


## Workers comp system:

# The failed delivery of health care

The New Jersey workers compensation system fails to deliver timely health care to injured and disabled workers, causing untold suffering to workers and their families, and millions of dollars in costs to the economy. A federal ranking of state workers compensation programs in 2000 by the U.S. Department of Labor's Office of Workers Compensation ranks New Jersey as only 55 percent compliant with essential workers compensation protections.

Justice delayed is justice denied. In 12 years of practice, I have observed people fighting for surgery and medical care, and fighting for temporary wage replacement funds just to keep off welfare and be able to pay for heat and electricity. Injured workers face hostile court battles lasting six to 18 months while their health deteriorates significantly and their family denied any income. It is a monstrous, backward system gone astray, padding the pockets of insurance companies and law firms on both sides of the bench, and supporting an expanding state administrative bureaucracy.



**The Law**  
and  
**More** Jay H. Bernstein

Acute emergent medical care should be vigorously instituted first, and the battle over payment and responsibility should be secondary. Medical care should not be placed on hold while litigation slowly unfolds with one witness every three weeks over a six-month period. Don't litigate while the worker bleeds. Health care should not be at the sufferance of insurance companies, judges and lawyers, and a statutory scheme from 19th century Germany.

Poor workers in New Jersey looking for non-emergency treatment or surgery face hostile insurance adjusters, adversarial lawyers, insurance company doctors paid to automatically cut off treatment as a *quid pro quo* for continued insurance company business, and clinics pressured to get them back to work, violating the medical oath and duty toward patients. Every week I am presented with a new client, whose original authorized surgeon

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or treating doctor is replaced by an insurance company "second opinion" doctor, merely for the purpose of halting treatment or canceling an authorized, scheduled surgery — all in the name of the bottom line. We're one of only eight states that deprives injured workers of any choice of a doctor and medical care.

Petitioners must pass myriad hurdles to prove themselves worthy of treatment. The system is broken beyond repair. Our co-workers are treated as malingers, liars, fakers, cheats. Yet "80 percent of the fraud is perpetrated by insurance companies and employers," asserted retired Judge Philip Bolstein at a seminar in 2001.

Why does an Iraqi prisoner of war or an inmate in any New Jersey jail receive quicker, better care than most of my clients?

The workers compensation system here supports systemic medical malpractice in all but name: Medical decisions are made by unqualified, non-licensed, laypeople — insurance adjusters, lawyers and judges. Compensation judges, many with no litigation, workers compensation or medical background, decide whether a worker will have surgery. They try their best to be fair, but their decisions by necessity are arbitrary and unscientific; no replacement for the sound judgment of a physician. Workers' chance for a course of treatment depends on the luck of the draw — which judge they're assigned.

There must be a more civilized, economical way to deliver health care to workers. Today's failed workers compensation system is medieval. Enacted in 1909, it originally was intended to end litigation and provide fast treatment and payment with a no-fault approach. Originally a civil code enactment, the workers compensation system has become entangled in a growing body of case law and is grinding to a halt.

The individual attorneys and judges are competent professionals trapped in a failed system. It's time for a replacement.

If we eliminate the litigation and motions for treatment, and provided blanket medical coverage for *all*, it's probable society would achieve a net savings of millions of dollars. Comparative legal models from Denmark to Japan suggest this alternative — adapted to local conditions — is realistic, equitable and cost-conscious. A Japanese model, mixing private health insurance and government insurance (akin to our system of private insurance and Medicare/Medicaid), but guaranteeing coverage to all citizens, is the best course. Another option is the federal longshoremen's model, providing strict, efficient medical coverage from a list of approved medical providers, guaranteeing workers free choice of competent doctors. Even the AFL-CIO plan, combining workers compensation and major-medical coverage into a single payer plan, is estimated to save 25 percent of the transactional costs of workers compensation litigation.

Until a comprehensive reform of New Jersey's workers compensation system is instituted, small-step, limited reforms should be undertaken. The new Democratic legislature majority must pass A-424, which would enable injured workers to choose a doctor in whom they have full confidence and one not beholden to the hidden agenda of an insurance company. Proper care for injured workers is a basic human right, long-neglected in New Jersey.

