work. Additionally, many state statutes had either specifically mandated that the law was to be “liberally construed in favor of the employee” [24], or the courts had interpreted the law in that manner. Now statutes were being changed to provide that “the facts in a workers’ compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer” [25].

Gain Control Over the Amount and Duration of Benefits

Employers and insurers argued that benefits should be kept low in order to “encourage” a return-to-work and that the duration of benefits should be strictly limited—even in the most serious cases. In some jurisdictions, benefits, they argued, should cease if the worker was capable of performing “any” employment. Workers would not have to be offered employment; benefits could be terminated if the worker was “deemed” capable of any employment—even at the minimum wage—regardless of prior income, skills, experience, or whether jobs were available. It was even argued, successfully, that benefits for permanently and totally disabled workers should cease at the magic age of sixty-five—whether or not the individual was eligible for Social Security benefits.

Gain Control Over Medical Records

The right to privacy and confidentiality over medical records doesn’t exist in workers’ compensation. Many of the nation’s largest workers’ compensation insurers demand that injured workers sign standard releases once a claim is made. These requests are made prior to the insurer accepting the claim, when injured workers are most vulnerable. One of them reads:

I AUTHORIZE any licensed physician, dentist, medical practitioner, pharmacist, hospital, clinic, other medical or medically related facility, insurance or reinsurance company, consumer reporting agency or employer having information available as to diagnosis, treatment and prognosis with respect to any physical, dental or mental condition and/or treatment of me, and any non-medical information about me, to give any and all such information to the particular Company in the CHUBB GROUP of Insurance Companies to which I am submitting a claim, or to its legal representative [26].

Gain Control Over Workers Themselves by Denying Them Legal Representation

Insurers and employers, complaining about the “litigiousness” of this no-fault system, convinced policy makers that plaintiffs’ attorneys were “milking the system” and that the answer was to cut their fees—and, in the process, make it difficult for workers to find attorneys willing to take their cases.

“DEFORM” TAKES HOLD

The many changes to workers’ compensation that had been introduced in Texas and Oregon provided a template for action in other states that now rushed to “deform” workers’ compensation. One of the most bitter battles took place in 1991 in Colorado.

Calling the amendments “this mess,” *The Denver Post* lamented the “Victorian concepts of employer responsibility (being) incorporated into Colorado law.” *The Rocky Mountain News* said the employer effort was “a little on the callous side.” In addition to implementing many of the provisions adopted in Texas and Oregon, Colorado legislators reduced benefits and terminated others as soon as the worker reached “maximum medical improvement,” even if the employer failed to re-employ the injured worker. Benefits for permanent total disability, only available to those with extremely serious injuries, were to be automatically terminated when the worker reached the age of sixty-five. This was to be the case regardless of the amount of Social Security retirement benefits or even if the worker was not eligible for those benefits.

Sadly, the new law was signed by Governor Roy Romer, recently chairman of the National Democratic Party. Eldon Cooper, an autoworker who was then president of the Colorado AFL-CIO, called the bill “one of the worst pieces of legislation passed by the Colorado legislature in the last forty years.” He emphasized that Romer’s failure to veto the bill was “a stab in the back” for all injured workers.

Also in 1991, Republican Governors in Maine (McKernan) and California (Wilson), in a prelude to even worse reforms to be enacted in the future, held state budgets “hostage” to force changes in workers’ compensation. McKernan

even furloughed (locked-out) state employees until the legislature caved into his demands to limit benefit payments to ten years, regardless of the worker's condition.

While most states eased off during the election year of 1992, Maine revisited the issue during a special session in October of that year. In a cruel blow to injured workers, the standard "deform" package was further enhanced by cutting the duration of benefits in half—from ten years to five. Payments to the surviving spouses and dependents of those killed on the job, previously lifetime benefits, were limited to less than ten years. All benefits were frozen and cost-of-living adjustments eliminated.

