The Politics of Workers’ Compensation Reform

John H. Lewis

Chapter 5 (pp. 85-104) in: Current Issues in Workers' Compensation
James Chelius, ed.
Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 1986
DOI: 10.17848/9780880995443.ch5

Copyright ©1986. W.E. Upjohn Institute for Employment Research. All rights reserved.
According to the program, this presentation deals with legislative efforts concerning workers’ compensation laws in the States of Louisiana and New Mexico. Both of these states are a long way from Rutgers, and may appear to have little relevance to a program the avowed purpose of which is to focus on the workers’ compensation systems of three northeastern states. Relevance may now appear to take more of a beating, since it is my intention to also discuss the States of Florida, Delaware and Alaska, which are at least as remote, in the political if not the physical sense, from the states which are to be the subject of our concern as the two previously mentioned.

Actually, the topic is better described as “Workers’ Compensation Reform and How to Get It.” Now, reform is a difficult subject to discuss, since it is to a great extent in the eye of the beholder. It may not even be excessively cynical or egotistical to say that reform is what I do, as opposed to whatever it is the rest of you do. However, to avoid controversy, for today’s purposes, the term “reform” will refer to significant changes in a workers’ compensation law in-
tended to provide long term solutions to perceived defects or deficiencies in the system—as opposed to what is best described as tinkering, which, unfortunately, is the usual legislative response to workers' compensation problems.

Given this unilateral change of topic, the relevancy of the states previously mentioned becomes apparent. All of these states have been involved, or are involved, in workers' compensation reform efforts. The patterns of success versus failure, and the events which led to the respective conclusions, are remarkably similar in these states, and as a result highly instructive for any state wishing to institute the long and difficult process of workers' compensation reform.

As distasteful and/or redundant as it may be to many of you, the first portion of our discussion will deal with the no longer recent Florida reform effort, which culminated with the legislation passed in 1979. Most aspects of the Florida experience have been talked to death and, fortunately, need not even be mentioned. What is of importance is how the forces in Florida arrived at what they believed to be a solution to the state's workers' compensation problems.

Most people in the compensation community are aware of the events of the 1979 Florida legislation session, and some are aware of the efforts made during the 1978 session, which resulted in some temporary patchwork and the famous "sunset" provision, which, theoretically, would have eliminated Florida's workers' compensation law in 1979 if new legislation had not been passed. Very few are aware of the years of work which went into preparing the state and the legislature to deal with workers' compensation on a meaningful basis. A significant amount of research was performed by a wide variety of groups and individuals, including Dr. John Burton, Associated Industries of Florida, the Florida Association of Insurance Agents, and myself. This research furnished the bedrock for the reform effort, since it provided
everyone involved in the process with factual information as to what was going on in the system. In addition, the Florida Workers' Compensation Advisory Council had spent several years looking at the compensation system and discussing the problems of all the interests involved, each of which was represented on the Council by individuals who were initially or took the time and trouble to become knowledgeable in workers' compensation matters. The Council itself was somewhat remarkable in that its activities were devoid of the public posturing and recriminations which often mark similar attempts at compromise. As a result, the Council was able to deal with substance, rather than illusion, and virtually all of its recommendations were adopted without internal dissent.

Another ingredient in the process was education. Through the activities of the trade groups mentioned above and others, numerous newspaper articles, including an influential series by the *Miami Herald*, a major legislative conference, and many months of study by a legislative joint committee, the general public and many members of the legislature were made aware of what the compensation system was all about and how it was performing or failing to perform. Most important, and perhaps by coincidence, one member of each house of the legislature became extremely well-educated as to the workings of the system, as well as the various reform proposals and their probable impact. As a result, they were able to provide leadership in legislative discussions and to keep the basic reform program together during the various committee and floor debates and through the critical late-night negotiating sessions.

