

2010

Compromise and Release Settlements in Workers' Compensation: Final Report

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Citation

Hunt, H. Allan, and Peter S. Barth. 2010. "Compromise and Release Settlements in Workers' Compensation: Final Report." Report prepared for State of Washington, Department of Labor and Industries. <https://doi.org/10.17848/rpt178>

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Washington Pension System Review

**COMPROMISE AND RELEASE SETTLEMENTS IN
WORKERS' COMPENSATION**

Final Report

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December 21, 2010

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COMPROMISE AND RELEASE SETTLEMENTS IN WORKERS' COMPENSATION

I. INTRODUCTION

Compromise and release settlements (or variants by other names such as redemptions, stipulations, compromise settlement, etc.) have become increasingly common among workers' compensation systems in the past four decades. According to the *Compendium on Workmen's Compensation* published by the National Commission on State Workmen's Compensation Laws, there are three elements to such a settlement. First, the payment of benefits is typically made in a lump sum, (though that need not be the case, as in structured settlements) rather than paid out over a period of weeks as with other workers' compensation benefits. Second, the settlement represents a compromise between the positions of the claimant and the insurer or employer, so that neither party gets exactly what they want. Third, such agreements typically involve a partial or full release of the employer and insurer from further liability for the injury.¹

It is worth mentioning that all three of these elements can be controversial, but the adequacy of benefit payments and the termination of future liability are particularly troublesome for many observers. This is because the future course of disability and medical treatment cannot be predicted with certainty. Thus what might seem to be a reasonable "compromise" today may turn out to be woefully inadequate (or excessive) in just a few years. For this reason, at least 14² states restrict or prohibit the "release" of liability for future medical expenses resulting from the injury.

In practice, such agreements are subject to nearly infinite variation involving provisions of statute, court interpretation, administrative rules, specific adaptation to circumstances of the claimant, employer policy, etc. All but seven states now generally allow such agreements but historically many more states did not permit such agreements.³

¹ Williams and Barth 1973, p. 235.

² Torrey 2007, Table 3, pg. 463-469.

³ See Dodd 1936, Somers and Somers 1954, Cheit 1961, and Berkowitz 1967. All disapproved of such a policy reflecting what Torrey 2007, labeled a "paternalistic" point of view.

In 1972, the National Commission on State Workmen's Compensation Laws addressed the policy issues of compromise and release settlements in workers' compensation programs with three specific recommendations.

R 6.16 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.

R 6.17 We recommend that the agency be particularly reluctant to permit compromise and release agreements which terminate medical and rehabilitation benefits.

R 6.18 We also recommend that lump-sum payments, even in the absence of a compromise and release agreement, be permitted only with agency approval.⁴

These statements could be regarded as representing "best practice" in 1972, even though the Commission pointed out that some form of compromise and release was "widely used" in state workers' compensation systems across the country. Clearly the National Commission came down on the side of placing certain limits on the use of compromise and release settlements in workers' compensation claims.

Louise Russell conducted an inventory of state practices with respect to compromise and release settlements for the National Commission which was published as one of the Supplemental Studies of the National Commission in 1973. At that time there were nine jurisdictions (including FECA) which prohibited the use of compromise and release (C&R) completely, and another six jurisdictions that allowed compromise only if it did not include a permanent release of liability (see Table 1). Russell reported that in at least 7 jurisdictions more than 20 percent of all indemnity claims were closed with compromise and release settlements.

There has been a great deal of movement since then in policies on compromise and release settlements, in both directions. Comparing Table 1 for 1970 with Table 3 for 2006, there were 11 states that moved from not allowing to allowing C&R, and 4 states that moved from allowing to not allowing C&R. Three states held firm in not allowing C&R (Nevada, Washington, and Wyoming). However, the clear trend of the last 25 years has been to a more permissive attitude on the part of workers' compensation legislators and administrators.

Table 2 is derived from the CompScope™ Benchmark publications of the Workers Compensation Research Institute (WCRI). For a group of 14 large states, it shows the percent of workers' compensation claims with more than 7 days of lost time

⁴ National Commission 1972, p. 110.

which have received lump-sum settlements after an average of 3 years of maturity, i.e., 3 years after the initial injury as of 2007.⁵ These data are adjusted to compensate for differences in industry mix, wage levels, and type of injury; so they should be very comparable. The table demonstrates the amazing range in the proportion of all indemnity claims that show such settlements, ranging from 3 percent in Texas and 9 percent in Wisconsin to 44 percent in Tennessee and 38 percent in Illinois. Further, the average amount of such lump-sum settlements ranges from just over \$13,000 in Indiana to over \$49,000 in Pennsylvania.⁶ The only obvious lesson that emerges from this analysis is that there is great variety in the way that lump-sum settlements are used in workers' compensation programs. It seems clear that this also reflects the great variety in use of compromise and release settlements.

So what is the reason for the growing popularity of compromise and release settlements, which obviously continues to the present day, regardless of the position taken by the National Commission? Again, Louise Russell provided an excellent analysis of the issue. She cited four reasons why insurers might be motivated to pursue a compromise and release settlement of a given claim. First, it will likely reduce the insurer's administrative costs. It is more expensive to keep a claim open and attend to the details that will inevitably crop up.

Second, a compromise and release will terminate the claim with little or no uncertainty about the ultimate cost. So C&R is a way to reduce risk and clear the books (dividends determined, etc.) of older claims. Third, it may well be that the insurer is able to settle the claim for less than would otherwise be the case. This is particularly true when the injured worker has a higher rate of discount than the insurer; i.e., the worker has a higher preference for consumption now rather than in the future compared to the insurer. Fourth, a compromise settlement offers a way to terminate the disputes that so frequently occur in workers' compensation cases: disputes over the severity of the injury, the cause of the injury, the residual capacity of the injured worker, and so on.

The injured worker faces a different set of incentives. Assuming that the worker has a choice between a steady stream of weekly benefit payments and a lump-sum

⁵ Note that these are not necessarily all claims that involve a compromise and release settlement, as there are other reasons for lump-sum payments.

⁶ Telles 2009, p. 15.

payment which will terminate his/her claim, the issue can be reduced simply to assumptions about the anticipated duration of disability and the workers' rate of discount (or time preference). However, this ignores the very real dimensions of uncertainty for the worker.

Will s/he be able to return to work at the old job and the old wage? Will the insurer keep paying the claim as long as the worker thinks it necessary? Is the workers' compensation benefit sufficient to meet the worker's usual budget needs? These and other uncertainties, combined with a relatively high discount rate, typically lead the worker to accept a reduced amount in a lump-sum payment with a compromise and release settlement.

The attorney who represents the worker also has a preference for money now rather than in the future. Typically the attorney receives a share of any lump-sum settlement, as regulated by the state. If a worker is represented by an attorney, it likely represents one of two circumstances; either the worker was just not able to understand the complexity of the workers' compensation system and needed help coping with all the requirements, or there is a dispute over some element of his/her compensation and the worker feels that representation is required to fairly present his side of the dispute.

Last, and probably not least, the system administrator has an interest at stake here as well. Like the insurer, the state agency that supervises the workers' compensation system incurs costs to monitor open claims. More significantly, the state agency incurs sizable costs when disputes occur and the agency has to intervene to mediate or adjudicate the dispute. More realistically, the state agency typically has to handle the oversight functions assigned to it with a fixed complement of staff. When the administrative burden grows too heavy, it can be appealing to trade continuing review and oversight of an extended claim for a quick review of a compromise and release settlement that terminates the claim.

Given the National Commission's reservations about compromise and release settlements, and yet with their obvious continued popularity in many if not most jurisdictions, how are we to interpret "best practice" in 2010? This paper will review the scant empirical evidence available on the outcomes of compromise and release settlements. We will examine experience in several states where policy on compromise

and release has changed recently. And we will attempt to summarize “best practice” on compromise and release circa 2010.

II. GENERAL TRENDS IN WC POLICY AND PRACTICE

As the political pendulum in the U.S. swings from left to right and back again through time, workers’ compensation policy is strongly affected. When the left is in the ascendancy, coverage is expanded, benefits are increased, and barriers to compensation are lifted. When it is the turn of the right, entitlements are restricted and benefits are reduced. This pattern has played out repeatedly over the last 50 years in workers’ compensation.

Spieler and Burton (1998) have fleshed out this tale by tracing workers’ compensation benefits to workers and costs to employers since 1960. The years from 1992 to 1998 (when the article was published) were labeled “The Neo-Reform Era” by Spieler and Burton. In the face of a political pendulum swinging to the right, benefits declined from 1992 through at least 2000; before a slight rise to 2003, and then a resumption of the decline to the present. The Workers Compensation Research Institute does not disagree with the pendulum image, but places the change in direction a little earlier. “In most states, the debate in the later 1980s and first half of the 1990s focused on containing costs for employers in order to enhance the competitiveness of American business. A growing number of states have enacted reforms that have contained or should contain costs.”⁷

Figure 1 shows the National Academy of Social Insurance workers’ compensation benefit and cost data per \$100 of covered wages from 1989 through 2007 (the latest data available). These numbers represent actual benefit payments in the calendar year to injured workers and to providers of their medical care as reported to state workers’ compensation agencies, or the National Council on Compensation Insurance (NCCI), the largest rate-making organization in the workers’ compensation field. The employer cost figures also come from these sources and A.M. Best, which reports insurance premium levels by state for workers’ compensation coverage. Costs represent employer expenditures in the calendar year for insurance premiums and benefits paid under deductible plans if the employer is insured. However, unlike insurance industry sources, these figures include the costs and benefits of self-insured employers. Self-

⁷ Gardner, Telles, and Moss 1996, p. xiii.

insured employer costs include benefits paid, an estimate of administrative expenses, and any excess insurance coverage for large or catastrophic claims.

The figure reveals that benefits have generally been falling as a percent of payroll since the early 90s, declining from 1.65 percent in 1992 to 0.95 percent in 2007 (a 42 percent decline). Employer costs have shown more volatility, falling from \$2.18 in 1990 to \$1.34 in 2000 (a 38 percent decline) and then rising to \$1.72 in 2004 (a 28 percent increase) as the insurance underwriting cycle is superimposed on the underlying benefit payments to workers.⁸

Figure 2 provides one more piece for the story. It shows NASI estimates of the trends in “cash” benefits and medical benefits from 1989 through 2007. “Cash” benefits represent the wage-replacement benefits paid to workers, including lump-sum payments where those are not designated for future medical costs. Figure 2 shows that the decline in cash benefits has been even more precipitous than that for medical benefits. Cash benefits have declined from a high of \$0.99 per \$100 of payroll in 1991 to \$0.48 per \$100 in 2007 (a drop of 51 percent), while medical benefits have declined from a high of \$0.69 per \$100 in wages in 1992 to \$0.48 per \$100 in 2007 (a decline of 33 percent). This no doubt reflects the rapid escalation of medical prices during the period which has caused aggregate medical costs for workers’ compensation claims to actually exceed indemnity costs for 2007 according to this measure.