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## THE LAW RECORD

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TITLE: Protection of an Insured's Mission or Business in the Context of an Insurer Supplied Defense

CITE (NOTE): 28 Rutgers L. Rec. 1 (May 1, 2004)

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A FAILED SYSTEM OF HEALTH CARE DELIVERY: The Workers Compensation System in New

[1]

Jersey.

By Jay H. Bernstein, Esq.

The New Jersey Workers' Compensation system fails to deliver timely health care to injured and disabled workers, causing untold suffering to workers and their families and millions of dollars in costs to the economy.

Justice delayed is justice denied. In twelve years of practice, I have observed human beings fighting for surgery, medical care and psychiatric care, fighting for temporary wage replacement funds to keep off the welfare rolls just to pay their heat and electricity bills. The injured workers face hostile court battles, six to eighteen months in duration, while their health deteriorates significantly and their families are denied any income. It is a monstrous, backward system, gone astray, padding the pockets of insurance companies and law firms on both sides of the bench, and supporting an expanding state administrative bureaucracy.

Acute emergent medical care should be vigorously instituted first, and the battle over payment and responsibility should be secondary. Medical care should not be placed on hold while litigation slowly unfolds with one witness every three weeks over a six month period. Health care should not be at the sufferance of insurance companies, judges and lawyers, and a statutory scheme from nineteenth century Germany.

For the wealthy and middle class, private health insurance (and private disability plans and State of New Jersey temporary disability pay) sometimes act as a temporary safety net, ensuring medical care and wage replacement to an injured worker.

Yet many workers fall through the safety net with no eligibility for income protection. For example, city workers fall outside of New Jersey's temporary disability program, impoverishing the city worker who is denied workers' compensation temporary payments.

For the majority of working poor (30% of the U.S. working population, earning under \$18,000 per year),

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employed at "McJobs" with no private health insurance, sick days or personal days, anything short of emergency room treatment is denied. This includes delays in major surgical procedures and proper treatment, no access to prescription medication and, therefore, aggravating acute injuries, leading to malpractice claims and causing lifetime, chronic disabilities, with untold costs to workers, their families, and the state economy.

NEW JERSEY COMPENSATION SYSTEM BELOW NATIONAL AVERAGE

The AFL-CIO reports that a federal ranking of state workers' compensation programs by the U.S. Department of Labor, Office of Workers' Compensation (2000), ranks New Jersey as only fifty-five

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percent compliant with essential workers' compensation protections. We can do better! Nebraska's ranking is eighty-seven percent, Connecticut's is eighty-four percent, and Iowa is at eighty-two percent.

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Even Pennsylvania scores seventy-two percent. The U.S. average is sixty-seven percent. New Jersey compliance with basic federal standards is therefore below even the national average for state workers' compensation programs. Only eight states, including New Jersey, deprive the injured worker of

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[7] any choice regarding a doctor and medical care. We can do better!

Equal access to quality health care is key to our families and workers, and the “United States [is] the only democratic industrialized country in the world that does not provide all of its citizens with equal access to

[8] quality health care.” The World Health Organization rates the United States as “55<sup>th</sup> in terms of

[9] financial fairness” vis-à-vis basic health care access.

### TREATMENT OF OUR CHILDREN AS A MODEL

Our children, if injured, are cared for immediately with no questions asked. We do not subject our kids to extensive cross-examination and recrimination for months at a time before deciding if treatment is necessary or related. We do not ask our children: Did you report your injury within twenty-four hours? What is the date of your injury? Are you faking your injury? Is it not true that you injured the same body part three years ago? Did you once use drugs? Who did you notify of your accident? Did you notify someone in a position of authority within forty-eight hours, or two weeks, or ninety days? Were you engaged in a fight, not related to your (school) work? What is the exact date and time of your accident? Did you know your injury was related to your activity, and if you did know, and ninety days have passed, and you did not notify anyone, it is too late to receive free treatment or compensation. Don't you have other causes for your injury, depression, etc.?

The wrong answer to any one of these questions for a New Jersey worker results in no medical care. We, as a society, would never expose our children to such a medieval system. The same level of comprehensive care for children (i.e., New Jersey Family Care) should be extended to all members of our family, all adults, and all workers! Emergency room treatment, by law, is provided to all Americans, regardless of cause or ability to pay. So why not all basic care?

