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January 31, 2025

Senator Michael Tipping, Chair
Representative Amy Roeder, Chair
Joint Standing Committee on Labor
100 State House Station
Augusta, ME 04333-0100

Re: Resolves 2023, c. 139; January 2025 Update

I. Introduction

Pursuant to Resolves 2023, c. 139(2), the Workers' Compensation Board (the "Board") is tasked with submitting a report to the Labor Committee no later than August 2025 that includes "a thorough analysis of the data and reports that were considered, identification of data or other areas that require further study and recommendations on any changes or adjustments to workers' compensation benefits in order to ensure claimants are receiving adequate benefits."

The Board's August 30, 2024 report identified several areas important to a thorough discussion of benefit adequacy and affordability. Benefit adequacy, costs to employers, return to work and employment rehabilitation have been discussed in previous updates. The final two, cost shifting and retroactivity, are the subject of this update.

II. Cost shifting

In the context of workers' compensation benefits, cost shifting occurs when an injured worker receives wage replacement and medical benefits from a payor other than the workers' compensation insurer responsible for paying benefits.

Payors include both private and public insurance and programs as well as the injured worker. For example, medical treatment may be paid by a health insurer or by MaineCare. Similarly, lost wages may be paid by a short-term or long-term disability insurer or by Social Security Disability Insurance.

In their December 14, 2017, article about cost shifting, Barry Lipton and Jim Davis from the National Council on Compensation Insurance ("NCCI") provide an example of cost shifting.

> [C]ost shifting, in and of itself, is not necessarily bad—sometimes it is the result of realigning practices with the original intent of a program. For example,

> SSDI beneficiaries receive Medicare to cover their medical expenses (after a waiting period). Medicare is not supposed to pay for medical costs due to covered work-related injuries; that is the responsibility of the WC insurer or other WC payor. This was established by the 1965 Medicare amendment to the Social Security Act.
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> To help ensure compliance, the Centers for Medicare & Medicaid Services (CMS) has a process for reviewing proposed Medicare Set-Asides (MSAs), which are the parts of WC settlements that cover costs that Medicare would otherwise pay.
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> Strengthening enforcement of Medicare's secondary payer role from 2001 to the present [2017] has had a large cost-shifting impact. Claims subject to MSAs are often quite large. In NCCI's 2014 study on MSAs, we found that insurers had to increase that component of their overall settlement on these claims in 2010 by roughly 60%, which is approximately $40,000 more per claim subject to an MSA. Once this became a more established practice, the average difference between the proposed and approved MSAs was much smaller (16% in 2015).
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> This was a major cost shift to WC from Medicare (which also covers SSDI beneficiaries). However, to the extent that the increases were appropriate to protect Medicare's interests, this cost shifting is appropriate.

Social Security Disability Insurance and Workers' Compensation Cost Shifting, National Council on Compensation Insurance, December 14, 2017 (footnotes omitted).

In the above example, costs were initially shifted from workers' compensation to Medicare. After CMS strengthened its enforcement efforts, the costs were appropriately shifted back to the workers' compensation system.

Costs are also shifted away from workers' compensation insurers when employees fail to report injuries as work-related. Failure to report may result from an employee being

> . . . unaware of their eligibility, be unwilling to spend the time and resources associated with claim filing, be aware of the potential for a disagreeable experience, be concerned about retaliation, pressured by their managers, or may not see the benefits of the filing process. For these workers, the costs of lost income and medical care fall outside the workers' compensation system.

Williams, Jessica A.R., Sorensen, Gloria, et al., *Impact of Occupations Injuries on Nonworkers' Compensation Medical Costs of Patient-Care Workers*, American College of Occupational and Environmental Medicine, Vol. 59, Number 6, June 2017, p. e119.

Whatever the reason, if an injury is not reported, insurers, governmental entities and others who are not responsible will shoulder the burden for the workers' compensation insurer. In short, there is no opportunity for that claim to be paid through the workers' compensation system.

Costs can also be shifted by operation of law. For example, in Maine (and most if not all other jurisdictions), wage replacement benefits are not designed to replace all of an injured worker's lost wages. Weekly compensation benefits in Maine are equal to 2/3 of the employee's gross weekly wages. The basis for replacing 2/3 of an employee's wages is

> to provide protection to workers against loss of income from work-related injuries and diseases. To achieve this goal, the program must carefully weigh the worker's interest in substantial income benefits against factors such as the loss of incentive for rehabilitation, which some believe may occur if income benefits are too high.

Report of the National Commission on State Workmen's Compensation Laws, July 1972, p, 53.

However, as discussed in the Board's September 30, 2024, update, the replacement rate for weekly compensation, over time, is impacted by inflation.

> For temporary and permanent total disability workers' compensation cases, there has long been agreement that the adequacy benchmark is two-thirds of pretax earnings (National Commission on State Workmen's Compensation Laws 1972). . . .
>
> Recent studies estimating the proportion of lost earnings replaced by workers' compensation for long-term temporary disability and PPD cases consistently show workers' compensation replacing well under half of long-term losses.

O'Leary, Paul, Leslie I. Boden, Seth A. Seabury, Al Ozonoff, and Ethan Scherer, Workplace Injuries and the Take-Up of Social Security Disability Benefits, Social Security Bulletin, Vol. 72, No. 3, 2012, p.13.

Also, an injured employee's fringe benefits are sometimes lost or compromised. Although the value fringe benefits can be included in an employee's average weekly wage[1], the amount that is added may not be sufficient to replace the benefits. Additionally, an employee's contributions to a retirement plan, such as Social Security, is interrupted entirely, or partially, while an employee is receiving workers' compensation benefits.