So generally speaking the last 25 years have been a period of downward pressure on workers’ compensation costs and benefits, especially wage-replacement (or cash) benefits.

According to Graetz and Mashaw:⁹

In short, where states must respond to the “non-competitiveness” claims of employers facing rising employee benefit costs and of insurers unable to get premium relief from state regulators, they are unlikely to produce or maintain an adequate workers’ compensation package. Benefits rose during the 1970s in the face of a credible threat of federal intervention. When that threat faded, retrenchment began, and it has generally continued to the present.

How has this impacted state policy on compromise and release settlements of workers’ compensation claims? We saw earlier (Table 1) that about 14 or 15 states placed significant limits on the use of compromise and release settlements in 1970. Table 3 shows the status of

⁸ These two series (benefits and costs) are not directly comparable because the employer costs for insured employers represents the premium which covers all present and future costs from injuries occurring in the current policy year, whereas the benefits represent payments to all injured workers from this and previous years that are paid in the current year. However, in a steady state of no employment growth, no wage increases, etc., future payments from the current injury year and current payments to all past claims would tend to converge.

⁹ Graetz and Mashaw 1999, p. 86.

these settlements in 2006. The number of states maintaining an outright ban on the practice has dwindled to about seven according to Torrey.¹⁰

It seems clear that employers and insurers believe that C&R settlements save them money. This seems to be seconded by those concerned with worker welfare, as they are generally wary of such settlements. However, it is not inevitable that injured workers lose and employers/insurers gain with a compromise settlement.¹¹ Is it possible that C&R's are a win-win? There is no necessary reason why insurers/employers should always have the advantage in such situations.¹² This would seem to depend upon the specific arrangements around closing claims or stopping periodic wage-replacement payments. In a state like Michigan, where the insurer/employer has the right to stop payments and the worker must protest, it seems clear that workers have less bargaining power. But in other states where the employer/insurer must secure the agreement of the worker and/or the workers' compensation regulatory agency to stop weekly payments, it would seem that the bargaining power of the injured worker is maintained. At any rate, this is an empirical question and we will review the evidence later in this document.¹³

It seems clear that the increasing incidence of compromise and release settlements in workers' compensation programs over the past few decades is part of the retrenchment of benefits discussed earlier. It also appears to be part of the struggle by workers' compensation administrative agencies to keep up with the demands for adjudication of disputes between claimants and their employer/insurer. According to Graetz and Mashaw:¹⁴

If the cost overruns of the 1980s are traceable in considerable degree to the liberalizing reforms of the 1970s, and the contemporary retrenchment is a response to the spiraling workers' compensation costs of the prior decade, what do these expansions and contractions tell us about the economics or politics of workers' compensation as a social insurance program? Put in historical perspective, the message is relatively clear. Left to their own devices, states are forced into a race—really a slow crawl—to the bottom in terms of the adequacy of workers' compensation coverage and benefits.

¹⁰ We say “about” seven because ultimately this is a judgment call and there is room for dispute in the classification of some state systems.

¹¹ See Schmit (1987) for an alternative interpretation that lump-sum awards are generally larger than their counterpart periodic payments.

¹² But see Thomason (1994) for an empirical analysis of the controversy and claims adjustment activities of workers' compensation insurers in New York state.

¹³ There is broader interest in the impact of lump-sum payments. See Herbst, et al. (1996) and Schaefer and Christensen (2006) for studies of lump-sum payments in other programs.

¹⁴ Graetz and Mashaw 1999, p. 86.

The analysis of Spieler and Burton¹⁵ concludes that “The history of workers’ compensation over the past forty years is largely a history of the conflicting goals of adequacy and affordability.” So, given this background let’s review the record on workers’ compensation systems regarding C&Rs. What policy changes have states been making regarding C&Rs? What research or policy evaluations have been conducted? How are we to understand the utilization of compromise and release in the early 21st century?

III. RESEARCH ON IMPACTS OF COMPROMISE AND RELEASE POLICY

A complex social system like workers’ compensation has many facets, and the availability of the compromise and release option has been alleged to impact a great many of them. At a minimum we need to reiterate the “five objectives of a modern workers’ compensation system.”¹⁶

- 1) Broad coverage of employees and of work-related injuries and diseases;
- 2) Substantial protection against interruption of income;
- 3) Provision of sufficient medical care and rehabilitation services;
- 4) Encouragement of safety;
- 5) An effective system for delivery of the benefits and services.

Some argument has been made to directly or indirectly connect the utilization of compromise and release settlements to each of these objectives.

However, the major policy questions are whether workers who accept compromise and release settlements are compensated for their loss as well as those receiving periodic payments (taking into account the uncertainty of compensation absent the compromise and release), and whether the existence of the compromise and release option promotes or inhibits the return to work of injured workers.

Policy Analysis

The first discussion of the compromise and release issue was the Dodd Report.¹⁷ Dodd felt that the existence of compromise settlements gave rise to temptation to dispute claims by employers, thus setting the scene for a cheaper settlement of the claim. Thus, he was especially wary of allowing compromise and release where the basic liability was in question. He

¹⁵ Spieler and Burton 1998, p. 235.

¹⁶ National Commission 1972, p. 15.

¹⁷ Dodd 1936.

maintained that determining liability for the claim was the role of the administrative agency and they should not be allowed to abdicate that responsibility.

Somers and Somers¹⁸ were especially critical of analogies between workers' compensation and tort liability procedures. They maintained that workers' compensation as a form of social insurance had fundamentally different principles and that administrative procedures should reflect that fact: "The fact is that the whole elaborate system, in which compensation is to be paid to the worker irrespective of fault, is based upon the large public interest involved. If the public purpose is destroyed through improper means of payment it becomes difficult to justify the program." They were also skeptical that lump-sum payments were being used by injured workers for rehabilitation purposes and instead focused on the obvious incentives for representatives of injured workers to encourage the acceptance of lump-sum settlements.

Berkowitz (1967) conducted an analysis of the practice of settlement in state workers' compensation programs for the U. S. Department of Labor. He was very critical of settlements which included a release of employer liability, but accepted that sometimes a compromise and release might be the best solution to a litigated claim where an all or nothing decision was not desirable either. However, Berkowitz felt it was critical that the state carefully evaluate whether the settlement was in the best interests of the injured worker. It was not enough to argue that the employer or insurance carrier wanted to "close the books" on the claim and were willing to offer a cash settlement to effect that purpose.

Empirical Research

There have been surprisingly few empirical studies of compromise and release settlements in workers' compensation systems in the U.S. One of the first was the study by Morgan, Snider, and Sobol in the State of Michigan. Michigan is a wage-loss state, which makes it more difficult to "compromise" on the amount of an injured worker's weekly benefit. However the practice of "redemption" of the employer's liability grew out of the need to settle disputes over workers' compensation claims with something other than a "yes or no" answer to weekly benefits.

Morgan's study (1959) involved interviewing 341 injured workers who settled their claim with a redemption (C&R) of at least \$500 in the first half of 1956, and 144 who were receiving

¹⁸ Somers and Somers 1954, p. 161.

weekly benefits in July 1957. At the time of the study, Michigan required that 26 weekly payments must have been made before a redemption of liability would be considered. The comparison cases had all received at least 13 weeks of benefits. So these were relatively serious disability claims. However, due to the limitations of the sampling design, it was not possible to ensure that the two samples were carefully matched.

They found that lump-sum settlement claims were considerably older, less likely to be from self-insured employers, more likely to involve back injuries, and with less tenure at the injury employer than the weekly benefit claims. For those who had returned to work, only about half as many of the lump-sum claimants reported that they were “able to work as well as before” (18 percent versus 34 percent). Interestingly, the lump-sum claimants were more likely to report that they “had a choice between lump-sum and weekly payment” (32 percent versus 17 percent). There were no significant differences between lump-sum and weekly payment claimants in their age, marital status, number of dependents, education, industry, occupation, or the reported “steadiness” or “level of skill” of the job at injury.

With a focus on rehabilitation (the study was funded by the Vocational Rehabilitation program in Michigan) Morgan and his co-authors concluded that the workers’ compensation system in Michigan was not providing adequate support for “vocational adjustment” after injury. This was a particular problem for those who accepted lump-sum settlements, as only six percent of these used their settlement for vocational rehabilitation purposes. Instead, the lump sum was generally used to pay debts incurred during the period of non-support and to meet living expenses.

Morgan et al. report that “the workers’ own feelings about their treatment varied from satisfaction to apathy to indignation.” In rough comparisons between the two groups of claims, they concluded, “Most of the contested settlement cases appear to have been settled for less than the worker would have received in weekly payments ... In most cases this was a method of compromise in the light of an uncertain legal liability.”¹⁹

Cheit (1961) studied 150 California workers’ compensation recipients who had accepted C&R settlements over \$1,000 and found that those who accepted such settlements came from families of lower socio-economic status than those who did not. They generally used the settlement money to pay debts or meet living expenses (38 percent), for home improvements or

¹⁹ Morgan, Snider, and Sobol 1959, p. 15.

mortgage payments (6 percent), or to start a business, buy income property or invest (14 percent). However, Cheit observed that when the worker was (1) offered a choice, (2) chose the C&R voluntarily, and (3) had a plan for use of the settlement, the plan was usually successful.²⁰

Barton (1971) used administrative files on workers' compensation claims to study a random sample of over 4,000 Texas claims, half of which had been settled with C&R agreements. Barton is a strong and forceful opponent of compromise settlements in workers' compensation, as indicated by the following statement: "Compromise settlement agreements (CSA's), which provide minimal protection to the injured worker, usually are negotiated between an inexperienced claimant, frequently ignorant of his legal rights, and a professional insurance company adjuster. The latter earns his salary by negotiating settlements advantageous to the underwriter."²¹ Even more boldly; "In effect, compromise settlements tend to short-circuit administrative procedures intended to protect the injured worker." Since Barton did not actually interview the injured workers in his sample, the inference is that this conclusion was the consequence of some pre-existing attitudes. It also probably reflected the fact that at that time, the Texas Industrial Accident Board was exercising little or no supervision over compromise settlements and only a minority of claimants were represented by counsel.

