

Should There Be a 21st Century National Commission on State Workers' Compensation Laws?

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Workers' compensation laws were enacted by the states beginning in 1911.¹ One of the reasons the states assumed responsibility for the program rather than the Federal government was the Supreme Court's interpretation of the commerce clause at the time. However, even after the interpretation of the commerce clause was changed in the 1930s, states have maintained their dominance over workers' compensation despite various proposals over the years for an increased Federal involvement in the program. Section I reviews

¹Burton and Mitchell (2003) examine the context in which workers' compensation programs emerged in the early 20th Century and trace the development of social insurance programs and employee benefits in the balance of the century.

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the proposal for Federal standards made in the 1970s by a national commission. Section II describes a 2009 proposal for a new national commission. I argue that the “traditional” national commission model is flawed for reasons provided in Sections III and IV. As an alternative I suggest that more narrowly focused examinations should be conducted by Study Panels hosted by existing organizations with record of success in dealing with important issues. Four possible topics for such examinations are introduced in Sections V to VIII.

The National Commission on State Workmen’s Compensation Laws

The National Commission on State Workmen’s Compensation Laws (1972 National Commission), created by Section 27 of the Occupational Safety and Health Act of 1970 (OSHAct), submitted its *Report* to the President and Congress in 1972.² The National Commission identified five major objectives for a modern workers’ compensation: (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; and (5) and an effective system for delivery of the benefits and services.

State workers’ compensation laws were evaluated using the five major objectives. The National Commission concluded that “Our intensive evaluation of the evidence compels us to conclude that State workmen’s compensation laws are in general neither adequate nor equitable.” The National Commission then made 84 recommendations designed to translate the five basic objectives into specific guidance for legislators and others involved in improving state worker’s compensation programs. Nineteen of the recommendations were designated as essential.

² Burton (2003) provides additional information on the National Commission on State Workmen’s Compensation Laws.

The National Commission recommended “creative Federal assistance” to enhance the virtues of a decentralized, state administered program. A key element of the assistance was to be a 1975 review of the state’s record of compliance with the 19 essential recommendations, which would culminate in Federal mandates enacted by Congress if necessary to guarantee state compliance with these essential recommendations. The National Commission members rejected federalization of state workers’ compensation programs, such as the preemption of state safety programs contained in the OSHAct. Instead, the 18 members unanimously recommended the enactment of federal standards, if necessary, to achieve compliance with the 19 essential recommendations.

Federal standards were never enacted by Congress, in part because states improved their laws in the 1970s. However, the average compliance score among the states with the 19 essential recommendations never exceeded 12.9 from 1972 to 2004, when the Department of Labor stopped tracking the progress or lack thereof.

The National Commission on State Workers’ Compensation Laws of 2009

The National Commission on State Workers’ Compensation Laws Act of 2009 (2009 National Commission) was introduced in the House as HR 635 in the 111th Congress by Congressman Joe Baca. The bill was opposed by most employers and insurers, was not enacted, and Baca was not reelected in 2012. However, the bill could be revised and resubmitted with another sponsor and so deserves an analysis.

HR 635 was roughly based on Section 27 of the OSHAct, which created the 1972 National Commission. Both acts began with a set of Congressional findings, which included in HR 635 a finding that since 1972, “changes in [sic] reductions in State workers’ compensation laws have increased the inadequacy and inequitable levels of workers’ compensation benefits.” Both specified the composition

of the members of the National Commission, which I will discuss in Section III. Both contained a list of subjects to be studied, which I will discuss in Section IV. The 1972 National Commission was authorized to hold hearings and to enter into contracts for the conduct of research, and each federal agency was directed to furnish information to the Commission. The 2009 National Commission *inter alia* was authorized to hold hearings, to secure information from federal agencies, to enter into contracts, and to issue subpoenas. The 1972 National Commission was directed to transmit its final report to the President and the Congress not later than July 1, 1972 and to cease to exist 90 days later. The 2009 National Commission was directed to submit its final report not later than 18 months after the enactment of the Act and to terminate 19 [sic] days later.