The employer/insurer coalition roared back into action in 1993. Nevada, Montana, Connecticut, Arkansas, California, Florida, Nebraska, Ohio, Oklahoma, and others instituted radical changes to their workers' compensation laws. In Arkansas, the changes were so bad that John F. Burton, Jr., who had been selected by President Nixon to head up the 1972 National Commission, wrote to Democratic Governor Jim Guy Tucker, telling him that the changes "would make a bad law worse." In Connecticut, where Democrats controlled both chambers in the state legislature, the blood-letting was rampant. Benefits, in all categories, were slashed by one-third, cost-of-living adjustments (COLAS) were repealed, and benefits from scarring injuries (unless on the head, face, or neck) were terminated.

Major reforms, or "deforms," followed in states like Minnesota, West Virginia, Pennsylvania, and Kentucky. Woven by insurer/employer efforts, the common thread was the one that had been so successful in other states. Even the insurance-owned rating organization, the National Council on Compensation Insurance (the organization state regulators depend upon for data), started to claim credit for their role in the partisan "deforms." They claimed to have "identified preferred system options" in order "to tackle the difficult but necessary job of enacting system reforms" [27].

Amazingly, even House Speaker Newt Gingrich attempted to capitalize on the fervor among employers, insurers, and their newfound allies in the medical community by appointing a Task Force to advise him on ways to "reform" the workers' compensation system. Among the kooky ideas to emerge from this group was to make workers' compensation voluntary rather than mandatory, to introduce Medical Savings Accounts (MSAs) into workers' compensation and require workers to contribute to their costs, and to give employers full control over medical decisions (not just control over choice of medical providers but "control" over the medical provider's decisions!). Not surprisingly, many of Gingrich's wealthy contributors had more than a "passing" interest in these proposals. They included the chairman of the Task Force, Richard Scrusby (head of HealthSouth—an active player in many workers' compensation managed care schemes), and Pat Rooney, the founder of the Golden Rule Insurance Company, the primary proponent of MSAs in the country [28].

LABOR'S STAND IN OHIO

The orgy of “reform” proved irresistible to employers, even in states not in the throes of a “crisis.” The battle in Ohio resulted in one of the most remarkable victories labor has seen in workers’ compensation in this recent era—when most states have used the real or contrived crisis to build a competitive advantage on the backs of injured workers.

Ohio is unique in at least one regard—William Green, the successor to Samuel Gompers as president of the American Federation of Labor, served as a state senator in Ohio and authored what became known as the Ohio Workmen’s Compensation Act. That law established an exclusive state fund to sell insurance to employers for workers’ compensation. While serving as vice president of the AFL, Green described to the delegates at the 1921 Denver convention of the Federation this key aspect of the Ohio law:

It provides that no liability insurance company can sell workmen’s compensation insurance in the State of Ohio. We have driven them out and the working man, his wife and his family daily fall upon their knees and thank Almighty God that these blood-sucking liability insurance companies are driven from their homes [29].

Despite the absence of commercial, for-profit insurance carriers operating in the state’s workers’ compensation system, in 1997 the Ohio business community saw the insurance industry-led campaign of “reform” in other states and started clamoring for more changes. They had already been successful in getting control over treating physicians through “managed care” in 1993 and politicizing the selection of the administrator of the system in 1995.

Ohio’s state fund had assets in 1997 that exceeded \$18 billion. An unfunded liability of \$2.5 billion in 1994 had been turned around, and by 1997 the fund had a surplus of \$2.9 billion—a swing of \$5.4 billion! Unlike employers in most surrounding states who had seen astronomical increases in premiums in the early ‘90s—more than 50 percent on average—premiums in Ohio had been virtually steady between 1990 and 1995 and actually had gone down 6 percent in 1996.

Proving that greed knows no boundaries, the Ohio Manufacturers Association, the Ohio Chamber of Commerce, Governor George Voinovich, and the Republicans who controlled the legislature decided to press their advantage and enact changes to the law they claimed would save employers an additional \$200 million a year. Their aim, of course, was not to make changes that would result in safer workplaces and fewer debilitating injuries; their aim was to reach into the pockets of workers injured on the job and remove \$200 million. This would be accomplished by eliminating coverage for certain conditions and reducing benefits for others.