The final component of the reform process was the cooperation between labor and management, which in terms of political reality left the legislature and the governor with little choice when the agreed upon package came to them for approval, despite the opposition of other, usually powerful,
interests. This coalition may not appear unique, but to the extent to which it was based upon the best interests of the two groups involved to the exclusion of peripheral interests in the compensation system, it is unique. It is interesting to note that many of the critics of the new Florida system fault the act of cooperation by the AFL-CIO leadership, rather than praise it. In reality, organized labor in Florida gained far more than it lost in 1979, and certainly benefited from the coalition, as compared to what most likely would have happened had the bill been structured through normal confrontation politics. In fact, if one compares what has happened to the workers' benefit package as the result of less publicized "reform" efforts in other states, the result in Florida looks better and better for the injured worker.

By way of comparison, we can look at the State of Delaware, which, in spite of significant political effort and what I believe to be the best of intentions on the part of most of those involved in the reform effort, repeatedly turned back a proposal far more financially generous than that which was passed in Florida, as well as in other states.

Delaware's reform effort grew out of an official study commission, which, near the end of its deliberations, became aware of the new Florida law and decided to emulate it. Unfortunately, the effort did not include, nor, for reasons of time, could it, the research and education portion of the Florida experience. In addition, the proponents of the bill which was drafted were faced with the knee-jerk reaction of some interest groups to any proposal that even looked like Florida's, which, as you well know, has been the subject of some of the least informed criticism of any workers' compensation law in history. As a result, numerous mistakes were made which, in retrospect, virtually guaranteed the failure of the reform effort. Certain interest groups were made to appear to be the source of all of the system's problems, which insured their opposition. Because of the lack of
factual information about the system and its shortcomings, broad support for change did not develop. The business community split, primarily as the result of internal political maneuvering. Organized labor was equally as divided, despite early support for the proposal, apparently because of outside influences having little to do with the merits of the legislative proposal. Finally, there was virtually no workers' compensation expertise within the legislature, so that opponents were able to sway votes by actually asserting that the only thing wrong with the system was the fact that insurance companies were taking in around $50,000,000.00 a year in premium, and paying out about $5,000,000.00 in benefits. The lack of knowledge on the part of many of those involved in the legislative debate was highlighted by Senate floor debate, which included fierce opposition to portions of the bill which merely recodified existing law, the very law which they claimed was virtually fault free. All of these problems and mistakes were probably aggravated by a political decision to go right back to the legislature after the bill's initial defeat instead of taking a year or two to do the basic work required to make a strong case for reform and for the proposal. Against this background of success and failure we can now look at and evaluate the recent developments in Louisiana and New Mexico.

**Louisiana**

From a political standpoint, Louisiana is a very interesting state in that virtually all aspects of government are highly politicized, with administrative appointments on many levels and virtually all legislative action based on interest group pressure and power politics. Contrary to popular belief, organized labor plays a significant role in this process and often can lay claim to "owning" one or the other house of the legislature, or both, as well as the governor's office. Please understand that the use of the term "own" is in the
political sense, and not the literal sense. The extent to which this state of affairs affects the actions of those involved in the political process was brought home to me on one of my first trips to the state, for a meeting with a broad spectrum of the business community. Several representatives of major, national employers expressed reservations about a proposal to create an administrative body to run the compensation program, on the grounds that at some point the political power held by "the other side" would result in a totally employee-oriented administration. Although this view was eventually rejected, it does illustrate how even major players in the political arena can be inhibited in efforts to improve a workers' compensation system.

The Louisiana effort, which was successful, parallels Florida in many respects. The impetus for reform came from the state's major business organization, the Louisiana Association of Business and Industry (LABI). Unlike most business associations, LABI is headed by an individual with a strong background in research. As a result, any legislation sponsored by LABI in areas such as workers' compensation is based upon well-documented facts, rather than opinion or gut-reaction. This was extremely important in two respects. First, no public pronouncements were made until the dimensions and cause of the problem were known, and until the efficacy of proposed solutions had been investigated. Through this process, it was found that the perceived source of the dual problems of high costs and low benefits was not the area of permanent total disability benefits, but rather the usual villain—permanent partial disability benefits. In addition, the viability of an income replacement system as a reform measure was confirmed, and the inadequacy of the court-administered system, which resulted in virtually no administration and an overwhelming reliance on compromise and release agreements to keep the system under control, was demonstrated.
Second, when the time for public and legislative debate came, the LABI position could be defended on a factual, rather than emotional, basis. As will be seen, this factor may have been the most critical in the entire process.

