ECONOMIC INCENTIVES IN WORKERS' COMPENSATION: A HOLISTIC, INTERNATIONAL PERSPECTIVE

COMMENT

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INTRODUCTION

The Morantz article is an outstanding addition to the literature on workers' compensation.[1] Morantz provided an insightful summary of the research in recent decades on both the United States and other countries' prevention and disability programs, presented a taxonomy for analyzing the research, and identified policy issues that deserve to be resolved if the workers' compensation program is to be an important contributor to prevention, compensation, and rehabilitation.

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1. Alison Morantz et al., *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS U. L. REV. 1015 (2017).

My comments fall into two general topics: (1) who are the crucial participants in the workers' compensation delivery system not included in Morantz's analysis?; and (2) what important parts of the research literature should be added to her compendium of relevant results?

I. OTHER SIGNIFICANT PARTICIPANTS IN THE WORKERS' COMPENSATION SYSTEM

Morantz indicates that the efficacy of the workers' compensation system depends primarily on the efficacy of four critical stakeholders: workers, employers, doctors, and insurers.[2] I believe the effectiveness of the system depends on three additional participants: trade unions, workers' compensation agencies, and lawyers.

A. Trade Unions

Morantz notes that unionized workers are more likely to have bargaining power that enables them to receive risk premiums in their wages.[3] There is also evidence that unionized workers are more likely to apply for workers' compensation benefits if they are injured than are unorganized workers.[4] These are contributions of unions to the operation of the workers' compensation delivery system at the micro level, which counteract employer and insurer actions at the individual worker or firm level. But employers and insurers also have a major effect on the operation of the workers' compensation program by their political activity at the state and federal levels. In some countries, workers have representation in the political process through injured worker organizations,[5] but in the United States, the representation has largely been provided by unions. From the standpoint of workers, the deleterious developments in the workers' compensation program in recent decades has in part been due to the decline in the union

2. *Id.* at 1024–31.

3. *Id.* at 1025, 1032–35.

4. Studies indicating that unionized workers are more likely to file workers' compensation claim are discussed in Emily A. Spieler & John F. Burton Jr., *The Lack of Correspondence Between Work-Related Disability and Receipt of Workers' Compensation Benefits*, 55 AM. J. INDUS. MED. 487, 497 (2012).

5. An example is the Canadian Injured Workers Alliance ("CIWA"). The CIWA states "[s]trength in unity is the only way the voices of injured workers will be heard by government officials. Strength in unity is also the only way we will make changes to workers compensation systems that keep thousands of injured workers in poverty." *Our Objectives*, CIWA, http://www.ciwa.ca (last visited Nov. 8, 2017).

movement.[6] In some states, unions are no longer effective participants in the legislative battles over workers' compensation, and at the national level, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") no longer has a staff member primarily devoted to workers' compensation.[7]

B. Workers' Compensation Agencies

Virtually all states have a workers' compensation agency that is part of the workers' compensation delivery system.[8] The functions performed by state workers' compensation agencies must be distinguished from the functions performed by the government unit that operates the insurance fund in those states with competitive or exclusive state workers' compensation insurance funds.[9]

Berkowitz and Burton,[10] as summarized in Burton and Berkowitz,[11] identified four administrative functions for a workers'

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6. "The union membership rate—the percent of wage and salary workers who were members of unions—was 10.7 percent in 2016 . . . . In 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent . . . ." U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, UNION MEMBERS—2016, at 1 (2017), https://www.bls.gov/news.release/pdf/union2.pdf.

7. The National Academy of Social Insurance ("NASI") has published an annual report entitled *Workers' Compensation: Benefits, Coverage, and Costs* since 1997. The NASI Study Panel on National Data on Workers' Compensation, which oversees the annual report, included a representative from the national AFL-CIO from 1997–2005, but the AFL-CIO has not been represented on the NASI Study Panel since 2005 because of the lack of a staff member primarily devoted to workers' compensation. To view these reports, see *Workers' Compensation*, NASI, https://www.nasi.org/research/workers-compensation (last visited Nov. 8, 2017).