Senate Bill 45, passed by the legislature and signed by Governor Voinovich on April 22, 1997, had numerous features that had already been implemented in other states. It cut the duration of wage loss compensation for some workers from 200

weeks to just 26 weeks. It radically changed the definition of occupational disease—a change that would have eliminated from coverage most repetitive motion injuries (the fastest growing and most costly occupational ailment facing workers today). This change was particularly discriminatory against women, who work in jobs that cause these injuries. SB 45 mandated the use of the AMA's *Guides to the Evaluation of Permanent Impairment* in a way that would have resulted in drastic benefit cuts for workers suffering from permanent partial disabilities. The new law also cut in half the time a claim could remain open for payment of compensation and medical benefits. Just to ensure that everyone knew who was in charge, the new law denied workers access to safety and health records about their workplaces that were maintained by the Bureau's Division of Safety and Hygiene.

On April 16, 1997, the day the Ohio House of Representatives voted on SB 45, *The Cleveland Plain Dealer* simply said, "today is pay day for Ohio businesses" [30]. Nearly concurrent with the passage of the new law, James Conrad (the man that Voinovich had put in charge at the Bureau of Workers' Compensation) announced a premium rate reduction for Ohio employers of 15 percent.

Labor, incensed with the mean-spiritedness of the Republican and business community assault on workers' compensation, sprang into action. Bill Burga, president of the Ohio AFL-CIO, and Warren Davis, director of Region 2 of the UAW, formed the "Committee to Stop Corporate Attacks on Injured Workers." Jack Sizemore, director of the UAW's Region 2-B and the Ohio Conference of Teamsters, also played a significant role. The Ohio Academy of Trial Lawyers began to raise funds, Ohioans Helping Injured Ohioans (a state-wide group of injured workers) started to mobilize its members, and religious groups lent a hand. Throughout the battle, organized labor led the coalition.

The only route open to prevent the new law from taking effect as scheduled on July 22, 1997 was to try to get the issue put on the ballot for a decision by the voters. It had been nearly sixty years since a referendum had appeared on the Ohio ballot. In order to do so, labor would have to meet the daunting task of gathering signatures totaling 6 percent of the voters who had participated in the last gubernatorial election. These 200,774 signatures would have to be obtained from registered voters in 44 counties, one-half the 88 in the state. On July 21, via armored car, 414,934 signatures from voters in all 88 counties were turned in to the Ohio Secretary of State. This immediately suspended the effective date of the new law—holding it in abeyance until the outcome of the referendum would be known on election day.

Now known as Issue 2, the referendum got off to a shaky start for labor. The wording of the measure, determined by the Republican Secretary of State, was dangerously misleading. A "yes" vote, as it would appear on the ballot, implied that the new law would reduce workers' compensation fraud. The bill, in fact, said little on the issue of fraud. The provisions most harmful to injured workers were either buried in the 18-line explanation or not mentioned at all.

The business community shifted into high gear. Organizing itself as the “Committee to Keep Ohio Working,” business raised more than \$7.7 million by the end of the campaign—more than triple the amount raised by labor and its allies. Among the largest contributors were the Ohio Manufacturers Association, the Chamber of Commerce, Chrysler Corporation, Proctor and Gamble, and the Ohio Automobile Dealers Association. Other significant contributors included General Motors, Ford, the Ohio Healthcare Corporation, and the Japanese-owned Honda Motor Car Co.

Labor’s goal was to get each member in the state to contribute \$2 to wage the campaign. Local unions chipped in; their parent unions, especially the building trades, and unions like the United Steelworkers, the United Auto Workers, the Communications Workers of America, the United Food and Commercial Workers, the American Federation of State County and Municipal Employees, and the Hotel Employees & Restaurant Employees, helped enormously. Even state federations from other states like Illinois, Louisiana, Massachusetts, Missouri, New Mexico, Pennsylvania, and Texas dug deep to help their sisters and brothers in Ohio. It was a great effort but labor was not able to raise even half of the amount that business was pouring into the campaign.