Once it was determined that problems truly existed, and that there were reasonable solutions available, LABI and the business community committed themselves to a true reform effort. Although there was legislation introduced rather quickly without the long lead time employed in Florida, it was with the understanding that it would almost certainly take two legislative sessions (in reality it also took a special session) in order to achieve the final goal. However, the first session could also be used as part of the educational effort, and it was. With the strong financial and political support of the business community, the entire project was handled on a professional basis, with the emphasis on establishing to the satisfaction of the voters and the legislature the need for change and the validity of the proposed reform. Both were accomplished, partly because of research efforts previously described, and partly because LABI did not take the all too common approach of simply proposing a reduction in benefits as a way to reduce costs. Instead LABI arrived at a package of benefit and administrative changes geared towards reallocating the premium dollar to areas in which it was needed, avoiding duplication of benefits and decreasing the cost of litigation. The latter was most significant in that, unlike Florida, Louisiana was unable to put together a coalition of labor and management. While I cannot even attempt to speak for organized labor in Louisiana, there is a widely held belief that because of inaccurate comparisons of the Louisiana proposal and the then recent Florida reform, as well as long-standing ties with the trial bar which did stand to lose if the proposals passed, labor could not, from a political standpoint, afford to be perceived as having cooperated or agreed with any management position. As a result, all at-
tempts at compromise failed, and unfortunately the benefit package eventually enacted into law was smaller than that which could have been obtained through negotiation.

As you must have already surmised, the first legislative proposal did not pass. As an aside, this "failure" was, in retrospect, for the best, since later drafts were, in my opinion, far superior and better suited for local conditions. However, the attempt did serve its purpose, since it brought the issue of workers' compensation to the forefront and raised the issues which would have to be faced. During the 10 months between legislative sessions, additional educational efforts were made, with particular emphasis on the members of the legislature. These efforts included a special legislative conference with speakers from both inside and outside the state, as well as special efforts with key legislators and potential sponsors. As was the case in Florida, several members of each house became totally conversant with the problems and the proposed solutions, thereby maintaining control of the debate process and influencing other, less knowledgeable legislators.

The modified package passed the House on its second attempt, in the regular session of 1982, but was amended many times in a labor-dominated Senate committee. Interestingly enough, virtually all the amendments were stripped by the full Senate, which was generally considered to be highly sympathetic to the labor/trial lawyer position. However, the operative word was "virtually," since the failure to strip all of the amendments meant that the bill had to go to conference committee. There, as a result of a weekend of political maneuvering, a compromise was reached without the consent of the business community and announced approximately 15 minutes before the end of the legislative session. The compromise included language which had not been previously offered, in areas not directly related to the reform effort (third-party actions) apparently in the belief that
LABI and the other backers of the bill would "settle" for what was sure to pass. To their credit, the business community stuck to its program of no action without a complete understanding of all implications of the proposal. Since this was impossible given the short time involved, the sponsors asked the representatives who supported them to kill the bill, and this was done. Once again, in retrospect this was the correct step to take, but the decision was not unanimous, and LABI was accused by some legislators and newspapers of being "greedy." In fact, LABI had already compromised the bill to a considerable extent on the basis of what might best be described as informed consent. The attempt to add new features at the last minute was a mistake from all standpoints. Last minute changes, if not properly evaluated, tend to come back to haunt the authors, and experience in other states and in federal programs such as the Longshore Act clearly demonstrates the danger in this type of maneuver.