Barton found that nearly one-half of workers' compensation cases in Texas were settled by compromise settlements, while only two percent were settled by Board order. He found that CSA claims involved more severe injuries (as indicated by time from injury to return to work). Barton also was concerned that CSA settlements were frequently premature; in one-fifth of these cases, the settlement was signed before the claimant received their notice of rights from the Board.

More recently, Thomason and Burton (1993) explicitly studied the impact of C&R in New York using a sample of 977 closed permanent partial disability (PPD) claims. These were claims that originated with work-related injuries in 1972 and that had closed by the end of 1987 or 15 years later. They developed a reduced form model of the likelihood of a lump-sum settlement as well as the amount of compensation paid to claims of different characteristics.

Among the variables included in their model were age, the pre-injury wage, the weeks of temporary total disability paid (as a proxy for injury severity), the gender and tenure of the

²⁰ Russell 1973, p. 184.

²¹ Barton 1971, p. 262.

worker with their employer, whether the claimant was represented by an attorney, the type of insurance arrangement (state fund, private insurance, or self-insured), and measures of the number of claims adjustment “interventions” and the number of those “interventions” that were ultimately reversed by the Workers’ Compensation Board.²²

They then used this model to estimate the amount of compensation that each claimant would have received under both the adjudicated weekly benefit regime and the lump-sum settlement award, given the characteristics of the claim, the claimant, and the insurer. To compare these disparate estimates, they calculated the discount rate that would equate the lump-sum settlement with the future stream of weekly benefits for comparable injuries. In other words, they calculated the discount rate that would yield the weekly benefit stream from the equivalent estimated lump sum.

The results indicated that claimants were settling for lump sums that were significantly less than they could have expected to receive through adjudication. In fact, the average discount rate associated with a lump-sum settlement was calculated at 24 percent annually. These results cannot be lightly dismissed as due to either the severity of injury or to a disputed insurer liability, since both are controlled by the method of estimation. Of course, it is still possible that claims settled with lump sums were somehow “different” than other claims, but these results are robust enough that it would be unlikely that they could be refuted with more careful measurements of claim characteristics.

As part of the New Mexico comparative study of permanent partial disability and return to work,²³ the authors presented results which make it possible to compare earnings losses and compensation payments for compromise claims (less than five percent of the PPD total) and regular PPD benefit claims. New Mexico is a state that discourages compromise settlements and, of course, there is no way to be sure that the small number of compromise claims adequately reflects the larger group of PPD claims. However, it is very provocative to note that the observed earnings losses after the injury are 22 percent higher for the compromise claims, while their workers’ compensation benefit payments are 20 percent lower. The result is a 10-year estimated

²² Thomason and Burton 1993, Table 3, p. 521.

²³ Reville et al. 2001.

income replacement rate of 47 percent for PPD claimants and only 31 percent for compromise claimants.²⁴

The authors speculate that perhaps lump-sum payments discourage employment somehow, or because the claims are disputed, the lump-sum payments may be less than the actual value of the claim to reflect the reduced likelihood of compensation for the disputed claim. In either event they conclude, "... we recommend that future research should examine the outcomes for lump-sum recipients more carefully."²⁵

A briefing paper for the Labor-Management Advisory Council on Workers' Compensation at the Montana Department of Labor and Industry by Frank Neuhauser of the Survey Research Center at the University of California, Berkeley has recently been posted on the web.²⁶ Neuhauser presents arguments in favor of permitting compromise settlement of medical costs in workers' compensation claims, in addition to indemnity costs.

Arguing from a theoretical perspective, Neuhauser points out that absent co-pays or deductibles, injured workers have no incentive to restrain their consumption of medical services in workers' compensation claims. Similarly, with fee-for-service payments by insurers, the incentives for providers also promote over-treatment. So he maintains that medical treatment costs of injured workers in workers' compensation programs are clearly inflated over what they would be under group health systems. In such a situation, there is an opportunity for a compromise bargain between the worker and insurer or employer to share the potential gains from an alternative arrangement.

On the empirical side, Neuhauser cites cost savings of up to 30 percent with implementation of utilization and treatment guidelines to control over-treatment at one California employer. Further, comparing the fraction of incurred benefits that go for medical costs in states that allow settlement of medical to those that do not across the 37 NCCI states, he estimates that allowing settlements might reduce medical costs by 8 to 12 percent. This could amount to as much as 6 to 10 percent of total workers' compensation costs. And he maintains that workers would be better off, or at least more satisfied, if they were allowed to settle their future medical costs.

²⁴ Reville et al. 2001, Table 5.1, p. 30.

²⁵ Ibid., p. 32.

²⁶ <http://erd.dli.mt.gov/wcstudyproject/settlementandclaimclosuresdiscussionFINAL.pdf>

While Neuhauser recognizes that there might be public policy issues raised by allowing compromise settlement of medical benefits in workers' compensation, he cites the fact that there are very few concerns raised in those states that allow such settlements already. He also notes that the Medicare Set-Aside regulations are evidence of such policy issues, although the experience under these regulations has not yet been evaluated. He speculates that "the barrage of concerns raised by insurers and the pressure to raise rates in response suggests that insurers may have been settling these cases for substantially less than the expected cost of future medical care when workers were covered or soon to be covered by Medicare." (Neuhauser, p. 10)

He also faces the difficult issue of cost shifting between workers' compensation insurers and group health providers by asserting that it is likely to be of small impact since workers' compensation medical costs are only about one percent of all medical treatment costs in the U.S., and given that "... a minority of occupational health care is covered by settlements and only a portion of this treatment is likely to be picked-up by other payers. Consequently, it is unlikely that the cost shifting amounts to more than a small fraction of 1% of third party costs." (Neuhauser, p. 8)

One last empirical study completes our review of research findings. A very recent research paper from the Center for Economic Studies of the U.S. Census Bureau compares two outcomes of litigated workers' compensation claims in California.²⁷ Hyatt compares claims adjudicated by the California Workers Compensation Appeals Board which are resolved with a "compromise and release" (C&R) agreement to those resolved by "stipulation and award" (SA). With compromise and release, the claimant receives a single lump-sum payment and the claim is permanently closed. With a stipulation and award, the disability payments are made over time, medical benefits will continue, and there is no ban on reopening the claim.

Using quarterly data from the Unemployment Insurance system, Hyatt finds that "Average employment decreases prior to and increases after settlement for CR claimants, but for SA claimants it declines before and after settlement."²⁸ There are wide differences in earnings and other characteristics between these two groups, and Hyatt emphasizes statistical tests of differences between them. However the fact is "that labor supply is increasing immediately upon

²⁷ Hyatt 2010.

²⁸ Ibid., p. 11.

receiving a CR, but not a SA settlement. This increase in labor supply is caused by an immediate and sustained increase in the labor force re-entry rate and a decrease in the exit rate.”²⁹

He attributes this to a feeling of “closure” for the injured worker who receives the C&R settlement and cites the psychological literature as identifying such a concept in other life situations as indicative of a “perceived sense of resolution to a stressful or traumatic event.”³⁰ Of course, it is also consistent with other interpretations such as, “... a claimant is concerned that their working may be interpreted as evidence that their injury is less severe...”³¹ At any rate, Hyatt is firm in the conclusion that his results are not consistent with the assumptions of economic theory about the behavioral reactions to lump-sum payments. They demonstrate that labor force participation rates are sensitive to the method of litigation settlement, however.

IV. CHANGES IN C&R POLICY

There have been a number of important policy changes on C&R among the states since the time of the National Commission. Several states have moved to soften or loosen their restrictions on compromise and release settlements (AZ, CO, IN, KY, NJ, NY, ND, PA, RI, WI, WV). Others have increased restrictions, or banned compromise and release (or just release, or just medical release, etc.) completely (DE, MN, NM, TX). However, it is discouraging to report that there has been virtually no analysis of these policy changes, either pre- or post-reform.³² Thus, we will try to construct an impression of the impact of such changes from the general pattern of claims in some states where such data are generally available.

Oregon

In Oregon, the compromise and release issue has been treated as part of the dispute resolution system for workers’ compensation claims. In 1987, HB 2900 addressed the amount of litigation by imposing requirements for the speed of processing claims. However, the number of

²⁹ Ibid., p. 12.

³⁰ Hyatt 2010, p. 7.

³¹ Ibid., p. 8.

³² We contacted persons who are knowledgeable about workers’ compensation policy issues in several states, including CA, MN, NY, OR, TX, WI, WV. None of them were aware of any analyses dealing directly with the issue of compromise and release settlements, either before or after policy changes.

hearings requested continued to increase and reached a peak of 27,549 requests in 1989.³³ The most common issue in dispute in the late 1980s was the degree of permanent disability (46 percent of disputes in 1987).

As a result, several major changes were made to the Oregon workers' compensation statute by SB 1197 in 1990. Foremost among these were further efforts to encourage injury prevention and promote return-to-work programs, the imposition of the "major contributing cause" standard for the work-relatedness of disability; and the allowance of compromise and release settlements (termed claim disposition agreements or CDAs). Oregon CDAs allow injured workers and their insurers to enter into compromise and release agreements for benefits other than medical services.

The impact of these (and several other major) changes to the law in Oregon have been stunning. The number of requests for hearing fell by 60 percent in the 10 years following 1989,³⁴ while the number of accepted disabling claims fell by 34 percent,³⁵ and employment increased by 32 percent.³⁶ The number of permanent total disability awards fell from a net total of 195 claims in 1988 to 10 in 1998, a decline of 95 percent. The number of CDAs went from zero to about 3,000 annually and have ranged around that figure ever since.³⁷ The impact of these changes on insurance premiums in Oregon was also remarkable. Since 1991, when the impact of the 1990 reforms began to be felt, annual pure premium (representing only loss costs) declined by 59 percent to 2007.³⁸

A study by the Workers Compensation Research Institute sought to evaluate the reforms of 1990 by comparing a sample of Oregon claims originating in the last four months of 1989 with another sample of claims from the similar period in 1991.³⁹ In both cases, the claims were evaluated at a point roughly two and one-half years following the injury. They analyzed the cost

³³ Oregon Department of Consumer & Business Services 2008, p. 70.

³⁴ Oregon Department of Consumer & Business Services 2008, p. 70.

³⁵ *Ibid.*, p. 14.

³⁶ *Ibid.*, p. 14.

³⁷ *Ibid.*, p. 74.