8. "The typical workers' compensation act has these features: . . . (g) administration is typically in the hands of administrative commissions; and, as far as possible, rules of procedure, evidence, and conflict of laws are relaxed to facilitate the achievement of the beneficent purposes of the legislation . . . ." 1 LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION, DESK EDITION § 1.01 (2016). Alabama is the only state that administers its workers' compensation program through the courts. U.S. CHAMBER OF COMMERCE, 2016 ANALYSIS OF WORKERS' COMPENSATION LAWS, chart XI (2016).

9. For example, the workers' compensation agency adjudicates disputes between workers and carriers, including state workers' compensation funds, while the state fund collects premiums and pays benefits. In states with exclusive state workers' compensation funds, these "agency functions" and "state insurance fund functions" may be performed by different units within a single government entity.

10. MONROE BERKOWITZ & JOHN F. BURTON, JR., PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION 75–98 (1987).

11. John F. Burton, Jr. & Monroe Berkowitz, *Paean to an Active Workers' Compensation Agency*, WORKERS' COMPENSATION MONITOR, Sept.–Oct. 1989, at 1, 4–7.

compensation agency.[12] The *record keeping function*, which "is present in all agencies to some degree . . . begins with a first report of the injury" to the agency, which is followed by "subsequent reports on the case and information on the eventual disposition of the case."[13]

Some states go further and also perform the *monitoring function*.[14] "This function involves procedures for checking on the performance of carriers, employers, and others in the delivery system."[15] "It also encompasses providing advice or sterner strictures if the performance of carriers or employers falls short of standards established by the agency."[16]

"Another group of agency procedures has to do with the *evaluation* of the worker, particularly if the worker has a permanent disability."[17] In a few states, "the agency itself takes on the responsibility for determining the extent of permanent disability."[18] In most states, the agencies "do almost nothing in the area; the parties reach some agreement"—that the agency rubber-stamps—or the parties "resort to the contested procedures."[19]

The fourth function is *adjudication*, which is initially undertaken "in almost all states" by the workers' compensation agency as opposed to a state court.[20] In all states with a workers' compensation agency, appeals from the agency are heard by the state courts.[21]

Burton and Berkowitz argued that:

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12. *Id.* at 4–5.

13. *Id.* at 4.

14. *Id.*

15. *Id.*

16. *Id.* Burton and Berkowitz indicate that monitoring can be conducted on three levels:

> 1) *micro-monitoring* (examining individual cases), 2) *macro-monitoring* (looking at a pattern of cases to determine the quality of the performance of carriers, rehabilitation counselors, or whoever else is charged with providing benefits and services), and 3) *program monitoring* (examining agency or system performance and making recommendations to the legislature for possible changes).

Id. at 5.

17. *Id.* at 4.

18. *Id.*

19. *Id.*

20. *Id.* at 4–5.

21. In Alabama, the workers' compensation program is administered by the courts and the initial level of appeal is to the Court of Civil Appeal. In most other states, the initial appeals from the workers' compensation agency are heard by Court of Appeals. In seven states (Alaska, Hawaii, Minnesota, Montana, New Hampshire, Oklahoma, and Rhode Island) the initial appeals from the agency are heard by the State Supreme Court. U.S. CHAMBER OF COMMERCE, *supra* note 8, at chart XV.

> An active state workers' compensation agency—an agency that concentrates on record keeping, monitoring, and evaluation—is the key to an efficient delivery system. . . .
>
> Notwithstanding . . . the emphasis in most state workers' compensation agencies is on adjudication, not on the other administrative functions such as monitoring and evaluation. Many state agencies fell into this role of being an adjudicatory body by default. When state workers' compensation laws were first enacted, the prevalent view was that the programs would be largely self-administering, since benefit amounts and durations were specified in the statutes.
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> Unfortunately, in practice workers' compensation proved to be a complex program that required numerous controversial decisions. A substantial delivery system was needed to make these decisions, and essentially states had to choose between two types of delivery systems.
>
> One choice for the delivery system allowed the private parties to work out their own arrangements for the administration of the act. State agencies largely acted as quasi-courts to adjudicate those disputes the parties could not resolve by negotiations. This approach was taken in most states.
>
> The alternative type of delivery system turned to the state workers' compensation agency to fill the emerging need for administration; the state agency pursued the record-keeping, monitoring, and evaluation roles. This approach was chosen in only a few states, of which Wisconsin is probably the best example.
>
> The delivery system that makes the workers' compensation agency primarily a quasi-court was chosen in most states for a mixture of reasons. . . .
>
> Still another important reason why the passive workers' compensation agency approach was chosen is that efficiency is often equated with a small budget for the workers' compensation agency. State legislators often act as if the expenditures for running a state agency are the only relevant cost of the delivery system. They apparently fail to recognize that by holding down agency budgets they provide a strong incentive for the litigation-based approach to a delivery system.