The final act in this drama was played out between July 1982, the end of the legislative session, and January 1983, when a special session was called by the Governor to deal with workers' compensation and unemployment compensation. During that period, pressure on the legislature for enactment of the bill became almost overwhelming, and it became clear that the LABI proposal, or something very similar, was going to pass or some legislators would not be returning for a new term. In addition, the research and educational efforts which had been undertaken began to pay off to an even greater extent, with several key legislators who normally might have opposed a management position becoming active supporters. This included a Senator whose opposition had caused much difficulty in the past and whose eventual support did much to influence others, given the fact that he was a trial lawyer and well-respected in such matters. The bill was passed on January 14, 1983, and signed into law a short time later.
The new Louisiana workers' compensation law is substantially different from the old. For the first time there is an administration, with reporting of accidents and benefits payments, an enforceable penalty structure, and an informal litigation reduction system which in effect requires mediation prior to entering the court system. The maximum weekly benefit was increased, permanent total disability redefined and limited to avoid the payment of such benefits to those actually working or able to work, and a restructuring of the permanent partial disability system to rely primarily on income replacement benefits, with significant impairment benefits payable in the absence of income loss for those with schedule injuries in excess of 50 percent loss of use of the member, and a meaningful vocational rehabilitation program, mandatory for all parties.

New Mexico

New Mexico is perhaps the best example of a state in which reform has stalled, despite the best of intentions on the part of the participants. Unlike the discussions of the other four states in this paper, much of what I will say concerning New Mexico is based upon hearsay, inference and after-the-fact talks with those involved from the very beginning of the process, since I was only involved for the final two months in early 1983. The effort began with the deliberations of an official study commission of several years duration. It appears that some of the first problems arose during those deliberations and may have sealed the fate of the legislation which was eventually introduced. It has been stated that there has never been an effective study commission. I must take issue with that statement, since I served with two which led to the enactment of major legislation, but I can sympathize with the feelings expressed. New Mexico's experience may show why. Please keep in mind that this portion of the evaluation is based in part on the recollections
and perceptions of some of the parties, some of which are totally at odds with others. It appears that representatives of the two interest groups directly involved in the workers' compensation system—management and labor—were not well versed in the operation and structure of the compensation system. This is not a criticism. In fact it is to be expected in most instances since the leaders of business and labor organization usually have backgrounds and responsibilities which make it extremely unlikely that they will be able to come into a study commission with the requisite knowledge to make major decisions concerning the system. In the past this problem has often been "solved" by each side using their lawyers as representatives. Once again without necessarily implying criticism, it is a fact that the interests of employers and defense lawyers in the compensation system are not necessarily the same, nor are the interests of employees and their lawyers. Because of this, much of the early work of a study group should focus on educating those of its members without workers' compensation expertise. This was not done in New Mexico, nor does it appear to be the case in most other states. As a result, it is my belief that the labor representatives were left in the position of having to accept either what was being told to them by the other side (particularly the insurance industry, where the employer expertise eventually came from) or what they were told by representatives of the claimants' bar. The reasonable insecurity brought about by this situation was probably heightened by an interesting phenomenon which occurs during the work of most study groups—the impact of "observers." Although there is usually an effort made for study commissions to be balanced in their representation of interest groups, their meetings are often attended by large numbers of association representatives from business and the insurance industry. This can give, and in New Mexico did give, the impression of labor being outnumbered. In addi-
tion, large numbers of people make it very difficult to have frank discussions, and often lead to more public posturing than meaningful discussions of real problems.

From the management standpoint, it appears that there was somewhat of an educational effort through the insurance industry and their attorneys. As an aside I might mention, in all fairness, that there did appear to be a legitimate effort made by the representatives of the insurance industry to be candid and fair in their dealings with management, without any of the conflicts of interest of which the industry is often accused. However, it seems that the real educational effort was to a great extent limited to selling a rather narrow legislative program, which left management locked in to a somewhat inflexible program. Since any major change in the proposed bill would have required a time-consuming educational effort, it became virtually impossible for the employer/insurance representatives to seriously consider proposals made after the legislative session began, even though some of them may have been acceptable and might have led to passage of a reform package.