Borrowing sleazy tactics from other campaigns, the corporate-led “Keep Ohio Working” committee even sent out fliers to 150,000 Democrats featuring the silhouette of a donkey urging a “yes” vote on Issue 2. The Republican Party manufactured phony letters from “injured workers” that party activists were urged to send into newspapers supporting the changes proposed by Senate Bill 45, now on the ballot as Issue 2 [31].

The tactics seemed to be working. A poll conducted by *The Columbus Dispatch* in early October showed Issue 2 easily passing, by more than a two to one margin: 56 percent favored the measure, 26 percent said “no,” and 18 percent were undecided [32]. The major newspapers and television and radio stations were all supporting a “yes” vote.

But labor did have a strategy. Central labor councils around the state would designate field coordinators who would organize volunteers to handbill at plant gates and at work sites. Union newsletters and local publications would inform the members of the issues at stake. A “letters to the editor” campaign was initiated. Members were asked to post yard signs and to participate in phone banks targeted at contacting other members. A late television campaign featured injured union members talking about the importance of preserving the workers’ compensation system and ended with Senator John Glenn urging a “No” vote on Issue 2. The goal was not so much a general “get-out-the-vote” effort, but rather was a very deliberate and detailed plan to urge labor households to get to the polls and to vote “no.”

Labor’s hidden weapon in the campaign to defeat Issue 2 were the thousands and thousands of trade unionists who had been trained over the last quarter century at the Ohio AFL-CIO’s two annual week-long workers’ compensation

institutes. Organized and conducted by Tom Bell, the recently retired director of civil rights and workers' compensation for the Ohio AFL-CIO, these institutes trained local union activists on the details of the workers' compensation law and how to help members who got injured on the job. Bell, a thirty-nine year member of the United Steelworkers, had been designated by Ohio AFL-CIO President Bill Burga as one of two "coordinators" of labor's campaign against Issue 2.

The odds were daunting. Behind in the polls two to one; trying to get voters to the polls in an off-year election when there were no statewide races; and trying to focus the attention of voters on an arcane and difficult-to-understand issue like workers' compensation. Called into action, the rank-and-file activists trained by Bell and others over the years turned the tide.

By a huge fourteen-point spread, 57 percent to 43 percent, voters rejected the law that business had pushed through the legislature and that Voinovich had signed in April. An astounding 3.1 million voters had gone to the polls and registered their judgment (compared to 3.5 million in the 1998 presidential year election). The "no" vote, urged by labor, predominated in 73 of Ohio's 88 counties.

In defeat, big business and their defenders were shocked. The OMA claimed that "folks were confused." The administrator of the bureau, James Conrad—who had shamelessly campaigned for a "yes" vote—parroted the company line, saying that "the campaign was confusing to voters." Their message was clear: they didn't think that workers and voters in Ohio understood the issues—that they, the business leaders and their Republican allies, were the only ones smart enough to know what was best for injured workers.

Not surprisingly, workers and citizens in Ohio clearly saw what was at stake in the battle over Issue 2. They saw the business community's shameless effort to steal \$200 million from the pockets of injured workers—aided by raw political power. The bottom line was, as Bill Burga said, "We've proven that—in Ohio—people can be more powerful than money." Autoworker Rodney Boger from Local 2015 in Cleveland agreed, "They had the money, we had the votes." His colleague Jerry Cecil, also of the UAW, told *The Cleveland Plain Dealer* there was a simple reason labor prevailed: "Working people are not stupid. They knew this was targeted at them" [33].

Eight short days after the voters gave a resounding "NO" to the raid on injured worker's benefits, Governor Voinovich's administration announced a \$1.3-billion rebate of workers' compensation premiums to employers. This was an amount equivalent to 75 percent of the annual payment from employers into the state insurance fund.

Ohio President Bill Burga, in blasting the deceit and duplicity of Voinovich's handout, said, "\$1.3 billion didn't just drop from the sky; Governor Voinovich must have known for months that the bureau planned to recommend a massive rebate, even as he asked Ohio voters to approve Issue 2's cuts in workers' comp benefits" [34].

CAN WORKERS EVER WIN CONTROL?