³⁸ *Ibid.*, p. 82.

³⁹ See Gardner, Telles, and Moss 1996.

of claims pre- and post-reform and attempted to assign to specific law changes the share of cost reduction between the two cohorts.

They divided cost growth into “natural” factors such as increases in employment levels, wage rates, medical costs, and shifts in employment and contrasted these with “controllable” cost growth. Controllable cost growth includes costs that can be controlled by policy changes or behaviors of participants in the workers’ compensation system; things such as duration of disability, changes in the size of PPD payments or in the likelihood of receiving PPD payments, changes in benefit levels, or changes in utilization of medical and other services.

Before the 1990 reforms, Oregon used a device called the Disputed Claim Settlement (DCS) for those claims where the employer or insurer does not accept liability, but pays the worker a lump sum in exchange for agreeing to withdraw the claim. A DCS agreement in Oregon prevents any further claim activity; it is a final settlement. The 1990 reforms added a Claims Disposition Agreement (CDA) to the Oregon system. Under the terms of a CDA, the employer or insurer agrees to compensate the worker for the disability in a lump-sum indemnity payment. However, medical benefits are not terminated under the CDA. Subsequently, it was determined that the rights to return-to-work services under the workers’ compensation act were also not terminated by a CDA.

The number of DCS agreements rose significantly from 1987 to 1991 (from 3,778 to 6,021 or 60 percent) but then declined to 4,942 in 1992 and 4,100 by 1994. CDA agreements began in 1991 with 1,729 approved, but then rose rapidly to 3,383 in 1993 and 3,216 in 1994.⁴⁰ So, the number of DCS agreements rose initially and then fell back to the baseline level with the introduction of the CDA option. Gardner et al. note that it is not unusual to find both a DCS agreement and CDA on the same claim as the employer or insurer accepts part of the claim, but rejects another part in the agreements.

Gardner et al. estimate that “controllable” costs in Oregon declined by 8.7 percentage points per year as a result of the many system changes in 1987 and 1990. This was more than enough to offset the “natural” cost growth of 7.4 percentage points for the same period (p. xvi). Compared with eight other states (FL, GA, IL, MA, MI, MO, NJ, PA) Oregon was the only one

⁴⁰ Gardner et al. 1996, p. 55.

with a reduction in “controllable” costs.⁴¹ “Back-end indemnity” costs⁴² were reduced by 5.1 percentage points per year from 1989 to 1991, made up of 5.9 percentage points reduction due to PPD and lump-sum propensity, 0.1 percentage point reduction due to TTD duration, and 0.8 percentage point reduction due to “other” indemnity changes.

Overall, WCRI judged that the sharp reductions in claim volume (by 9.4 percent per year), mostly resulting from the increased safety promotion efforts, were the most important factor in the cost reductions. However, the share of lost-time claims that received PPD or lump-sum payments dropped from 44 percent in 1989 to 38 percent in 1991, and with less litigation, attorney costs were reduced as well. The large increases in average amount paid for settlements (31 percent for DCS and 25 percent for CDA) reflected a reclassification of benefits rather than a net increase.

In summary:

The introduction of CDAs sped resolution and reduced TTD duration in a small group of claims: about 5 percent of all indemnity claims and one-eighth of PPD claims. Although the average lump-sum settlement amount in claims resolved through a CDA increased to about \$5,500 in 1991, the increase in total indemnity was only about 3 percent per year. One possible explanation for this increase in lump-sum amounts was that in negotiating, parties effectively may have substituted settlement payments for the 16.5 week decline in TTD duration over the period. At \$240 per week (the average TTD rate), this substitution would account for most of the increase in the average settlement payment.⁴³

The issues raised by the extensive changes to the Oregon workers’ compensation system, further complicated by a change in claims adjustment policies by the dominant (state fund) insurer in the market, prompted the Oregon legislators to commission their own evaluation of the law changes. A research group assembled by the Workers’ Compensation Center at Michigan State University completed the Oregon Major Contributing Cause Study (Welch 2000). The study responded specifically to concerns that the “major contributing cause” standard of liability, enacted in 1990 and refined by legislation in 1995, had resulted in inequitable compensation for injuries and diseases where the etiology of disability was less than clear and employer/insurers could argue that something other than work was the “major” cause.

⁴¹ Ibid., p. 145.

⁴² Generally those costs associated with the closure of the claim, including assessment of PPD or other permanent disability and any other matters that might involve the administrative involvement of the state workers’ compensation agency.

⁴³ Gardner et al. 1996, p. 143.

Through interviews with injured workers and other knowledgeable parties, they developed a model of the factors driving down workers' compensation costs and benefits in Oregon from 1990 through 1998. Using a multivariate regression analysis to control for factors like age, gender, body part injured, occupation and industry of employment they estimated that 13 percent, or about one-third, of the 40 percent in total premium reductions by 1996 were due to the law changes of 1991 and 1995.⁴⁴

Pennsylvania⁴⁵

Pennsylvania Act 57 in 1996 authorized the use of compromise and release settlements for all workers' compensation claims, including the release of both indemnity and medical benefits. This was a sudden change of policy directed at reducing delays in adjudication of claims that was strongly supported by the business community. However, according to David Torrey's excellent review of the Pennsylvania experience, it was not a total reversal of policy. Rather it represented reform to a system of commutation of benefits that had provided an imperfect substitute for C&R.

Prior to the law change in 1996 for accepted injuries where the worker had reached a plateau in medical condition, the parties were allowed to stipulate a partial disability, which meant 500 weeks of PPD benefits. Then they would agree that the 500 weeks of benefits could be paid in a lump sum. Torrey reports that the lump sum was typically negotiated first, with the "weekly" benefit amount (i.e., the degree of partial disability) dictated by spreading the lump sum over the 500 weeks.⁴⁶

But there was no release of liability for medical costs for the employer and the claimant could attempt to reopen the case within the next three years. Since the standard of approval of such commutations was "the best interest of the claimant" it was necessary for attorneys to coach

⁴⁴ Welch 2000, pp. 22–23.

⁴⁵ We owe this section to the remarkable legal scholarship and initiative of Judge David Torrey of the Office of Adjudication in the Pennsylvania Department of Labor and Industry. See Torrey (2007) for the original, much more thorough treatment of these issues.

⁴⁶ Torrey 2007, p. 401.

injured workers to maintain that the purpose of the lump sum was to further their rehabilitation and facilitate a return to work, whether that was the case or not.⁴⁷

Nevertheless, the adoption of C&R policy was a major change for the Pennsylvania workers' compensation system. First, in Judge Torrey's opinion the fact that the process became more forthright and honest from the claimant perspective makes a big difference. Second, the requirement of a public hearing with transcript and judge to approve the agreement lends an extra modicum of seriousness to the transaction which undoubtedly makes an impression on the claimant. Third, the assigned role of the judge is to insure that "the claimant understands the full legal significance of the agreement."⁴⁸ This minimizes the chance that a claimant will sign away his or her rights without being fully aware of the consequences.

Torrey reports that the number of commutation petitions assigned to judges dropped from 4,008 in 1996–1997 to 29 in 1999–2000 to be replaced by a considerably larger number of compromise and release agreements. In fiscal year 2005–2006 a total of 14,112 requests for C&R approval were granted, while only six were denied.⁴⁹ According to statistics kept by WC Judge Torrey, half of his C&R caseload in 2004–2005 emanated from litigated claims. The other half came from claims where there was no obvious dispute, but simply a desire by the parties to terminate the claim with a lump-sum settlement. Approximately 25 percent of all benefit payments in the Pennsylvania system are lump-sum payments associated with C&R agreements.⁵⁰

There has been no "official" evaluation of this fundamental change in policy, but Judge Torrey conducted a study of his C&R claimants for two fiscal years, 2004–2005 and 2005–2006 and reported the results in his long, authoritative law review article. While these results are not from a scientifically designed study, they do represent a slice of the workers' compensation population in Western Pennsylvania.

Torrey approved 114 C&Rs during fiscal year 2005–2006, with a monetary range from \$700 to \$375,000 and an average settlement of \$59,538. Twenty-three of these claims (or 20 percent) received payouts over \$100,000 and 18 of these 23 signed a release for both indemnity

⁴⁷ Ibid, p. 433.

⁴⁸ Torrey 2007, p. 409.

⁴⁹ Ibid., p. 402.

⁵⁰ Ibid., p. 403.

and medical benefits. Apparently this is fairly typical because Torrey reports that 83 percent of all C&Rs in Pennsylvania included a full release. Fifty-two percent of his C&R sample also included a resignation from employment as part of the agreement. This aspect of C&R does not get much attention, but should figure prominently in evaluations of the practice. A follow-up study of the work experience of claimants following C&R (as suggested by Reville et al. 2001) would help to resolve the question of whether they are moving on to other jobs or becoming dependents of public income maintenance programs.

With regard to liability for future medical expenses, Torrey reports that 10.3 percent of C&Rs include employer/insurer responsibility for medical expenses for a specific, defined period of time, while 6.7 percent involve unlimited liability for future medical costs (i.e., release for indemnity only).⁵¹ He also indicates that only 10 percent of the C&Rs he approved in 2005–2006 also required approval of the Medicare Set Aside amount for future medical treatment.⁵² Further he reports that none of the C&Rs that he has approved (since 1996) are known to have been subject to an attempt to reopen the claim and set aside the C&R.

So what is known about Judge Torrey's C&R claimants? The average age was 47, with an obvious deficit both of claimants under 40 and of college graduates, and thirty-two percent were women. The claimants were overwhelmingly from "the working class" with nurses being the only group from the professional class. Nearly half (47 percent) of C&R claimants reported that they had no private health insurance, although some did have access to Medicare or Medicaid, and the overwhelming majority of claims involved orthopedic injuries. The average weekly wage was reported as \$522, with a weekly benefit of \$358. Torrey estimated the yearly income as \$27,145 with an annual workers' compensation benefit of \$18,622.⁵³ Thus the typical settlement of \$59,538 would amount to less than three years of weekly benefits, after deduction of medical cost reserves.

Judge Torrey felt that the motivation of the claimant to settle was an important thing to assess. "The inquiry and its response can lead to a better evaluation of whether the C&R process

⁵¹ Torrey 2007, p. 406.

⁵² *Ibid.*, p. 420.