Our nation treats felons, prisoners and victims of gun shot wounds immediately, in the emergency room, no questions asked. Our Army troops treat enemy soldiers immediately, no questions asked.

By contrast, a poor worker in New Jersey looking for treatment or surgery beyond the emergency room is faced with hostile insurance adjusters, adversarial lawyers, insurance company doctors paid to automatically cut off treatment as a quid pro quo for continued insurance company business and clinics that are pressured to get them back to work, violating the doctor's medical oath and duty towards the patient. Every week I am presented with a new client, where the original authorized surgeon or treating doctor is replaced by an insurance company doctor merely for the purposes of cutting off treatment or canceling an authorized scheduled operation. All in the name of the dollar.

The original no-fault workers' compensation system, instituted in 1909, has cracked. Petitioners (i.e. injured workers) must pass a myriad of hurdles to prove worthy of treatment. The system is broken beyond repair. Our co-workers are treated as malingerers, liars, fakers, and cheats. Prisoners of war, convicted felons and murderers receive much better, more consistent and more immediate treatment than most New Jersey workers! Why does an Iraqi prisoner of war or an inmate in any New Jersey prison receive quicker and better care than most of my clients? Why does a worker's family suffer with no electricity, no heat, no income, while awaiting a judge's decision regarding temporary pay and emergency surgery, sometimes delayed eighteen months in long drawn out court battles? I have litigated battles between insurance company doctors with questionable backgrounds, (one doctor whom has failed his medical board tests twelve times, yet is chief of treatment for our largest city's police force). I have

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been forced to bring to court world renowned experts from the best New York surgical programs in order to face recalcitrant judges adverse to specialized medical care and surgical procedures that could ultimately return a worker to the labor force.

If New Jersey eliminates insurance litigation, the insurance company profit motive, the insurance company lawyers, the administrative workers' compensation courts, the lost days and years of worker production, and instead provides blanket medical coverage for all society, it would likely achieve a net savings of millions of dollars. Comparative legal models from Denmark, the Netherlands, Japan and Canada suggest that this alternative, adapted to local conditions, is realistic, equitable and cost conscious. A Japanese model, mixing private health insurance and government insurance (akin to our system of private insurance and Medicare/Medicaid), but guaranteeing coverage of all citizens, is the best and most realistic course. America covers the poorest individuals under Medicaid, and the middle and upper middle class under private health insurance. However, the working poor (35 million workers) and lower middle class exist in a vacuum, with no proper health coverage.

Recently, the AFL-CIO has proposed a single payer system that would combine both workers' compensation and major medical coverage into a single policy, cutting transaction costs by twenty-five

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percent. The AFL-CIO argues that a single payer system would allow injured workers to "have greater access to medical services *without the dispute and delay* imposed under the workers'

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compensation system."

Our nineteenth century brethren created a new system from scratch, the workers' compensation civil system. It worked well for nearly one hundred years. It is time for a replacement.

Why has this egregious violation of the most basic human right, the right to health care, come to pass? Is it the fault of judges, striving to lower workers' compensation insurance rates for New Jersey businesses? Or is the problem intrinsic to our statutes and laws, known as the New Jersey Workers' Compensation Rules?

I have witnessed a trial (one of many) with a fair and caring judge, and an honorable respondent and petitioner's counsel grilled a poor elderly woman for an hour, over a simple question of the exact date of her present and prior injuries. She could not remember if it was 1/17/98 or 1/19/97 or 1/21/98 or 2/17/99. The injury was real. The need for immediate treatment, and possible curative surgery was agreed. She had no private medical insurance and no job or income.

If she failed the litmus test of a faded, hazy memory, her treatment, by statute and rule, would be denied. I witnessed a Salem witch trial, dressed in modern form, in New Jersey. Trial by fire, trial by water, trial by Memory.

No one in the courtroom realized the travesty of this cross-examination, a Salem witch trial by memory. If she failed, she was out, out of luck, no chance for treatment anywhere.

I ask, where is the humanity and fairness in this hollow system?

Would we deny treatment to a child for an erroneous memory, or even if the child was at fault, or the child was on drugs, thus causing a serious injury? No. Drug abusers, felons, robbers and prisoners receive full medical care. To do otherwise constitutes unusually harsh punishment, deemed

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unconstitutional.