> This is a myopic view of efficiency, because what is often not appreciated is that a low-cost agency is not cheap when the total administrative costs of the delivery system are considered.[22]

I would like to report that the *Paean to an Active Workers' Compensation Agency*,[23] written some twenty-five years ago, resulted in progress in state workers' compensation agencies. Unfortunately, states appear to have increasingly endorsed hyper-myopic efficiency in their support of state agencies: is there even one state that could now be held out as relying on an active state agency? This topic deserves more attention because, in my view, the overall quality of a state's workers' compensation program depends more on the performance of the workers' compensation agency than on the type of insurance arrangements available in the state.

C. Attorneys

The most surprising omission from Morantz's list of stakeholders in the workers' compensation system who "make consequential choices at crucial decision points"[24] is attorneys and, in particular, applicants' attorneys. One consequence of the adoption of the passive workers' compensation agency model by most states is that workers almost invariably need an attorney to represent their interests when claims are filed that involve moderate or serious injuries. Insurers or employers who self-insure and rely on third-party administrators have their interests protected by claims adjusters and attorneys. Workers generally need attorneys to protect their interests.

The crucial role of applicants' attorneys is illustrated by the effort to regulate applicants' attorneys' fees in the Florida workers' compensation program. The Florida workers' compensation statute was amended in 2003 to include an attorney's fee schedule that substantially reduced fees in many cases.[25] In *Murray v. Mariner Health*, the Florida Supreme Court upheld the legislation because it permitted a claimant to receive a reasonable attorney's fee even when that amount exceeded the statutory attorney's fee schedule.[26] In response to the *Murray* decision, in 2009 the Florida Legislature removed any ambiguity about its intent by removing the word

22. Burton & Berkowitz, *supra* note 11, at 7.
23. *Id.*
24. Morantz et al., *supra* note 1, at 1024.
25. FLA. STAT. § 440.34 (2003), *amended by* FLA. STAT. § 440.34 (2009).
26. 994 So. 2d 1051 (Fla. 2008).

"reasonable" in relation to applicants' attorneys' fee.[27] The Florida Supreme Court responded in *Castellanos v. Next Door Co.*, by concluding "that the mandatory fee schedule in section 440.34, which creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and United States Constitutions as a violation of due process."[28]

The apparent reason for the Florida limitation on applicant attorneys' fees is the assumption that attorney involvement increases the amount of benefits paid to injured workers. But this assumption needs to be used with care. Casual inspection of workers' compensation data reveals that cash benefits tend to be higher in cases in which attorneys are involved, and there is a natural tendency to assume that attorneys are therefore responsible for the higher benefits. However, this assumption overlooks the likelihood that more serious injuries both result in higher benefits and attract lawyers, which means that the lawyers' involvement may not be a source of the higher benefits.

Thomason and Burton[29] is one of the few studies that has examined the effect of attorney involvement on the amounts of workers' compensation benefits. We examined the payment of permanent partial disability ("PPD") benefits in New York to workers with non-scheduled injuries (mainly back cases),[30] which at the time was the only category of benefits in the state for which lump sum payments (equivalent to compromise and release ("C&R") agreements) could be made.[31] The study found that the involvement of applicants' attorneys increased the probability of lump sum settlements, reduced the amount of those settlements compared to the settlements received by workers with equivalent injures who did not rely on attorneys, and had no statistical effect on the award amount in litigated cases.[32] We reached the conclusion that, "[a]s predicted, retention of legal counsel increases the probability of settlement and decreases settlement size, indicating that claimant attorneys are acting contrary to their clients'

27. FLA. STAT. § 440.34 (2009), *held unconstitutional by* Castellanos v. Next Door Co., 192 So. 3d 431 (2016).

28. 192 So. 3d at 432.