⁵³ *Ibid.*, p. 427–428.

is a constructive addition to the system.”⁵⁴ As he analyzed his 114 C&R claimant responses, he noted that there was “scant evidence” of lump summing to promote vocational rehabilitation. Three of the 114 reported plans for retraining and three more had plans to open a business. In contrast, a much larger proportion stated that they sought the C&R to obtain “relief from the claims adjustment process and/or the stress of litigation.”⁵⁵ However, the majority expressed their wish “to get on with my life.” This lends further credence to the Hyatt research findings reported above. Only one worker among the 114 quizzed about their motivation reported that they were unable to meet the cost of living on the weekly workers’ compensation benefit.

Torrey also considers the traditional concerns of critics of compromise and release based upon his experience in the Pennsylvania system.⁵⁶ The issue of “overreaching,” or soliciting settlements by claims adjusters is a problem. Judge Torrey reports that there are instances of “cold calls” from claims adjusters to workers’ compensation claimants suggesting a lump-sum settlement in exchange for a release from future liability. However, he feels that the requirement for an open hearing and the judge’s responsibility to ensure that the claimant understands what s/he is giving up have served to protect workers’ interests.

The paternalistic motivation behind the prohibition of C&R in early statutes was based largely on the fear of what Torrey terms “dissipation,” the possibility that injured workers who accept lump-sum settlements would dissipate those funds too rapidly and end up requiring government assistance. While there have been no follow-up studies of C&R claimants in Pennsylvania, Torrey reports his impression that dissipation is a concern. Anecdotes abound of claimants who demonstrated that they were not capable of handling a lump sum responsibly.

Concerns over “cost-shifting” could undermine one of the principles that workers’ compensation programs are built upon, namely that the cost of the good or service produced should include the cost of injuries to the workers who produced it. While this potential certainly exists in Pennsylvania as elsewhere, Torrey feels that the steps taken by CMS to protect Medicare and Medicaid from such cost shifting have made a large difference.

⁵⁴ Ibid., p. 429.

⁵⁵ Ibid., p. 431.

⁵⁶ Torrey 2007, pp. 437–441.

Judge Torrey also addresses what he terms the “starve-out” claims adjusting strategy. It is alleged that some insurers/employers consciously adopt a strategy of denying claims and forcing the injured worker to fight for their workers’ compensation benefits. Then, when the worker has exhausted his or her resources, the employer/insurer offers a C&R at a reduced figure, knowing that the worker is now desperate. Torrey believes that this does happen in Pennsylvania, however he asserts this is not “a rampant problem.”⁵⁷

Torrey offers his evaluation of the C&R in Pennsylvania, beginning with the following:

The ability of the parties to engage in a C&R has provided an efficient case resolution method with regard to workers who have permanent but not seriously-disabling injuries. Under the Pennsylvania wage-loss system, such workers can remain on temporary total disability (TTD) for years. This generous potential duration of benefits can result in the temptation of a minority of workers to unreasonably extend their disabilities. Final settlement can cut short this tendency. The C&R, at the same time, has reduced the serial filing of adjustment petitions by employers. All agree that the large number of cases that would stay open for years or decades, going through multiple rounds of expensive litigation, has been reduced. The wasteful litigation costs involved in such serial litigation have often been avoided by settlement.⁵⁸

In addition, he cites these positives. The existence of C&R has led to the facilitation of mediation, with the emphasis on the “compromise” element. Use of the C&R has clearly reduced the adjudication caseload and the backlog of claims awaiting adjudication, resulting in a system with significantly fewer delays. Torrey also notes that a culture of “frivolous claims filing” by injured workers seeking settlements has not developed in Pennsylvania.

There are also criticisms of the addition of C&R to the system from Judge Torrey. The lack of a requirement for a “bona fide dispute” means that it is possible for the parties to engage in a compromise purely for convenience. Without a “best interests of the worker” standard for judicial review, it is entirely possible for a “manifestly bad deal” to be approved. Pennsylvania statute specifically states that a paternalistic standard of review is not appropriate, but that the judge is only responsible for insuring that the claimant fully understands the terms of the agreement and the potentially serious consequences. The C&R can also result in a “windfall” for the claimant’s attorney, who typically receives 20 percent of the settlement amount, regardless of the amount of effort involved.

⁵⁷ Ibid., p. 440.

⁵⁸ Torrey 2007, p. 442.

Finally, Judge Torrey offers his recommendations concerning the availability of C&R settlements in Pennsylvania's workers compensation system.⁵⁹

Recommendation 1 – Retain the statutory requirement of an open, on-the-record hearing where the claimant appears personally and testifies under oath with regard to his understanding of the effect of the C&R.

Recommendation 2 – The existence of a bona fide dispute should be a prerequisite for C&R.

Recommendation 3 – Where the claimant is without representation, the judge should be equipped with a “best interests” approval criterion.

Recommendation 4 – In a non-litigated case, attorney fees should be limited to 15 percent.

Recommendation 5 – The statute should provide for jurisdiction to entertain a set-aside attempt, with a limitation of three years for such action.

Recommendation 6 – A procedure should be established for claimants such as group health insurers to advance their claims either before or as part of the C&R proceeding.

Recommendation 7 – The defendant's purchase of an annuity to fund a settlement does not absolve the employer and carrier of secondary liability in the event of the annuity carrier's default.

Judge Torrey offers three major conclusions from his ten years of experience with C&R settlements in Pennsylvania. First, maintaining that compromise in workers' compensation cases is antithetical to the system is “noble but unrealistic.” He maintains that workers' compensation is an adversarial system, and that fact must be recognized. Second, state oversight of settlements is still necessary. There are examples where claimants are taken advantage of by overzealous claims adjusters, and these cases must be prevented. Third, policy concerns over the potential dissipation of lump sums by injured workers persist, but in the absence of adequate follow-up studies such concerns are difficult to assess.

A recent study by the RAND Center for Health and Safety in the Workplace (Greenberg and Haviland 2008) reports on similar comments from stakeholder interviews conducted in Pennsylvania as part of a review of issues and performance of the state workers' compensation system. It was agreed by “both sides of the bar” that C&R does facilitate more rapid resolution of claims. It also serves to complement the mediation of disputes. But concerns were expressed about coverage of future medical and indemnity costs, particularly given the lack of sophistication in handling large sums of money on the part of many injured workers. They also offer the following observation:⁶⁰

⁵⁹ Ibid., pp. 445-450.

⁶⁰ Greenberg and Haviland 2008, p. 47.

As a matter of policy, C&R has become the linchpin of Pennsylvania's efforts to promote the early resolution of workers' compensation disputes other than through litigation. And Act 147 has recently built on that same foundation, both by establishing a requirement for mandatory mediation of disputes and by creating a resolution-hearing mechanism to expedite the judicial review of C&R settlements.

Judge Torrey reports that in his personal experience under the expedited process in Pennsylvania, C&R approval in a litigated case can usually occur in a week or two. For claims that require a petition, it takes three to four weeks to convene a hearing, approve the C&R proposal, and circulate the approval order.⁶¹

Texas

Texas is noteworthy because it is one major state that has moved against the tide by restricting compromise and release settlements in workers' compensation with legislation in 1989 that took effect in 1991. This occurred as part of a very broad reform of Texas workers' compensation law and in response to a perception of excessive use (and abuse) of compromise settlement agreements (CSAs) in resolving Texas claims. About 40 percent of all claims in Texas included disputes that needed resolution and over 99 percent of disputed claims in Texas resulted in CSAs in 1986. In addition, about 15 percent of non-disputed claims were resolved with a lump-sum payment.⁶²

Texas also began an intensive study of the return-to-work rates and patterns of workers' compensation claimants, beginning with a study by the Center for the Study of Human Resources at the University of Texas. This study was requested by the legislature as part of the Texas Workers' Compensation Act of 1989 and consisted of both a comparative analysis of claims filed in 1989 and 1991 (i.e., pre- and post-reform) and a non-comparative analysis that described claim patterns across the period. This study involved more than 600,000 Texas workers' compensation claims including medical-only claims, and also used Texas Employment Commission data on employment and quarterly earnings to assess return-to-work patterns.

Under the new law, injured workers with higher-benefit single claims (>\$5,000) were determined to be more likely to return to work sooner and remain at work longer than under the

⁶¹ Torrey 2007, p. 415.

⁶² Barth, Victor, and Eccleston 1989, pp. 38–39.

old law. This pattern held across gender, age, industry and other categories examined. Under the new law injured workers also experienced smaller weekly earnings declines after injury and more complete returns to pre-injury earnings levels.⁶³

However, the major payoff to the new law in Texas was a huge reduction in formal dispute resolution proceedings. Under the old law, approximately 60,000 informal hearings were required each year. This declined to less than 30,000 by 1997. Further, the disputes appealed to district court declined from 14 percent to less than 1 percent. In addition, the attorney representation of injured workers decreased significantly. Thus, the effectiveness of dispute resolution increased substantially in Texas under the reforms. Of course the abolition of compromise and release was only one element of a complex array of changes to the Texas law, and these results should not be taken as a consequence of any one element of the reforms.

Minnesota

Minnesota is a state which has shown recent interest in review of their dispute resolution processes, including “stipulation for settlement” outcomes, some of which are essentially compromise and release settlements. This is despite the fact that Minnesota was identified by Torrey (Table 3) as a jurisdiction which does not allow compromise and release agreements.⁶⁴ Minnesota has embraced the mediation model of dispute resolution, which seems to match an irresistible tendency to compromise.

The Management Analysis and Development (MAD) division of the Minnesota Management & Budget department conducted an analysis of 2007 disputed cases together with a set of 43 stakeholder interviews as part of a “Dispute Resolution Business Process Improvement Project” launched by the Minnesota Department of Labor and Industry (MAD 2008).

Minnesota has a complex two-track dispute resolution process, with medical and rehabilitation issues plus disputes involving less than \$7,500 handled by the Department of Labor and Industry (DLI), and the remaining claims (66 percent of total) handled by the Office of Administrative Hearings. According to the MAD report, 39 percent of “Claim Petitions” are settled with stipulation, 19 percent are certified to the Hearing Division, 9 percent are dismissed,

⁶³ Texas Department of Insurance 1993.