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[1] "'Average weekly wages, earnings or salary' does not include any fringe or other benefits paid by the employer that continue during the disability. Any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of the state average weekly wage at the time of injury. The limitation on including discontinued fringe or other benefits only to the extent that such inclusion does not result in a weekly benefit amount greater than 2/3 of the state average weekly wage at the time of injury does not apply if the injury results in the employee's death. For injuries occurring on or after January 1, 2020, any fringe or other benefit paid by the employer that does not continue during the disability must be included for purposes of determining an employee's average weekly wage to the extent that the inclusion of the fringe or other benefit will not result in a weekly benefit amount that is greater than 2/3 of 125% of the state average weekly wage at the time of injury. The limitation on including discontinued fringe or other benefits only to the extent that such inclusion does not result in a weekly benefit amount greater than 2/3 of 125% of the state average weekly wage at the time of injury does not apply if the injury results in the employee's death. 39-A M.R.S.A. § 102(4)(H).

As mentioned above, sometimes costs are shifted to other payors, like private health and disability insurers. This can be a temporary measure while an employee waits to see if a claim will be deemed compensable. In situations like this, the health or disability insurer is entitled to repayment. If the workers' compensation insurer's repayment is less than the amount paid provisionally, the employee may be responsible under the Act for the difference.

Cost shifting can also be caused by legislative and judicial decisions.

> For an example, according to the Southern Poverty Law Center, the Alabama Legislature amended that state's Worker Compensation Act in 1992 to enact a more difficult standard for workers reporting "injuries which have resulted from gradual deterioration or cumulative physical stress disorders" because such claims were "one of the contributing causes of the current workers' compensation crisis facing [the] state."

Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, David Michaels, PhD, MPH, Occupational Safety & Health Administration, United States Department of Labor, June 2015, p. 14, fn. 13.

One final example is the misclassification of employees as independent contractors.

> Misclassifying workers increases the likelihood of work injuries through two mechanisms. First, by misclassifying wage employees as independent contractors, employers do not have to worry about the OSHA requirement to provide a safe workplace since OSHA law does not cover the self-employed. Second, these employers avoid paying workers' compensation premiums (as well as unemployment and other benefits and taxes). The misclassifying employer is not longer concerned about workers' compensation premiums rising following a work injury, so is less likely to invest in safety. The result is increased risk of work injuries at workplaces where employees have been misclassified, and, when those injuries do occur, the injured workers, their families and the taxpayer bear the costs, subsidizing the employer's hazardous operations.

Adding Inequality to Injury: The Costs of Failing to Protect Workers on the Job, p. 8.

III. Retroactivity

The concept of retroactivity with respect to changes in the Act is one that has sometimes caused confusion. First, legislation can apply retroactively. In *Grubb v. S.D. Warren Co.*, 2003 ME 139, a case involving a retroactive change in how partial incapacity benefits were determined, the Law Court held that

> . . . statutory amendments may be applied retroactively to alter an employee's level of benefits for injuries predating those amendments, *see Tompkins v. Wade & Searway Constr. Corp.*, 612 A.2d 874, 877-78 (Me. 1992) (relying, in part,

> on *General Motors Corp. v. Romein*, 503 U.S. 181, 190-91, 117 L. Ed. 2d 328, 112 S. Ct. 1105 (1992)) . . .

Grubb, 2003 ME 139, ¶10.[2]

Since it is well settled that legislative changes can be retroactive, the next question is what does it mean for a change to be retroactive? For purposes of rate making (and loss cost filings) changes to the Act are considered retroactive if they affect dates of injury prior to the effective date of a change, even if the change only applies to benefit payments made after the effective date of the amendment. Even though the payment calculations only apply prospectively, the law will have a retroactive impact because it applies to dates of injury that occurred before the date of the change.

The definition of retroactivity matters with respect to the cost impact of law changes. Insurers and self-insurers cannot charge additional premiums for a prior policy year to account for costs related to subsequent amendments. Additional costs for subsequent amendments after a policy year ends must be absorbed by the insurer or, in the case of a self-insured employer, the employer.

IV. Conclusion

Workers injured at and because of work are entitled to statutorily mandated lost wage and medical benefits. If these costs are shifted to payors outside of the workers' compensation system, then the financial burden is not borne by employers that are responsible. Instead, the burden is carried by payors that have no connection to, or control over, the workplace environment where the injury occurred. This obscures the actual cost of workers' compensation injuries and makes it more difficult to evaluate the circumstances in which injuries occur, to formulate meaningful safety programs, and to create return-to-work and stay-at-work initiatives. Also, in evaluating the adequacy of benefits, it is important to have a clear picture of the total costs that are and are not covered by the Workers' Compensation Act.

That said, the Board is unaware of any Maine-specific studies that address the question of whether, and to what extent, workers' compensation costs are shifted to other payors. This is an area that will require further study.

In the case of employee misclassification, premium and injury costs are shifted away from non-compliant employers to employers that cover their employees as required under the Act. This puts employers that follow the law at a competitive disadvantage when they bid on jobs or otherwise offer their services and products.

[2] Ultimately, the new method was not applied to the employee because the Court held that a legislative change did not obviate the need to show a change in circumstances since a prior decree.

Finally, the concept of retroactivity, both legally and in terms of cost analysis, should be clarified to ensure that statutory amendments are evaluated with a full understanding of who benefit from, and who will pay for, retroactive amendments.

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