29. Terry Thomason & John F. Burton, Jr., *Economic Effects of Workers' Compensation in the United States: Private Insurance and the Administration of Compensation Claims*, 11 J. LAB. ECON., 1993, at S1.

30. *See id.* at S11.

31. *Id.* at S13–S14.

32. *Id.* at S27–S28.

interests. Specifically, attorneys appear to undervalue the claim, inducing claimants to accept smaller settlements."[33] I added this commentary to the results:

> Unfortunately, these findings are not surprising, given the method used to determine claimants' attorneys['] fees in New York (and in most jurisdictions), namely a contingency fee system with the amount of the fee tied to the size of the lump-sum settlement.
>
> Suppose we were to use a system for compensating attorneys that tied the amount of the fee to the degree of success in reemploying the worker after the work injury. Or suppose we were to pay attorneys who negotiate lump-sum settlements (or, more generally, C&R agreements) as if the benefits were being paid on [a] continuing basis. These fee systems would likely lead to drastic changes in the behavior of attorneys and in the operation of workers' compensation programs.[34]

Here are three suggestions for the research agenda: First, recognize that attorneys are crucial participants in the workers' compensation system. Second, develop an analytical framework that spells out the incentives for applicant and defense attorneys, similar to the set of incentives or moral hazards discussed by Morantz that are currently used to analyze the behavior of workers, employers, and carriers. One interesting incentive issue concerns the consequences of shifting applicants' attorneys' fees to employers or carriers when the fees are the consequence of unwarranted delays in payment or frivolous denials of liability.[35] Third, conduct more empirical studies of the effects of various methods of compensating applicant and defense attorneys.

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33. *Id.*

34. John F. Burton, Jr., *Digests of Important Publications: Economic Effects of Workers' Compensation in the United States: Private Insurance and the Administration of Compensation Claims*, WORKERS' COMPENSATION MONITOR, Nov.–Dec. 1993, at 21, 22.

35. I was surprised in recent conversations with Florida applicants' attorneys about the importance they place on fee shifting as a remedy for inappropriate delays and denials by employers and carriers.

II. OTHER OBSERVATIONS

A. *Insurance Arrangements*

Morantz begins her discussion of insurer incentives by indicating that:

> The incentives of the insurer depend on the nature of the insurance market and on whether the insurer is public or private. For the private insurer in a competitive market, the overriding incentive is to maximize profits by accurately forecasting each employer's workers' compensations costs. . . . Moreover, in some jurisdictions, rating bureaus or other public entities may constrain, or even eliminate entirely, private insurers' capacity to compete on price by offering different insurance premiums.[36]

I am not sure what the phrase "in a competitive market" means. The rest of the sentence spelling out "the overriding incentive is to maximize profits" appears to be applicable to private carriers in all states (except those that have exclusive state workers' compensation funds), regardless of the extent of competition permitted among carriers in the state. But there is another meaning of a competitive market that does not seem to be what Morantz had in mind, and that represents the most significant change in the delivery system for workers' compensation benefits in the last thirty-five years.

Three types of regulatory arrangements are used for workers' compensation insurance in the United States.[37] The first category is *pure administered pricing*, in which a rating bureau develops manual rates for a detailed set of occupational and industrial insurance classifications.[38] Manual rates are based on pure premiums (loss costs based largely on previous benefit payments), which are increased by a loading factor, which consists of an allowance for loss adjustment and other expenses and for profits.[39] The manual rates are approved by the state regulatory agency and must be adhered to by all insurance

36. Morantz et al., *supra* note 1, at 1030–31.

37. TERRY THOMASON, TIMOTHY P. SCHMIDLE & JOHN F. BURTON, JR., WORKERS' COMPENSATION: BENEFITS, COSTS, AND SAFETY UNDER ALTERNATIVE INSURANCE ARRANGEMENTS 38–41 (2001).

38. *Id.* at 38.