The victory that thousands of rank-and-file unionists and non-union workers demonstrated in Ohio on that early November day in 1997 was a clarion call and beacon of hope to millions of injured workers across the country whose lives had not only been harmed by job injuries and illnesses, but who had been subject to the false promise of a social insurance system they had been led to believe would help them in their time of pain and suffering.

State AFL-CIO organizations in other states are looking at the possibility of ballot initiatives to correct the harm that earlier “deform” efforts brought to the workers’ compensation systems of their states. In Arkansas, efforts are underway to put on the ballot a measure to restore dignity and justice to those injured on the job. Colorado labor, and their allies in the trial bar, won a key decision in the courts to return a “Safe Workplace” initiative that had been illegally prevented from appearing on the ballot in 1992.

Future battles lurk on the horizon. Insurers and employers are licking their lips in anticipation of further “reforms” in large states like Illinois and New York. Governor George Pataki has introduced a measure in New York that would drastically cut benefits to injured workers.

But there are flashes of hope—the New York AFL-CIO and its allies in the safety and health movement and the trial bar are mobilizing to meet the challenge. The labor movement has established a training program to equip union activists to help injured members navigate the system. Committees on safety and health are organizing political efforts to show legislators the need to improve prevention and benefits to those injured on the job. Attorneys who represent injured workers are raising much-needed funds to educate the public on the issues and to publicize the assault on basic protections. Injured worker groups are reaching out to injured workers to engage them in the battle.

Labor in California, fresh from a resounding victory for labor-endorsed candidates in the 1998 elections, is pressing to gain long-delayed benefit increases in workers’ compensation that had been promised by the employer community when they won savings of \$5 billion as a result of “deforms” passed in 1993.

Injured worker organizations are blossoming all over the country. Long-established groups, like the Louisiana Injured Workers Union [35], have extended their hand to help similar groups in Mississippi, Texas, North Carolina, Alabama, Florida, Virginia, and Pennsylvania. State labor organizations in Texas, Ohio, North Dakota, New York, and elsewhere are lending assistance and support to these groups. In one of the most successful examples, the Pennsylvania AFL-CIO nurtured and helped establish the Pennsylvania Federation of Injured Workers—a group that now has twelve chapters throughout the state.

Injured workers are crucial to helping workers regain control over their lives after a job injury or illness. They provide guidance and support to people who, after being hurt on the job, are further damaged and insulted by the system that is

supposed to help them. They furnish a support system where others, including labor, fall. They can mobilize injured workers to demonstrate and agitate for improvements in workers' compensation and job safety and health laws.

Employer and insurer groups continue to try to expand their control over workers' compensation programs by influencing both legislators and administrators. Renewed concern for the plight of injured workers—on the part of some governors, state legislators, and workers' compensation commissioners—is being met with renovated warnings of crisis: costs, business leaders say, are about to escalate again. But winning coalitions can be formed by grassroots organizing, discussion and communication with co-workers, and old-fashioned political action. As we learned in Ohio, the battle to regain control over workers' compensation and safety and health on the job can be won.

ENDNOTES

1. National Academy of Social Insurance, *Workers' Compensation: Benefits, Coverage, and Costs, 1996, New Estimates*, p. 14, 1999.
2. The average profit in 1997, the most recent year available, was 14.3 percent. To put this into perspective, the average profit in the same period for auto insurance was 5.5 percent; for homeowners insurance it was 5.4 percent. National Association of Insurance Commissioners, *Report on Profitability By Line By State in 1997, 1998*.
3. Workers' compensation is supposed to provide income and medical benefits for workers who are injured or become sick because of their jobs. Death benefits are to be provided to surviving spouses and dependent children of workers who are killed on the job. Most workers are covered through their state law or through separate laws for federal employees, railroad workers, seafarers, longshoremen, and shipyard workers.
4. Over the years, workers' compensation has been presented as a "deal" between labor and management where workers injured on the job were "guaranteed" compensation without having to prove the employer at fault. In return for providing this "sure and certain" compensation, employers were granted immunity from lawsuits under the doctrine of exclusive remedy.
5. Samuel Gompers' Speech before the Conference on Social Insurance, Washington, D.C., December 8, 1916. From "American Federation of Labor Records: The Samuel Gompers Era 1877-1937; Reel 112, pp. 550-560," courtesy of the Samuel Gompers Papers, Department of History, University of Maryland. The issue of "control" was not an idle concern. Gompers believed strongly that workers could only be secure if they controlled their own destiny. Improvements in the lives of workers would only come, he argued, if workers exercised economic power through the development of their own organizations—and this included and meant control over social insurance issues like workers' compensation.
6. Public Law 91-596, *Occupational Safety and Health Act of 1970*, Sec. 27(d)(1).
7. *The Report of The National Commission on State Workman's Compensation Laws*, Government Printing Office, 1972.
8. D. Hanners, Workers' Comp War at Stalemate, *The Dallas Morning News*, July 10, 1989.