So why do we question, interrogate, litigate, and test the adult worker, the elderly, the undocumented alien, the immigrant and the working poor with a litmus of issues and questions, before commencing the proper medical treatment. Is it simply to prevent fraud?

The threat of worker chicanery and fraud is usually successfully weeded out by the court, aided by insurance company "spies," secretly filming American citizens and conducting vast computer background insurance checks (CIB insurance supercomputer listing of all past accidents and litigation for all

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Americans). I witnessed the same in the former Soviet Union.

Judges effectively spot fraud and stop it in its tracks. As the straight talking, strict conservative Judge Bolstein stated; "Eighty percent of the real fraud is perpetrated by insurance companies and employers, –

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only ten to twenty percent stems from the workers." The audience was shocked at this statement, as going against the grain of politically correct accepted wisdom, and issued by the NYU Law trained dean of the judicial corps.

Treatment of a real injury should be immediate and timely. Let the trial determine liability, causal relationship and payment issues later. The court should care for the injured worker first. The workers' compensation system places the burden of payment on the employer, and thus ultimately on the consumer, through price increases. So be it. Simply provide treatment first, ask questions later.

The obverse withholding of necessary medical treatment and surgery (and temporary workers' compensation payment to feed and clothe the family), while a lengthy motion and trial proceed, is obscene, and medieval in its stark unfairness. Therefore, I would recommend that the courts determine responsibility, causal relationship and liability at the end of the process. Do not litigate while the worker bleeds.

We should not hold medical treatment for injured, battered workers hostage to litigation. The motion for medical and temporary benefits usually demands a three to six month trial at best. The process is grueling and demeaning to the frail and injured workers and takes an unnecessary toll, physically and emotionally.

There must be a more civilized, economically efficient way to deliver health care to our workers. There must be a better way, for instance, national health care. Our present day workers' compensation system, copied from a nineteenth century German model, is medieval and wrong. The workers' compensation system, originally intended to end litigation and provide fast treatment and payment with a no fault approach, has failed. Codified originally as a civil code enactment, the workers' compensation system has become stymied and entangled in a growing body of precedent and case law and is grinding to a halt.

Speed has been ended by litigation. The problem originally intended to be fixed has returned, seemingly endless litigation before payment or proper treatment. We have turned the system on its head. Insurance company profits, and parasitic law firms on both sides gain. The worker loses in the end.

The individual attorney and judge are competent ethical professionals, for the most part, trapped in a failed system. It is time to scrap the system and rebuild from scratch.

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## The New Jersey Workers' Compensation System Supports Systemic Medical Malpractice.

The New Jersey Workers' Compensation System supports systemic medical malpractice in all but name, medical decisions are made by unqualified, unlicensed, laymen:

- a. High school and community college educated insurance adjusters decide on all questions of [14] medical care, from the necessity of surgery to which medication will be paid.
- b. Biased doctors on insurance company payrolls – some who have been documented (by deposition) to have failed the New Jersey Medical Boards twelve times – decide all aspects of treatment, delivering the lowest level of healthcare possible. Licensed family doctors and [15] hospital surgeons have deemed such treatment unconscionable.
- c. Laymen Judges of Compensation, many with no litigation, workers' compensation, or medical background, decide whether a worker will have surgery or not. They try their best to be fair, but their decisions, by necessity, are arbitrary and unscientific. A patient's chance for [16] a course of treatment depends on the luck of the draw, i.e., which judge is assigned.
- d. Petitioner attorneys – many who view workers' compensation as a business and injured workers akin to Gouls, "Dead Souls," or mere accounts to be settled – with the largest and most prestigious petitioners firms refusing to file, as policy, motions for surgery or treatment, [17] as such are deemed economically inefficient, time consuming, and wasteful.
- e. Insurance lawyers with open disdain for working class people go to great lengths to find any legal loophole to deny treatment to the worker, all in the name of service to the insurance [18] company.

## The Answer. New Alternatives for Health Care Delivery.

If New Jersey eliminates insurance litigation, the insurance company profit motive, the insurance company corporate lawyers, the administrative workers' compensation courts, the lost days and years of worker production, and instead provided blanket medical coverage for all, it is probable society would achieve a net savings of millions of dollars. Comparative legal models, from Denmark and the Netherlands to Canada and Japan, suggest that this alternative, adapted to local conditions, is realistic, equitable and cost-conscious. Comparative law paradigms teach us valuable lessons. This article will examine the following health care and workers' compensation models listed below:

- Japanese two tier model – private insurance and government insurance in concert.
- Federal Longshoreman's Compensation model – strict enforcement of treatment rights.
- AFL-CIO proposal – universal health care, eliminate workers' compensation litigation.
- New York system – choice of treating doctor by injured worker.