39. *Id.*

carriers.[40] Individual employers may receive premium discounts, depending on the amount of their premiums, and may have their premiums adjusted by experience rating modifications, depending on the firm's previous experience.[41] These modifying factors are also approved by the insurance commissioner and must be used by all carriers.[42] Most carriers can pay dividends, but only after the expiration of the policy.[43] In short, there is "virtually no chance for carriers to compete in terms of price [of the insurance] at the *beginning* of the policy."[44]

A second type of regulatory arrangement involves *partial deregulation*, although there are several variants of partial deregulation.[45] For example, some states allow deviations in which individual carriers can deviate from the published manual rates by a specified percentage, sometimes limited to employers in particular insurance classes.[46] Deviations are generally subject to the approval of the state insurance commissioner.[47] Some states allow schedule rating plans, in which a carrier can adjust the premium changed to an individual policyholder based on subjective factors.[48]

A third type of regulatory arrangement is *comprehensive deregulation*, in which rating organizations publish loss costs (rather than manual rates) and insurers are permitted to set their own rates without prior approval of state regulators.[49]

Prior to the 1980s, all states with private carriers relied on pure administrative pricing to regulate workers' compensation premiums.[50] The changes in the regulatory environment since then have been tracked by the National Council on Compensation Insurance, which reports the date for each state when its "competitive rating law" was effective.[51] This is a category broad enough to include both comprehensive deregulation and partial deregulation.[52] Arkansas

40. *Id.* at 39.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 40.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 281.
50. *Id.* at 38.
51. NAT'L COUNCIL ON COMP. INS., ANNUAL STATISTICAL BULLETIN Exhibit 2 (2016).
52. *Id.*

adopted a competitive rating law in 1981, followed by thirty-three other jurisdictions by 1995.[53] As of 2016, there are thirty-seven jurisdictions (including the District of Columbia) in which a competitive rating law is effective, ten states with private carriers that still rely on administered pricing, and four states with exclusive state funds.[54]

Thomason, Schmidle, and Burton examined the effects of deregulation relying on state-level data from 1975 to 1995, which is the period when most states deregulated their workers' compensation insurance markets.[55] We found that most forms of partial deregulation were associated with higher costs for employers.[56] However, we found that comprehensive deregulation—loss costs systems that do not require prior approval of each carrier's rates—was associated with about an eleven percent reduction in the employers' costs of workers' compensation insurance compared to the employers' costs in states with private carriers with administered pricing or partial deregulation after controlling for other factors that affect the costs, such as benefit levels.[57] We also found that, after controlling for these factors, there were no statistically reliable differences in the costs of workers' compensation insurance between exclusive state-fund jurisdictions and states that allow private carriers.[58] Surprisingly, we also found that states with competitive state funds have workers' compensation rates that are nearly eighteen percent higher than the insurance rates in states with only private carriers.[59]

Morantz did not direct her comments to differences in the costs of insurance between states with private carriers and those with exclusive state funds, but rather focused primarily on the consequences of the different insurance arrangements on workplace safety. For example,

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53. THOMASON ET AL., *supra* note 37, at tbl.A.9.

54. The ten states with private carriers that still rely on administered pricing are Arizona, Florida, Idaho, Iowa, Massachusetts, Nevada, New Jersey, New York, West Virginia, and Wisconsin. NAT'L COUNCIL ON COMP. INS., *supra* note 52. The four states with exclusive state funds, which are not included in this publication, are North Dakota, Ohio, Washington, and Wyoming.

55. THOMASON ET AL., *supra* note 37; *see also* Terry Thomason, Timothy P. Schmidle & John F. Burton, Jr., *The Employers' Costs of Workers' Compensation Under Alternative Insurance Arrangements*, WORKERS' COMPENSATION POL'Y REV., Mar./Apr. 2001, at 3, 3 [hereinafter Thomason et al., *Alternative Insurance Arrangements*] (summarizing the results of an examination of the determinants of employers' costs of workers' compensation).