9. K. Herman, Greed Blamed for Rise in Workers Comp Rates, *The Dallas Morning News*, April 8, 1988.
10. "The 1991 Bonehead of the Year was chicken king Lonnie 'Bo' Pilgrim, chosen for something he'd done in 1989. He'd handed out \$10,000 checks on the floor of the Texas Senate as lawmakers considered a workers' compensation issue he opposed. The Boneheads said Mr. Pilgrim was guilty of "overpaying \$9,999.75 to what are basically two-bit politicians." L. Powell, Some Grocers Have More in Store Than Customers Want, *The Dallas Morning News*, August 15, 1999.
11. *Texas Workers' Compensation System Data Report*, Texas Workers' Compensation Commission, 1998.
12. Attorney representation of workers at the benefit review conference dropped from 44 percent to 27.1 percent; at contested case hearings workers had attorneys 62 percent of the time in 1991, but by 1994, representation had dropped to just 38 percent. For insurance carriers, representation at benefit review conferences increased from 32.2 percent to 50.8 percent by 1994; attorney representation of carriers at contested case hearings grew from 73 percent in 1991 to 90.6 percent in 1994. See Workers' Compensation System Performance Analyzed, *The Research Review*, Texas Workers' Compensation Research Center, 1995.
13. *Texas AFL-CIO: Supreme Court Opinion Hurts Workers*, statement from Joe Gunn, President of the Texas AFL-CIO, December 30, 1994.
14. A good summary of the assault on comp laws in both Texas and Oregon is in D. Hytowitz and R. Moore, Safeguarding Employee Rights: State Workers' Compensation Systems Under Attack, *Trial*, pp. 44-48, September 1990.
15. The law now says: "If a compensable injury combines with a preexisting disease or condition to cause or prolong disability or a need for treatment, the resultant condition is compensable only to the extent the compensable injury is and remains the major contributing cause of disability or need for treatment." Oregon Revised Statutes §656.005 7(a)(B). Similarly, occupational disease has the same burden: "The worker must prove that employment conditions were the major contributing cause of the disease or its worsening. Existence of the disease or worsening of a preexisting disease must be established by medical evidence supported by objective findings." §656.802 (2).
16. *Larson's Workers' Compensation*, Desk Edition, §12.10.
17. There is a growing industry of for-profit information-gathering firms that collect workers' compensation records and market them to employers for "screening purposes" in order to "take the guesswork out of hiring!" One company advertises that its services can help employers determine "which applicants are safe" and brags that they "manage the largest body of workers' compensation records in the country." Brochure from AVERT. Information on this firm can be obtained at www.avert.com.
18. This amazing string of stories on workers' comp fraud is detailed in "Workers Comp Off to a 'Fraudulent' Start" in the AFL-CIO publication *Workers' Compensation Notes*, Issue 1-92, January 1992.
19. D. Michaels, Fraud in the Workers' Compensation System: Origin and Magnitude, *Occupational Medicine: State of the Art Reviews*, 13:2, pp. 439-442, April-June 1998.
20. An update on the insurer/employer fraud campaign is in: Fraud, Fraud and More Fraud, *Workers' Compensation Notes*, Issue 2-98, March/April 1998.