Who Should Examine Workers' Compensation?

The Membership and Selection Process for the 1972 National Commission

The OSHA Act specified that the National Commission would have 18 members: three cabinet members and 15 members appointed by the President from among members of state workers' compensation boards, representatives of insurance carriers, business, labor, the medical profession, "educators with special expertise in the field of workmen's compensation," and the general public. An unwritten criteria used by the Nixon White House staff was that, to the extent possible, the appointees would be Republican.

How could a National Commission dominated by Republicans unanimously conclude that state laws were "in general neither adequate nor equitable" and that Congress should enact Federal standards for state workers' compensation programs if states did not significantly improve their laws?

First, most members were experts in workers' compensation and cared about the future of the program. The hearings and evidence

presented to the National Commission revealed a system in much worse shape than these experts had expected, and they were willing to open their minds to fundamental changes in order to preserve the state-run system.

Second, the 1970s were part of a by-gone era of technology. The Commission had 11 meetings that consumed 32 days. A pattern emerged: a tentative agreement was reached during a meeting on an important issue and then some members would meet with their constituents for lunch or dinner and be persuaded to change their minds, and so the next meeting we had to start over. The issue we all knew was critical to our report was determining the role for the federal government in workers' compensation. Most members had been shocked that Congress preempted state safety programs as the enforcement mechanism in the OSHAct and were dead set against a similar takeover of workers' compensation. In order to avoid the now-we-agree-before-lunch-but-now-we-don't-agree-after-lunch syndrome, we first discussed the idea of federal standards at a meeting on the boat provided by the Governor of Maryland, which stopped for lunch on the Eastern shore of Maryland, away from the constituents of the Commission members. And our critical final meeting where we agreed to unanimously support federal standards was held at Airlie House, a conference center 50 miles west of Washington, in which the only phone in the main building was up a long flight of stairs from the meeting room. The Vice-Chairman, who was the conduit of our deliberations to our "overseers" in the Nixon Administration, soon tired of trudging up and down the stairs and so we proceeded to agree on the content of the final report in relative isolation. All these machinations to isolate the deliberations of the National Commission from outside influence would be impossible today amidst instant monitoring from cell phones, texting, and Skype.

Third, the 1970s were part of a by-gone era of politics. The OSHAct was passed with support of the Republican Administration and with large majorities in the Senate and House. The primary authors were Senator Williams, a Democrat from New Jersey, and Congressman

Steiger, a Republican from Wisconsin. Today, such bi-partisan cooperation in Congress is rare, if not nonexistent. And a unanimous National Commission report involving members from both parties and representing a variety of interest groups is inconceivable today.

The Membership and Selection Process for the 2009 National Commission

HR 635 specified that the 2009 National Commission would have 14 members: four cabinet members and 10 appointed members: the chairman appointed by the President, the vice-chairman appointed by the majority leader of the Senate in consultation with the majority leader of the House; two each by the majority and minority leaders of the Senate; and two each by the majority and minority leaders of the House. No more than six of the appointed members could be from the same political party. At least three members must represent injured workers; three members must represent insurance carriers or employers; and at least one member must be from the general public. In addition, HR 635 specified that members should (1) have significant depth of experience as members of State workers' compensation boards; as representative of insurance carriers, employers, and injured workers; in the general fields of business and labor; or (2) be members of the medical profession with relevant experience; or (3) be educators having special expertise in workers' compensation.

There are three major flaws with this scheme for selecting members of the 2009 National Commission. The system is convoluted: the overlapping instructions remind me of three-dimensional chess. There may not be a combination of members that satisfy all the mandates.³ The separation of authority to appoint the members of

³Seven of the appointed members must represent injured works or represent insurance carriers or be members of the general public. This leaves three appointed members to satisfy the remaining four categories: members of State workers' compensation boards; in the general fields of business and labor; members of the medical profession; and educators with special expertise in workers' compensation.

the 2009 National Commission among the President and leaders of four factions in Congress virtually guarantees that the deliberations of the Commission will be divisive and the report splintered. Three flaws and you are out.