56. Thomason et al., *Alternative Insurance Agreements*, *supra* note 55, at 5.

57. *Id.*

58. *Id.*

59. *Id.* at 6.

she argued that "monopolistic public insurers may be able to consider subsidizing prevention programs or policies whose benefits can only be realized over relatively long time horizons."[60] Morantz also stated that "the relative scarcity of innovative insurance-related prevention programs in the United States could arise, at least in part, from the fact that private insurers in non-monopolistic markets (which exist in all but four states) have relatively weak incentives to subsidize long-term prevention programs."[61]

There are reasons to be skeptical of the hypothesized advantages for exclusive state funds in promoting workplace safety. Thomason, Schmidle, and Burton "found that injury rates were higher in exclusive-state-fund jurisdictions than in states that permit private insurers to underwrite workers' compensation insurance policies."[62] One reason we offered for this result is that "private insurers may be relatively more aggressive in claims management."[63] Paradoxically, we also found that injury rates were lower in jurisdictions with competitive fund states than in states that only have private insurance carriers.[64] The disparate results for state funds in jurisdictions without private carriers and for state funds in jurisdictions with private carriers suggest that any assertions about the relative performance of state funds in promoting safety must be used with care.

B. Physician Incentives

Morantz indicates it is useful to differentiate between two roles that physicians commonly play in workers' compensation: (1) to serve as "gatekeeper" in deciding whether an injured worker is eligible for workers' compensation benefits because the injury is work-related, and (2) to decide whether to treat the worker—a decision affected by factors such as the fee structures and the administrative costs of treating workers' compensation patients.[65]

There are two other important roles that physicians often perform in workers' compensation: (3) to decide whether the worker has sufficiently recovered from her injury to be able to return to work and, if so, whether there are limitations on the tasks the worker can perform, and (4) to determine if the worker has a permanent impairment and, if

60. Morantz et al., *supra* note 1, at 1031.
61. *Id.* at 1060.
62. THOMASON ET AL., *supra* note 37, at 285.
63. *Id.*
64. *Id.*
65. Morantz et al., *supra* note 1, at 1029–30.

so, to rate the extent of the permanent impairment, which will affect whether the worker qualifies for permanent total disability benefits or (more commonly) the size of the award for permanent partial disability benefits.

A particular doctor may perform more than one of these functions. For example, the doctor who provides the initial treatment to the injured worker may subsequently rate the worker's permanent impairment for the purpose of determining the amount of PPD benefits the worker will receive. That is one reason that employers and insurers support provisions found in the workers' compensation statutes in twenty-one jurisdictions that either allow the employer to make the choice of the treating physician without limitation or require the employee to choose the treating physician from a list provided by the employer.[66]

C. *The Inspectorate Pillar*

Morantz indicates this pillar "consists of the activities of federal, regional, and local inspectorates that set minimum safety standards, conduct inspections, and penalize employers for violating those standards."[67] I appear to have more reservations than Morantz about the performance of the three functions in the U.S. occupational safety and health program.

1. Standards in the Occupational Safety and Health Act ("OSHAct")

Congress, in enacting the Occupational Safety and Health Act ("OSHAct"),[68] did not directly prohibit or require specific actions by employers. Instead, section 654(a)(1) subjects the employer to a general duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm."[69] In addition, section 654(a)(2) requires each employer to "comply with occupational safety and health standards promulgated under this chapter."[70] The OSHAct requires the Secretary of Labor (acting through the

66. RAMONA P. TANABE, WORKERS' COMPENSATION MEDICAL COST CONTAINMENT: A NATIONAL INVENTORY, 2015, at 59–66 tbl.11 (2015).

67. Morantz et al., *supra* note 1, at 1022.

68. 29 U.S.C. §§ 651–678 (2012).

69. § 654(a)(1).

70. § 654(a)(2).

Occupational Safety and Health Administration ("OSHA")) to promulgate standards under the administrative procedures specified in the Act,[71] and the Secretary has issued several thousand such occupational safety and health standards.[72] These standards consist of three types: interim standards, emergency temporary standards (a category of no current significance), and permanent standards.[73]

The Secretary of Labor promulgated 4400 interim standards in 1971 shortly after the OSHAct became effective.[74] These interim standards remain in effect until revoked or revised using the procedure for new permanent standards.[75] The interim standards were federal standards and national consensus standards issued by organizations such as the American National Standards Institute ("ANSI") that existed when the OSHAct was passed.[76] Some were criticized as too vague and others were attacked as unnecessarily specific and even meddlesome, and as a result, OSHA deleted approximately 600 safety standards in 1978.[77] A further problem was that many of the ANSI standards contained the word "should" rather than "shall," which were struck down by courts because they were considered advisory rather than mandatory.[78] In 1984, OSHA formally removed 153 provisions of the general industry standard that had adopted advisory standards from ANSI.[79]

Despite these deletions, almost all of the OSHA standards currently in effect are the interim standards that were issued by OSHA in 1971.[80] The reason is that the new permanent standards issued under section 655(b) of the OSHAct have been sparse. Between 1971 and 2016, thirty-seven major health standards and fifty-five major safety standards were adopted.[81] Three of the health standards were vacated or revoked,[82] and so the grand total of permanent standards adopted and still in effect in over forty years is eighty-nine—about two per

71. § 655(a).