⁶⁴ He notes that settlements are allowed in Minnesota, but he classified this as not allowing C&R because the claimant’s rights to reopening are usually accepted.

and 22 percent had no outcome as of July 2008. An additional 43 percent of the Hearing Division disputes result in a settlement (with or without stipulation). Combining the two outcomes, nearly half of the disputes going to the Office of Administrative Hearing result in some kind of a settlement.⁶⁵

There was a simultaneous inquiry conducted in Minnesota by the Office of the Legislative Auditor (OLA), Program Evaluation Division which resulted in a report titled “Oversight of Workers’ Compensation” in February 2009. They conducted four different surveys of workers’ compensation claimants and combined the survey results with administrative data to find that “concerns about the impact of some settlement agreements on injured workers merit further study.”⁶⁶

Their analysis points out that the “stipulation for settlement” can result in either a “mediation award” or an “award on stipulation.”⁶⁷ But these can be either a “full, final and complete” settlement where the worker gives up all rights to future benefits (or all future benefits except medical) or “to date” settlements which involve a lump-sum payment to settle a claim for a specific period of time, without prejudice to future benefits. In either case, the agreement must be approved by a DLI dispute resolution specialist or workers’ compensation judge.

According to one finding of the OLA study “Concerns about the impact of some settlement agreements on injured workers merit further study.”⁶⁸ They expressed reservation about such agreements when the injured worker has not returned to work or completed their vocational rehabilitation plan. They report that nearly 100 percent of injured workers return to work when a vocational rehabilitation plan is completed, but only 18 to 29 percent when the claim is settled before completion of the plan.⁶⁹ They further note that in 2006, 53 percent of vocational rehabilitation plans were completed, but 27 percent were closed as part of a settlement

⁶⁵ Minnesota Management Analysis & Development 2008, p. 19.

⁶⁶ Office of the Legislative Auditor 2009, p.73.

⁶⁷ Ibid., p. 73.

⁶⁸ Ibid.

⁶⁹ Ibid., p. 74.

agreement and not completed.⁷⁰ Presumably this reflects a tendency to just take the lump sum and leave the labor force.

Only 21 percent of respondents to the OLA survey agreed that their settlements amounts were fair (agreed or strongly agreed) and 35 percent agreed or strongly agreed that the parties negotiated fairly. Just over half (57 percent) of workers who settled agreed or strongly agreed that it was the right thing to do.⁷¹ That means that up to 43 percent did not think it was the right thing to do. The OLA recommendation was as follows: “To ensure that voluntary settlements are in the workers’ best interests, the Department of Labor and Industry should track settlement terms and outcomes for the workers and, as needed, adjust the criteria for approving such awards.”⁷² Their conclusion is revealing, “Workers should not be settling workers’ compensation claims under terms that defeat the purpose of workers’ compensation—helping injured workers recover their health and get back to work at a wage comparable to what they earned before being injured.”⁷³

Washington

As reported above, Washington is one of a very small group of states that have banned compromise and release settlements throughout the modern era. However, even in Washington there is some scope for compromise settlements in litigated claims. First, there is the fact that the Washington statute does provide for lump sum payments in the case of death or permanent total disability.⁷⁴

This option has been in the law since 1911, but it provides for a “commutation” of future benefits rather than a compromise and release settlement.⁷⁵ Such a commutation is to be “equal or proportionate, as the case may be, to the value of the annuity then remaining,…” and such a

⁷⁰ Ibid.

⁷¹ Ibid., p. 75.

⁷² Office of the Legislative Auditor 2009, p. 76.

⁷³ Ibid., p. 76.

⁷⁴ RCW 51.32.13

⁷⁵ But in *Harrington v DLI* the Supreme Court of Washington held that a worker who had received such a lump-sum and then returned to work could not receive compensation for a new injury because he was already receiving lifetime wage replacement through the earlier commutation.

conversion was to be at the discretion of the department upon written application to the department. This provision is still applicable today, but through lack of updating (since 1957) the maximum amount of such a commutation now is only \$8,500 and therefore this option has fallen into disuse.

Second, at the Board of Industrial Insurance Appeals (BIIA) level there is the “Order on Agreement of Parties” which is a certification by the BIIA that a voluntary agreement between the injured worker and the employer or insurer is consistent with the law and the facts of the case. In fact, the BIIA has limited ability to determine the facts in the absence of a hearing, so in practical terms this reduces their role to assuring conformance with the law. This provision dates from the introduction of the Mediation/Review process at BIIA in 1996. The intent was to provide a means to settle appeals without the requirement of a formal hearing, or for a settlement during a hearing. The number of these agreements has fluctuated between 1,800 and 2,000 per year in the past few years, so use of this option is quite common.

In addition, there are so-called “sidebar settlements” between injured workers and self-insured employers that look somewhat similar to compromise settlements in other states.⁷⁶ Under one of these agreements, the injured worker agrees to withdraw his/her workers’ compensation claim in exchange for a lump-sum payment. Sometimes these agreements also stipulate separation of the worker from his/her employment. Such agreements are not reviewed by either L&I or BIIA, but of course they also would not be binding in the same sense as an order from the Board or a formal release of liability would be in other states. However, such private agreements might be enforceable at Superior Court in Washington provided they are consistent with the law, and in particular do not necessitate either the worker or employer giving up their future rights, which is specifically prohibited by Title 51 of the Industrial Insurance Act.

Compromise and Release and Medicare

Since the mid 1980s the Federal Government has had an interest in workers’ compensation through the *Medicare as Secondary Payer Act* (42 U. S. C. Para 1395) which established that Medicare was to be the secondary payer in cases where there was another source of medical cost payment. In 2000, the Health Care Financing Administration (HCFA) announced

⁷⁶ The Attorney General’s office does not enter into such agreements on behalf of the Accident Fund.

that they were going to begin monitoring workers' compensation (and other) lump-sum settlements to protect the interests of the Federal Medicare program.

In those instances where a lump-sum payment was made to settle a workers' compensation claim, HCFA wanted to verify that the obligation for future medical costs for the claimant was satisfied. The justification for this concern was the likelihood that the claimant would eventually become eligible for Medicare or Medicaid, and that Medicare might then become responsible for the cost of treatment. The Federal government wanted to ensure that private insurers took care of their obligation first.

Thus the requirement for review and approval of compromise and release settlements in workers' compensation came into being. After some early overreaction by attorneys in the workers' compensation community, these regulations were implemented. Initially this only involved claims where the worker was currently entitled to Medicare and claims in which the settlement was over \$250,000 and there was an expectation that the claimant would become a Medicare beneficiary within 30 months.⁷⁷ However, compliance was tepid at best and workers' compensation attorneys continued to resist implementation by refusing to stipulate which portion of settlements were designated for medical costs and which portion for indemnity.

In 2003, the Medicare as Secondary Payer Act was amended by the *Medicare Prescription Drug Improvement and Modernization Act*, which included provisions that clarified the role and strengthened the hand of the (renamed) Centers for Medicare and Medicaid Services (CMS) in dealing with workers' compensation settlements. So now the requirement for review and approval is statutory and is effectuated by CMS insistence on a Medicare Set Aside (MSA) Trust which must be established and funded appropriately before CMS will approve the compromise and release settlement.

In 2009 another tightening of this requirement was introduced to the U.S. House of Representatives in a bill called the *Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2009*. In addition to lowering the threshold for review to \$25,000, it would require that future workers' compensation settlements not limit or extinguish the right of the claimant involved to payment of medical expenses incurred after the effective date of the agreement. In other words, it would no longer be allowable to negotiate a release of medical

⁷⁷ Welch 2003, p. 4.

liability in a workers' compensation claim unless CMS approved, or the total amount of the settlement was less than \$25,000. The bill was referred to the Ways and Means Committee in May 2009.

V. "BEST PRACTICE" ON COMPROMISE AND RELEASE

By way of conclusion, we will try to summarize the wisdom that emerges from this review of the evidence on compromise and release settlements in workers' compensation systems. Of course, it is obvious that "beauty (or wisdom) lies in the eye of the beholder." Our aim is to provide an objective interpretation of the findings in this review, but we readily acknowledge that there is no such thing as universally recognized "best practice" in compromise and release policy, or any other issue in workers' compensation programs.

We begin by noting the policy trend has been in favor of extending the use of C&R for the past half-century at least. Fewer states ban or seriously limit the use of C&R and restrictions placed upon their utilization are generally fewer. Obviously the use of compromise and release settlements in workers' compensation is serving some purpose. But the range in policy today is from an outright prohibition of C&R (as in Washington) to no oversight at all if the claimant has representation (as in Florida). Within this extremely wide policy range, what can we say about "good practice" for the 21st century?

First, it seems clear that careful review of C&R agreements by the state agency is highly recommended. The evidence indicates there can be a degree of short-sightedness by claimants in compromise settlements, bargaining power is not evenly distributed between the injured worker and the insurer or employer, and the public interest in these outcomes must be protected as the early scholars on workers' compensation indicated.⁷⁸

Second, the standard of this review should be broad so that the complex range of issues can be accommodated. The "best interests of the claimant" standard seems to promise better results than just ensuring that the claimant understands the significance of the agreement. If there is to be a review of the settlement, it should be broad enough to be effective and specific enough to be useful.

⁷⁸ See Moroni (2009) for a very spirited presentation of this position in the context of the 2005 workers' compensation reforms in Missouri, which removed the paternalistic role of reviewing such settlements.

Given the desire for a “fair and final” settlement, the question of reopening must be near the top of the policy agenda. The crux of this issue would seem to be the advisability of a full medical release (as opposed to release of indemnity), since the future medical implications of an injury or disease are truly unknowable in advance. Therefore, good practice might restrict the use of medical release, possibly keeping medical treatment open for a specific term of years. This would provide both some degree of security for the worker and limited certainty for the insurer/employer, but recognize the problem of inability to foretell the future. The existence of structured settlements today can provide another mechanism to accommodate these uncertainties, as does the CMS review for medical benefit adequacy.

Another question that emerges from this review is whether a “bona fide” dispute should be required as a prerequisite for a C&R settlement. This issue is focused on the “compromise” part of the equation. If there is no dispute, then it seems clear that there is no compromise, but just a “release” in exchange for a cash settlement. An elaboration of this issue involves the possibility of banning C&R where the dispute is over the employer’s basic question of liability, as some of the early writers suggest. However, this argument can easily be stood on its head and the C&R used only where there is contention over the compensability of the claim, i.e., where the dispute is an all or nothing outcome. Then compromise does offer a less than perfect solution for both sides.

Perhaps it once was clear whether a given employer was liable for a particular injury or illness, but of course today it is not. With the expansion of workers’ compensation liability from the simple historical “injury by accident” requirement to include occupational disease, repetitive strain, long-term exposure and other claims with more complicated etiology, it is no longer clear who carries the liability. A significant policy challenge like Oregon’s “major contributing cause” requirement only reinforces this conclusion. Again, the C&R settlement offers a way out of the causation dilemma.