Another factor which eventually led to defeat was a perhaps inadvertent politicizing of a major issue, the permanent partial disability benefit package. Once again, an income replacement system was being considered. Such proposals are automatically tagged as "Florida wage loss," which is a distinct negative to most trial lawyers, and some labor leaders, and immediately puts proponents on the defensive. Unfortunately, some in the business community talked about the proposal in terms which could lead one to believe that it was punitive and antilabor, when in fact there was no reduction in the total amount of benefits to be paid to injured workers, but rather a redistribution. This put the leadership of organized labor in an extremely difficult position, since accepting an otherwise favorable package could
lead to charges of having given in to management interests. Like politicians, labor leaders are elected and cannot afford to be put in such positions if they wish to remain as leaders. This result might have been avoided if more of the local leadership had been brought into the process at an earlier date, had the benefit of a short course in workers' compensation and the effect of the proposed legislation, and been given an opportunity to have any and all questions answered. I do not know if this was possible from a political standpoint, but it would seem that more input from the rank and file in all states might give the leadership broader support for meaningful change.

As can be seen, the education process, or the lack of it, has significance throughout the reform effort. Once again, it appears that the New Mexico proposal was hampered by lack of education on another level—that of the legislature. As I mentioned previously, it is my belief that a major legislative effort requires the informed backing of several members of each house. Not only does this help to sway votes and avoid debate over nonissues, it also provides a mechanism for resolving conflict, since both sides are often better able to accept a compromise if it originates, or at least seems to originate, from a member of the legislature rather than from a spokesman for an interest group. This cannot be accomplished unless the legislative advocate knows what he or she is talking about. It appears that for a number of reasons, the legislation in New Mexico did not have the benefit of this type of assistance.

The final missing ingredient was research. It is amazing how little is known about the operation of most workers' compensation systems, particularly the important items such as who is getting the benefits and what it takes from a procedural standpoint to get them. In the absence of factual information, what one tends to get from the experts testifying
at legislative hearings is myth rather than reality. What is even more disconcerting is the fact that the same myths are heard in every state, which makes for a lot of boredom for those of us who do business in more than one state and must attend what amounts to the same hearings, with what appear to be the same witnesses, in a number of states. When you have heard the same misstatements of fact in two different states five thousand miles apart in the course of two days, you tend to lose faith in the legislative process, or at least in those who should know better than to say the things they do. Neither side has a monopoly in this area, but in New Mexico it was the opponents of the reform proposal who dominated the arena, with the usual tales of how the only thing wrong with the system was insurance company profits, how it was humanly impossible for an administrative structure to handle minor problems more efficiently than the courts, and how an income replacement system, no matter how it was structured, was not only unworkable but virtually guaranteed an 80 percent reduction in benefits paid to injured workers. None of these arguments was new, at least not in other states, and with a year of preparation could have easily been answered. It is possible that the fight was already over by the time these arguments were raised in legislative hearings (where the bill was killed), but had that not been the case a factual defense would have been extremely helpful.

**Conclusion**

There should be a point to all this narrative and there is. In fact, there may be several. I would like to start with mention of the comment made earlier by Alan Tebb, that he would be willing to pay in order to have someone from the labor side to talk with. I believe that as that statement was intended—as an attempt to change an unfortunate but not unexpected reality, rather than a criticism—it is true, but
Politics of Reform 99

does not go far enough. It is good to have someone to talk to on the labor side, but it is better to have an educated public, business community and legislature, also. It goes without saying that this means that the subject of discussion is fact, rather than fancy, and that the necessary research is included as part of the education, negotiation and compromise process. It also assumes a good faith effort by the parties, excluding, to the greatest extent possible, controversies and maneuvering unrelated to the merits of the workers' compensation program. As history now shows us, it is virtually impossible to pass decent legislation without most of these factors being present, particularly research and education, and the more of these elements that come together, the better the changes for real success.