72. STEVEN L. WILLBORN, STEWART L. SCHWAB, JOHN F. BURTON, JR. & GILLIAN L. L. LESTER, EMPLOYMENT LAW: CASES AND MATERIALS ch.21 § A(3) (6th ed. forthcoming Aug. 2017).

73. *Id.* at ch.21 § A.

74. *Id.* at ch.21 § A(4).

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 107–09 (25th ed. 2016).

82. *Id.* at 107.

year.[83] Two reasons for the slow pace of adopting permanent standards are the cumbersome process for adopting the standards and the amount of effort that OSHA has devoted to defending the standards in court. The pace also depends on the effort devoted by OSHA to new standards, which in turn depends in large part on the attitude towards regulations by the President and Congress. An acceleration of standards promulgation in the next several years seems unlikely.

2. Inspections

There are currently twenty-nine states in which the federal government operates the safety and health program for private sector employers and twenty-one jurisdictions in which the state operates the program for private sector and public sector employers.[84] In 1992, there were 1953 federal and state inspectors, which meant that federal inspectors could visit each establishment in Federal OSHA states once every eighty-four years.[85] In 2016, there were 1840 federal and state inspectors, which meant that federal inspectors could visit each establishment in Federal OSHA states once every 145 years and that state inspectors could visit each establishment in state OSHA plan states once every ninety-seven years.[86]

The number of inspections has varied considerably during the past forty years.[87] Inspection activity peaked at 91,516 inspections in fiscal year ("FY") 1976, set a record low of 24,024 in FY 1996, and averaged about 38,000 per year in FYs 2001–2009 and about 39,000 per year in FYs 2010–2015.[88] An inspection can result in multiple citations. In FY 2015, there were 35,820 inspections and 65,033 citations.[89]

3. Penalties

The annual averages of initial penalties (proposed by OSHA) and current penalties (collected after contested penalties are resolved) by the Federal OSHA program for fiscal years 2001 to 2016 were $177.5 million and $104 million, respectively.[90] Initial penalties averaged

83. *Id.* at 107–09.
84. *Id.* at 135–38, 138 n.5.
85. *Id.* at 57.
86. *Id.* at 55–56, 138 nn.9–10.
87. WILLBORN ET AL., *supra* note 72, at ch.21 § E(1).
88. *Id.*
89. *Id.*
90. *Id.* at tbl.21.

$130.5 million per year in FYs 2001–2008 and $224.6 million per year in FYs 2009–2016, a 72% increase that roughly corresponded with the change in presidential administrations.[91] To put the OHSA penalties in perspective, in 2014 (the latest year with data from both pillars), the total of initial penalties in the Federal OSHA program was $211.9 million[92] and the national total of the employers' costs of workers' compensation was $91.8 billion.[93] This means that workers' compensation costs were greater than four hundred times the costs to employers of OSHA penalties.

Based on this data and a review of the literature on OSHA, I reached this conclusion:

> Overall, the evidence suggests that the Occupational Safety and Health Act (OSHAct) has done little to improve workplace safety . . . . OSHA's ineffectiveness in part may be due to the lack of inspection activity . . . . But the evidence also suggests that allocating additional resources to plant inspections may be imprudent, given the mixed results of inspections on safety.[94]

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91. *Id.*

92. *Id.*

93. MARJORIE L. BALDWIN & CHRISTOPHER F. MCLAREN, NAT'L ACAD. OF SOC. INS.,WORKERS' COMPENSATION: BENEFITS, COVERAGE, AND COSTS 2 tbl.1 (2016).

94. John F. Burton, Jr., *Economics of Safety*, *in* 20 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 863, 868 (James D. Wright ed., 2d ed. 2015).