Appropriate Organizations to Examine Workers' Compensation

The 21st Century examinations of contentious issues in workers' compensation should rely on organizations with an established record of objective studies on the program or related fields, such as the Institute of Medicine, and the National Academy of Social Insurance. In later sections, I provide more information on these organizations and suggest specific topics for which they seem appropriate.

What Should be the Scope of the Examination?

The Scope of Issues Examined by the 1972 National Commission

Section 27 of the OSHAct directed the National Commission to “undertake a comprehensive study and evaluation of State workmen’s compensation laws to determine if such laws provide an adequate, prompt, and equitable system of compensation. Such study and evaluation shall include, but not be limited to, the following subjects:” There followed a list of topics (subjects) from (A) the amount and duration of permanent and temporary disability benefits and the criteria for determining the maximum limitations thereon, to (N) the extent to which private insurance carriers are excluded from supplying workers’ compensation coverage and the desirability of any such exclusions, to (P) methods for implementing the recommendations of the Commission.

While most of the specified subjects to be examined resulted in evaluations by the National Commission that were critical of the

workers' compensation programs as of 1972, there were some subjects – such as topic (N) – that reflected concerns of particular interests in the field.

The Scope of Issues Assigned to the 2009 National Commission

HR 635 provided three general duties for the 2009 National Commission (1) to review the findings and recommendations of the 1972 National Commission; (2) to study and evaluate State workers' compensation laws to determine if they provided an adequate, prompt, and equitable system of compensation for work-related injury and death;⁴ and (3) to study whether additional remedies should be recommended to ensure prompt and good faith payments of benefits.⁵ There followed a list of specific topics (or matters) from (1) to (13) that roughly paralleled topics (A) to (P) assigned to the 1972 National Commission, with some exceptions. Topic (3) assigned to the 2009 National Commission added a requirement that a study should be made of remedies to discourage misclassification of workers as independent contractors or leased employees to avoid paying workers' compensation benefits, and topic (6) required an evaluation of "standards for determining assurance of benefits caused by aggravation or acceleration of preexisting injuries or diseases." These topics added pro-worker elements to the instructions to the 2009 National Commission. A final change, which is hard to understand, is that the 1972 National Commission topic (P) "methods of implementing the recommendations of the Commission" became topic (13) for the 2009 National Commission: "methods of communicating the recommendations of the Commission."

⁴ General duty (2) was repeated with minor variations in wording as specific matter (2) to be studied and evaluated by the 2009 National Commission.

⁵ It is not clear to me what these additional remedies include: perhaps tort suits against carriers or employers?

Appropriate Scope for an Examination of Workers' Compensation

The scope of issues assigned to the 1972 National Commission, and especially to the 2009 National Commission, invites divisions among the participants in the examinations because the recommendations almost invariably result in “winners” and “losers.” To the extent benefits are increased, or coverage of workers and employers is increased, or definitions of work-related injuries and diseases are expanded, workers are likely to be considered winners and employers and insurers are likely to be considered losers. A major achievement of the 1972 National Commission was the agreement among all the participants that the survival of the state-run programs depended on significant improvements in coverage and benefits. But agreement on such issues is less likely today given the change in the political environment. Moreover, the issues assigned to the 2009 National Commission are even more divisive because the changes generally suggest that solutions should redress problems faced by workers or their lawyers. It is not surprising that the employer and insurance communities generally reacted negatively to the introduction of HR 635.

The best way to improve workers' compensation in the 21st Century is to choose narrow topics for which solutions are not immediately obvious and for which the solutions have considerable potential to be beneficial to most if not all parties in the workers' compensation system. To use jargon: the issues to be examined should not be zero-sum games (where one party's gain is another party's loss) but should be issues where mutual gains are possible.