This brings us to Alaska. Several years ago I had the good fortune to come in second or third, I don't know which, in the competition for a contract to investigate the ramifications of open competition in the workers' compensation insurance market. This loss enabled me to enter into a contract with the State of Alaska to study and report on all aspects of its workers' compensation system, including what happens to injured workers after they receive permanent partial disability benefits. Alaska is an excellent research subject in that it has all the potential for real problems, due to extremely high benefits (now approximately $1,000.00 for income benefits), highly seasonal employment and a relatively transitory workforce. At the same time, the state has a very small population, around 400,000, so that it is possible to look at the universe of workers' compensation cases rather than a small sample. And it has a compensation community which, for the most part, is willing to listen and learn. I am quite proud of the resulting report and would like to take a minute to quote a small, highly relevant portion of it.
As can readily be seen, workers' compensation is a complex subject and not an easy one for employers, labor representatives, and an otherwise burdened legislature to deal with in an intelligent manner. Typically, matters are made worse by virtue of the fact that no matter how good their intentions, many interest group representatives do not have a working knowledge of the compensation system, and are familiar primarily with the 'horror stories' that can be developed about any system. The nature of the political process, in which legislative hearings seem to demand highly emotional testimony, results in hearings which offer legislators and the public little in the way of education, but instead rather extreme and emotional arguments having little to do with the normal operation of the compensation system, and having even less to do with the real problems and issues at hand. During the 1982 legislation session, a coalition of employer and labor representatives developed a workers' compensation package which was in part enacted into law. The package was developed not as the result of confrontation politics or the exercise of countervailing political forces, but rather was the result of many hours of education, discussion and debate away from the legislative forum. Hopefully this initial success will be expanded into a commitment by the members of this group to continue their efforts for an extended period of time, using the freedom offered by the private sector to discuss and investigate what might initially be impossible to deal with in the legislature, and to continue the education and legislative process.
If the legislature is to maintain its constitutional responsibilities with regard to the legislative process, it cannot stay involved with the compensation system simply through intermittent contact. Obviously, the entire membership of the legislature cannot devote its time to learning how the workers’ compensation system operates and what changes may be needed. However, if there is one common thread running among the states which have had success in controlling their workers’ compensation systems, it is the existence of a long-term commitment, not only by labor and management, but also by a small number of legislators, all of whom have taken the trouble to learn enough about the realities of the system to make intelligent decisions which benefit the system as a whole. While politics cannot be totally taken out of a political issue such as workers’ compensation, the kind of cooperation which leads to success minimizes totally partisan posturing, and encourages well thought out compromise. This is not the type of compromise which is often found at the last minute on the floor of the Senate or the House, of uncertain outcome. It is compromise that recognizes that neither side can for long totally dominate the compensation program, and that in fact the social and economic impact of the compensation system may make it desirable for both parties to accept something less than what might be in their short-run financial best interests.  

I am not a particularly naive person, at least not since 1979 when I quit the practice of law because of the lying, cheating and stealing that one sees when involved in trial practice and instead moved on to the pristine field of legislative work. I
know it is naive to assume that in every state we can educate, cooperate and get the legislature to look at the real problems of the workers' compensation system. In some states this is impossible, and power politics will continue to control the fate of the compensation system. In the final analysis, it is up to legislators and representatives of the business and labor communities to learn, perhaps for the first time, what workers' compensation is all about. States such as Florida, Louisiana and Alaska can be copied, not as to their laws, but instead with regard to the ways in which they went about obtaining meaningful change. Their similarities can be summarized as follows:

1. Extensive basic research as to how the current system is operating and where the benefits are going.

2. Continuous dialogue between labor and management, with minimal interference by lawyers, doctors, insurance carriers and others with only a secondary interest in the system.

3. Education of the public and the legislature, with facts rather than opinion and hyperbole.

4. Decisions on philosophy made before legislative drafting begins and before public positions are taken by the major parties.

These states are good examples of this process, of how to structure a bill and how to get it enacted into law. They are examples of how to really reform rather than patch and how to handle defeat and pressures for immediate action. Workers' compensation is simply too important to be left to any other course.
NOTE