21. What Percentage of Workers With Work-Related Illnesses Receive Workers' Compensation Benefits? *Journal of Occupational and Environmental Medicine*, 40:4, pp. 325-331, April 1998.
22. *Guides to the Evaluation of Permanent Impairments*, American Medical Association, Fourth Edition, p. 1/5, 1993.
23. The campaign to eliminate coverage for pre-existing conditions is closely linked with insurer efforts to abolish Second Injury Funds (SIF). These funds were set up to "encourage" employers to hire workers with disabilities by covering the risk if the worker suffered a subsequent work-related injury or disease. Insurers now argue that SIFs are no longer needed due to the Americans with Disabilities Act (ADA). Of course, the ADA continues to be under attack from the business community, especially the U.S. Chamber of Commerce. The conclusion of all of this is inescapable: the elimination of SIFs, the restrictions on pre-existing conditions, and the continuing attack on the ADA are all aimed at transferring "risk" back to people with disabilities and reducing their opportunities for employment.
24. Even according to insurance industry representatives, "workers' compensation statutes are intended to be humanitarian legislation to protect the worker and to benefit society. To achieve those objectives these laws must be liberally construed in favor of the employee." D. DeCarlo and M. Minkowitz, *Workers' Compensation Insurance and Law Practice: The Next Generation*, pp. 59-60, 1989.
25. Florida Workers' Compensation Law, §440.015.
26. Copy dated December 1, 1998. On file in author's collection.
27. *1993 Issues Report*, National Council on Compensation Insurance. Bill Hager, NCCI's President at the time, bragged that the current situation "offers the National Council on Compensation Insurance both a tremendous opportunity and a challenge to funnel the forces of change down the proper avenues of thought." (Emphasis added.)
28. For more information on this bizarre Task Force, see: "Gingrich Taps Health Care CEO to Chair National Workers' Compensation Panel," *Workers' Compensation Report*, Bureau of National Affairs, Oct. 16, 1995; "Gingrich Fund-Raiser Heads Secret Task Force," *Roll Call*, Jan. 25, 1996; see also AFL-CIO's: *Workers' Compensation Notes*, "Gingrich Task Force on Workers' Comp," Issue 5, Sept./Oct. 1995; "Gingrich and Workers' Comp: Vol. 2," Issue 6, Nov./Dec. 1995; and "Gingrich and Workers' Comp: The Final Chapter?" Issue 1, Jan./Feb. 1996.
29. *Report of Proceedings of the Forty-First Annual Convention of the American Federation of Labor Held at Denver, Colorado, June 13 to 25*, The Law Reporter Printing Company, Washington, D.C., p. 394, 1921.
30. B. Morrison, House to Vote on Comp Bill, *The Cleveland Plain Dealer*, April 16, 1997.
31. One letter, contained in a "GOP Action Kit," reads: "A couple of years ago, I was hurt on the job. Due to extent of my injuries, I was unable to work for several months . . . but it took almost six weeks for my claim to be finalized. What's worse . . . a third of my settlement went toward lawyers' fees. I'm sure you can imagine the amount of strain the whole episode put me and my family under." As quoted in "Democrats Charge GOP sending Fake Letters," *Dayton Beacon Journal (online)*, October 22, 1997.
32. A. Johnson, This Much is Clear: Issue 2 Ahead in Poll, *The Columbus Dispatch*, October 5, 1997.
33. M. Tatge and B. Morrison, Overhaul of Workers' Comp Law Rejected by Voters, *The Cleveland Plain Dealer*, November 5, 1997.

34. The handouts to employers continue. Shortly after the Bureau announced another \$673-million rebate to employers, Region 2 and Region 2B of the United Auto Workers (UAW) filed suit to block the action. Warren Davis, director of Region 2, said, "Jim Conrad has been a bagman for the corporate special interests in this state for years. These continued acts of corporate welfare are going to cost Ohio workers the benefits that they need." L. Turnbull, "UAW Sues to Derail Givebacks: Union Challenging Rebates from Workers' Comp Bureau," *The Columbus Dispatch*. April 10, 1999.
35. The Louisiana Injured Workers Union played a key role in the publication of: *Job Damaged People: How to Survive and Change the Workers' Comp System*, A Joint Project of the Environmental Health Network and the Louisiana Injured Workers Union, 1993.

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