Should there be a waiting period required before filing for a C&R? This goes back to the basic question of requiring a dispute before proceeding. Requiring maximum medical improvement (MMI) on the part of the claimant seems reasonable, but requiring that a specific period of weekly benefit payments has expired does not allow for sufficient flexibility to handle the complexity of many claims. These provisions seem less prevalent among state systems today

than they were earlier. Besides, such an arrangement is really more in the nature of a commutation of future benefits, rather than a compromise over those benefits.

Last, and certainly not least, attorney fees need to be addressed to provide some correlation between the amount of effort required on the part of the attorney and the benefit to the client. In this regard, it might also be a good idea to allow a “cooling-off period” after the settlement to allow both parties to reconsider what they have agreed to in the heat of the moment.

We recognize that the practical exigencies of workers’ compensation in the 21st century are manifest in the existence of the compromise and release option. The overwhelming majority of states allow some form of compromise and release agreement. It is obvious that this practice provides a desirable option for particular situations. We also have the firm impression that the “best administered” workers’ compensation systems are more careful about the indiscriminate use of compromise and release settlement as a policy option.

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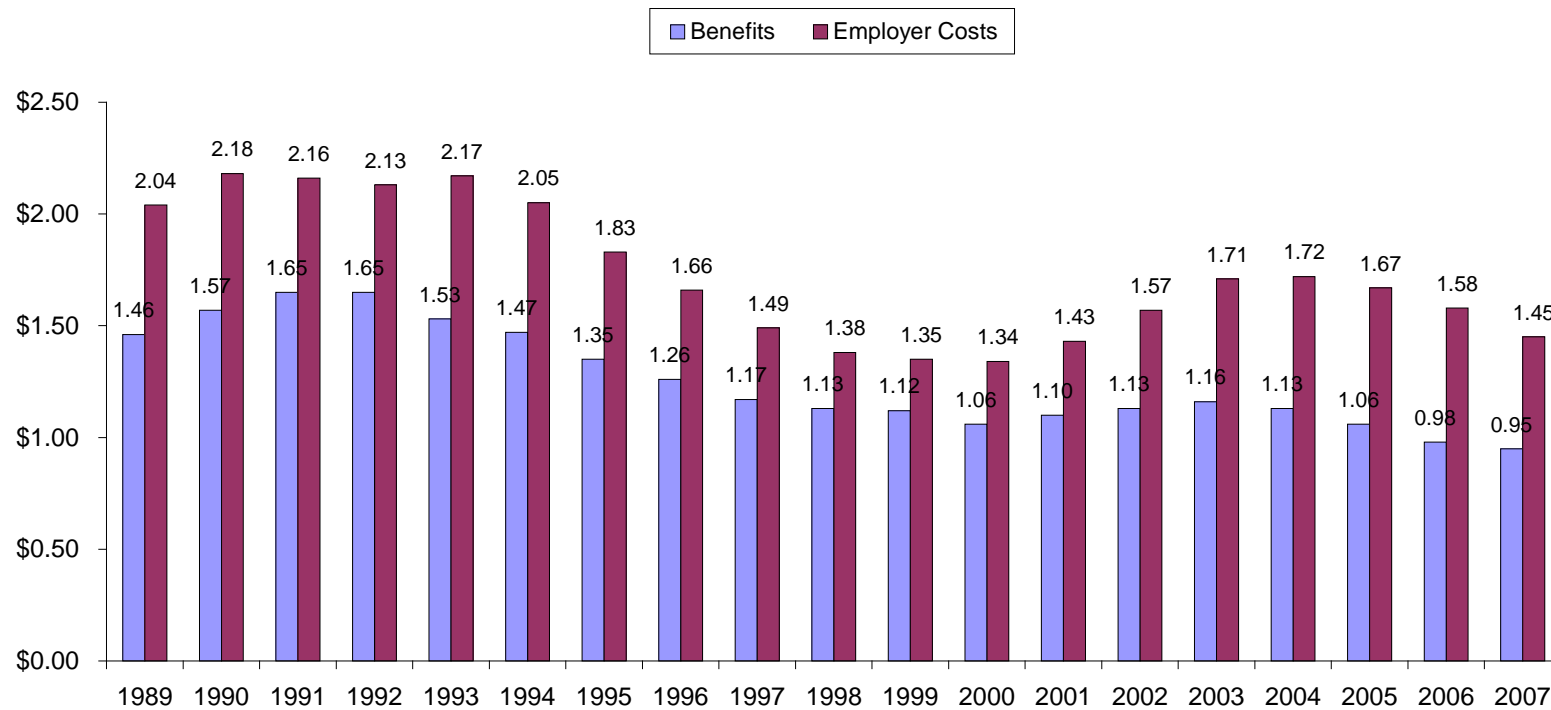
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Figure 1 Workers' Compensation Benefits* and Costs per \$100 of Covered Wages, 1989–2007**

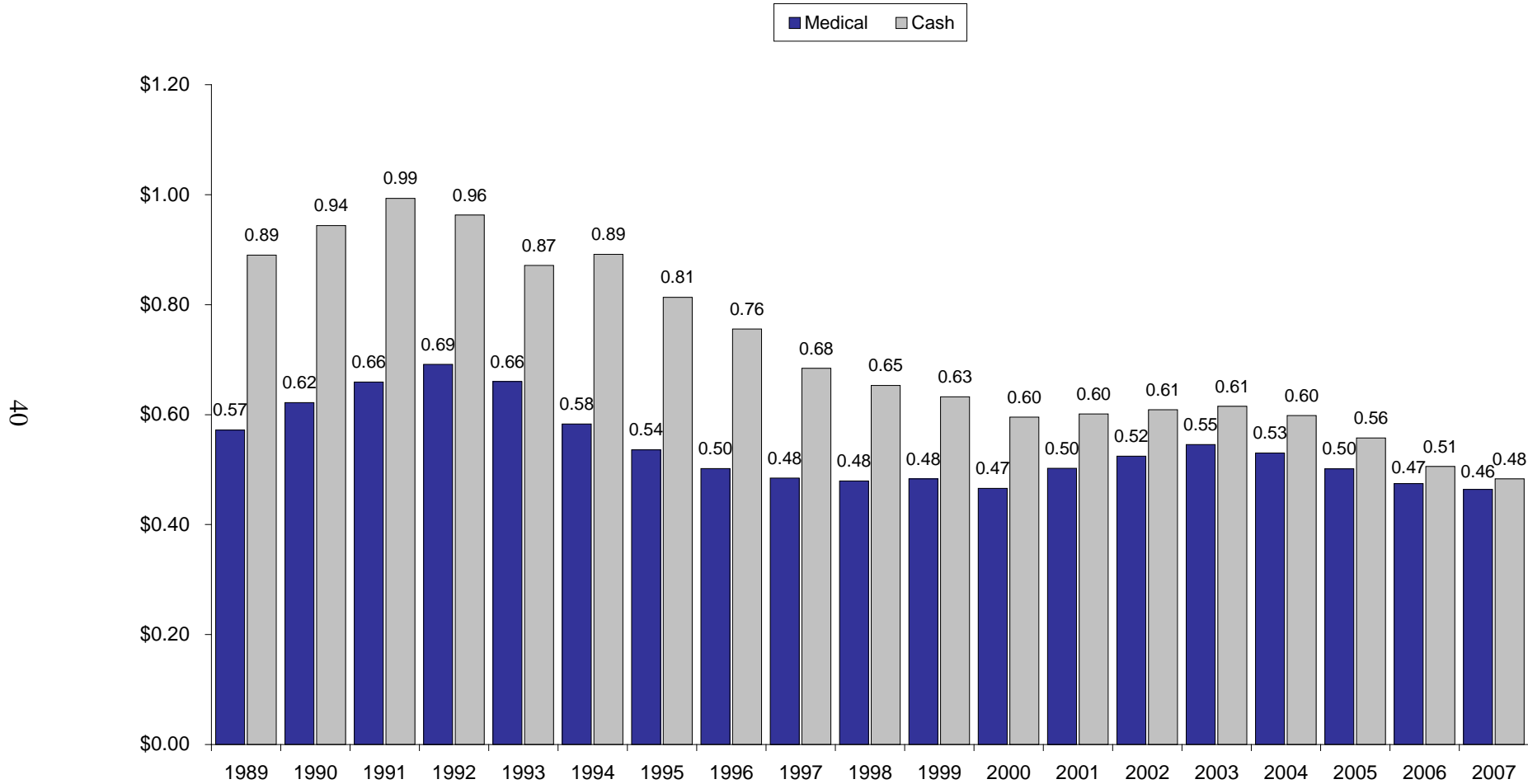


* Benefits are payments in the calendar year to injured workers and to providers of their medical care.

** Costs are employer expenditures in the calendar year for workers' compensation benefits, administrative costs, and/or insurance premiums. Costs for self-insuring employers are benefits paid in the calendar year plus the administrative costs associated with providing those benefits. Costs for employers who purchase insurance include the insurance premiums paid during the calendar year plus the payments of benefits under large deductible plans during the year. The insurance premiums must pay for all of the compensable consequences of the injuries that occur during the year, including the benefits paid in the current as well as future years.

SOURCE: Sengupta, Reno, and Burton, 2009, p. 5.

Figure 2 Workers' Compensation Medical and Cash Benefits per \$100 of Covered Wages, 1989–2007



SOURCE: Sengupta, Reno, and Burton, 2009, p. 6.

Table 1 Status of Compromise and Release Settlements, ca 1970

	(1) Compromise and release permitted?	(2) Compromise without release?	(3) Are medical benefits included in the settlement?	(4) Reopening after settlement possible?	(5) Agency approval required	(6) Hearing held
Alabama	YES	–	SOMETIMES	NO	YES ⁿ	NR
Alaska	YES	–	SOMETIMES	YES	YES	SOMETIMES
Arizona	NO	NO	NA	NA	NA	NA
Arkansas	YES	–	ALWAYS	NO	YES	ALWAYS
California	YES	–	NR	NR	YES	SOMETIMES
Colorado	NO	YES	ALWAYS	YES	YES	SOMETIMES
Connecticut	YES	–	USUALLY	NO	YES	USUALLY
Delaware	YES	–	NR	NR	YES	ALWAYS
Dist. of Columbia	YES	–	NEVER	YES	NO	NA
Florida	YES	–	ALWAYS	NO	YES ^o	ALWAYS
Georgia	YES	–	USUALLY	NO	YES	NEVER
Hawaii	YES ^a	–	SOMETIMES	NO	YES ^p	SOMETIMES
Idaho	YES	–	USUALLY	NO	YES	SOMETIMES
Illinois	YES	–	USUALLY	NO	YES	USUALLY
Indiana	NO	NO	NA	NA	NA ^q	NA
Iowa	YES	–	USUALLY	YES	YES	SOMETIMES
Kansas	YES	–	ALWAYS	YES	YES	ALWAYS
Kentucky	NO	YES	ALWAYS	YES	YES	NEVER
Louisiana	YES	–	USUALLY	NO	YES ^r	ALWAYS
Maine	YES	–	USUALLY	NO	YES	NR
Maryland	YES	–	NR	NR	YES	USUALLY
Massachusetts	YES	YES ^b	USUALLY ^g	NO	NR	()
Michigan	YES	–	ALWAYS	NO	YES	ALWAYS
Minnesota	YES	–	SOMETIMES ^h	YES	YES	SOMETIMES
Mississippi	YES	–	ALWAYS	NO	YES	ALWAYS ^u
Missouri	YES	–	ALWAYS	NO	YES	ALWAYS
Montana	YES	–	SOMETIMES	NO	YES	SOMETIMES
Nebraska	YES	–	ALWAYS ⁱ	NO	YES	ALWAYS
Nevada	NO	NO	NA	NA	NA	NA
New Hampshire	YES	–	NEVER ^j	NO	YES ^s	ALWAYS
New Jersey	NO	NO	NA	NA	NA	NA
New Mexico	YES	–	ALWAYS	NO	NO	NA
New York	NO	YES	NEVER	YES	YES	ALWAYS
North Carolina	YES	–	ALWAYS	NO	YES	SOMETIMES
North Dakota	NO	NO ^c	NA	NA	NA	NA
Ohio	YES	–	ALWAYS	NO	YES	ALWAYS
Oklahoma	YES	–	ALWAYS	NO	YES	ALWAYS
Oregon	YES	–	SOMETIMES	()	YES	SOMETIMES
Pennsylvania	NO	NO	NA	NA	NA	NA
Rhode Island	NO	YES ^d	SOMETIMES ^k	NO	NR	NR
South Carolina	YES	–	ALWAYS	NO	YES	SOMETIMES
South Dakota	YES	–	USUALLY	NO	YES	SOMETIMES
Tennessee	YES	–	NEVER	NO	YES	USUALLY
Texas	YES	–	SOMETIMES	YES ^m	YES	USUALLY
Utah	YES	–	SOMETIMES	YES	YES	SOMETIMES
Vermont	YES	–	SOMETIMES	YES	YES	SOMETIMES
Virginia	YES	–	USUALLY	NO	YES	SOMETIMES
Washington	NO	YES ^e	NA	NA	NA	NA

	(1) Compromise and release permitted?	(2) Compromise without release?	(3) Are medical benefits included in the settlement?	(4) Reopening after settlement possible?	(5) Agency approval required	(6) Hearing held
West Virginia	NO	NO	NA	NA	NA	NA
Wisconsin	NO	YES	USUALLY	YES	YES	SOMETIMES
Wyoming	NO	YES ^f	NA	NA	YES	SOMETIMES

NA—not applicable

NR—no response

- (a) Only at the appellate level and, in general, medical is not part of the settlement.
- (b) An employee may reserve his rights under a particular section of the act, but this is very exceptional.
- (c) Compromise settlements are allowed only for settlement of disputed *past* benefits.
- (d) Permitted only after compensation has been paid for more than 26 weeks. Parties may agree on extent of disability.
- (e) Permitted at the appellate level.
- (f) Compromise without release permitted on permanent partial ratings.
- (g) However, if case has been previously determined compensable generally, medical is paid in *addition*.
- (h) Only when primary liability is denied.
- (i) Almost.
- (j) Except accidents prior to effective date of amendment passed in 1959.
- (k) No compromises, but commutations of “future” disability.
- (l) Yes—compromise; No—release.
- (m) By court action
- (n) Compromise and release settlements approved by courts.
- (o) Must be approved by the judge of the industrial commission.
- (p) Compromise and release permitted only at the appellate level; must be approved by appeals board.
- (q) Compromise settlements not recognized, but all agreements between the parties must be approved by the agency.
- (r) Court-administered State.
- (s) Rarely.
- (t) Both sides must supply current medical reports. Referee may ask for more medical evidence.
- (u) If case is still before the labor department and has not been appealed to the superior court.

SOURCE: Adapted from Russell, 1973, Table 1, pp. 197–199.

Table 2 Lump-Sum Settlements for 2004/2007 Claims with More Than 7 Days of Lost Time, Multistate Comparisons,
Adjusted for Injury and Industry Mix and Wages

Performance Measure	CA	FL	IA	IL	IN	LA ^a	MA ^a	MD	MI ^a	NC	PA ^a	TN	TX	WI	14-state median ^b	10-state median ^c
Claims with lump-sum settlements (percent)	19%	28%	22%	38%	23%	17%	13%	18%	12%	33%	14%	44%	3%	9%	19%	22%
Average lump-sum settlement per claim with more than 7 days of lost time and a lump-sum settlement	\$16,869	\$17,239	\$28,758	\$24,662	\$13,115	\$30,699	\$30,941	\$16,990	\$44,336	\$31,130	\$49,096	\$29,050	\$13,984	\$20,054	\$26,710	\$18,647

Note: 2004/2007 refers to claims arising in October 2003 through September 2004, evaluated as of March 2007.

^a Wage-loss states.

^b The 14-state median is the average of the states ranked 7th and 8th on a given measure; those states change depending on the measure being evaluated.

^c The 10-state median represents the 10 non-wage-loss states in the study, excluding Louisiana, Massachusetts, Michigan, and Pennsylvania, and is the average of the states that rank 5th and 6th on a given measure; those states change depending on the measure being evaluated.

SOURCE: Adapted from Telles, Eccleston, Radeva, Yang, and Tanabe, with the assistance of Igor Polevoy. 2009, Table 2.9, p. 15.

Table 3 State Compromise and Release Arrangement, ca 2006

	Allow C&R	Release for Medical	Hearing Required	Standard of Approval
Alabama	YES	YES	NO	Best interests; no paternalistic standard when ombudsman approves
Alaska	YES	YES	NO	Best interests ^g
Arizona	YES	YES ^a	NO	Existence of genuine disputed issue; claimant's understanding of agreement
Arkansas	YES	YES	YES	Best interests
California	YES	YES	NO	Adequacy
Colorado	YES	YES	NO	Best interests
Connecticut	YES	YES	YES	Best interests
Delaware	NO	NO	NA	NA
Florida	YES	YES	NO	None ^h
Georgia	YES	YES	NO	"Reasonable[ness] under the evidence available at the time"
Hawaii	YES	YES	?	[ⁱ]
Idaho	YES	YES	NO	Best interests
Illinois	YES	YES	NO	Best interests
Indiana	YES	YES	NO	Best interests
Iowa	YES	YES	NO	Best interests
Kansas	YES	YES	YES	Best interests
Kentucky	YES	YES	NO	"Reasonable assurance that the worker will have an adequate source of income during disability"
Louisiana	YES	YES	NO	Best interests
Maine	YES	YES ^b	YES	Best interests
Maryland	YES	YES	NO	Best interests
Massachusetts	YES	YES ^c	YES	Best interests
Michigan	YES	YES	YES	Best interests
Minnesota	NO	NO	NA	NA
Mississippi	YES	YES	NO	Best interests
Missouri	YES	YES	NO	Claimant's understanding of C&R
Montana	YES	YES	NO	Original claim: reasonable dispute; PPD: adequacy; PTD: paternalistic criteria
Nebraska	YES	YES	NO	Best interests
Nevada	NO	NO	NA	NA
New Hampshire	YES	NO	YES	Best interests
New Jersey	YES	YES	YES	"Fair and just"
New Mexico	NO	NO	NA	NA
New York	YES	YES	YES	To be approved unless found to be "unfair, unconscionable, or improper as a matter of law"
North Carolina	YES	YES	NO	"Fair and just"
North Dakota	YES	YES	?	Best interests ⁱ
Ohio	YES	YES	NO	Not allowed if clearly unfair or causing a gross miscarriage of justice
Oklahoma	YES	YES	YES	Best interests

	Allow C&R	Release for Medical	Hearing Required	Standard of Approval
Oregon	YES	YES ^d	NO	Disputed claim: bona fide dispute, reasonableness; accepted claim: reasonableness
Pennsylvania	YES	YES	YES	Claimant's understanding of C&R
Rhode Island	YES	YES	YES	Best interests ^k
South Carolina	YES	YES	NO	Must be "fairly made and in accordance" with Act
South Dakota	YES	YES	NO	No paternalistic standard prescribed ^l
Tennessee	YES	YES ^e	NO	Small original claims: best interests; accepted claims: whether employee is receiving, substantially, benefits provided by the law
Texas	NO	NO	NA	NA
Utah	YES	YES	NO	"Commission will not approve any proposed settlement that is manifestly unjust"
Vermont	YES	YES	NO	Bests interests
Virginia	YES	YES	NO	Bests interests
Washington	NO	NO	NA	NA
West Virginia	YES	YES ^f	NO	"Fair and reasonable"
Wisconsin	YES	YES	NO	Equity
Wyoming	No	NO	NA	NA

- (a) There is no release of medical allowed in accepted cases.
- (b) The release of medical is discouraged.
- (c) There is no release of medical allowed in accepted cases.
- (d) No release of medical is allowed in accepted cases.
- (e) A waiting period of sorts applies.
- (f) The release of medical is not allowed in occupational disease cases.
- (g) In cases where disability only is settled, approval need not be sought.
- (h) When a claimant is represented, the authorities do not review the proposal, except with regard to attorney's fees.
- (i) No reference in statute or regulation.
- (j) The statute refers to lump-summing of PTD.
- (k) C&R must be in the best interests of all parties, including CMS.
- (l) A claimant may not "waive rights the law would otherwise guarantee; [for example,] waiving future medical treatment when the insurer has not denied claimant's right" to the same. Memorandum from Mr. James Marsh, Director, S.D. Div. of Labor & Mgmt., S.D. Dep't of Labor, to the author (Sept. 16, 2005).
- (m) The department, in considering whether to approve a C&R, may consider medical evidence, "the length of time since the date of injury[,]" and "[a]ny and all other factors that bear on the equity of the proposed compromise."

SOURCE: Adapted from Torrey, 2007, Tables 1, 2, and 3, pp. 457–469.