*Collex*



- Pennsylvania system – Respondent may only terminate treatment via motion.
- Gephardt Plan – universal health care system.
- Schwarzenegger Plan – adopting effective independent medical review and eliminating judges.
- OSHA increased enforcement – prevention of occupational disease and accidents.

#### A. Japanese Model: Comprehensive Health Care through Private and Public Insurance.

The Japanese model, mixing private health insurance and government insurance (akin to our system of private insurance and Medicare/Medicaid), but guaranteeing coverage for all citizens, is the best and most realistic course. America covers the poorest under Medicaid, and the middle and upper middle class under private health insurance. The working poor (35 million workers) and lower middle class, by contrast, exist in a vacuum, with no proper health coverage. The Japanese system ensures health coverage for all with a mix of government and private programs.

The Japanese health care model is divided into two primary systems. The first of these systems is the Employee's Health Insurance System, which insures approximately thirty-three million subscribers and is

[19] funded through payroll contributions of eight percent of wages. Both employers and employees pay

[20] these contributions, thereby covering the dependents of each group. The second of these systems is the National Health Insurance System, which insures approximately forty-six million subscribers and

covers self-employed individuals, pensioners, their dependents and members of the same occupation.

[21] Subscribers begin paying into a National Pension program at age twenty. Fixed, old-age pension benefits are available at age sixty-five, and pension benefits are also available to fatherless

[22] families and disabled individuals. Under the National Health Insurance System, premiums are calculated by local governments based on income, the number of individuals that reside in a household,

[23] and the amount of assets that a subscriber has. These premiums total fifty-seven percent of health

[24] expenditures in Japan. The federal government contributes twenty-four percent of premiums, and

[25] local governments contribute seven percent. Additionally, medical insurance systems have been established for seamen, national public service employees, local public service employees, teachers and

[26] staff employees of private schools. [27]

In a recent article comparing various health-care systems, it was stated:

In Japan, about 80% of hospitals and 94% of private clinics are currently owned and operated privately, and very few public not-for-profit hospitals exist. Unlike the United States, where patients are often restricted in choice of health care provision, patients are able to choose their ambulatory care physicians. These physicians are then reimbursed based on a uniform fee-for-service schedule with hospital physicians receiving fixed

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salaries.

### B. Federal Longshoreman's Workers Compensation Model

The strict Federal Longshoreman's model, where a list of certified medical providers is guaranteed to the [29] injured worker and treatment is provided immediately by a doctor of the worker's choice, is far better than New Jersey's model. The Federal government protects our nation's dock and shipyard workers under this model, providing excellent healthcare under strict scrutiny by the federal government and immediate temporary payments.

Regarding final or permanent payments, the Federal Longshoreman's Act pays only for a limited list or [30] schedule of specified injuries, compared to the wide range of accidental and occupational pathologies [31] covered under the near limitless New Jersey State Workers' Compensation scheme. New Jersey State Law is superior in its breadth of coverage but illogical in the rationale used to set monetary awards. The Federal Longshoreman's Act, by contrast, provides a logical and sensible marker for compensating an injured worker: if the injury causes the worker to take a deduction in salary, the federal Act makes up the difference. This is an eminently more sensible approach compared to New Jersey's chart of disability [32] payments, where simple bronchitis may garner a \$2500 settlement with no connection to actual diminution of salary or work performance. To the sensible layman, New Jersey's system has no rhyme or reason.

### C. The AFL-CIO Integrated Health Care, Single Payer System.

The single payer system proposed by the AFL-CIO is "would combine workers' compensation and major medical coverage into a single policy system. They suggest that a 25% savings will occur as transactional costs will decrease and that injured workers will have greater access to medical services [33] without the dispute and delay imposed under the workers' compensation system."



### D. New York Model

New Jersey's working class would be greatly served by passage of pending legislation allowing a worker [34] to choose a private doctor of the worker's choice. In an explanatory note to the bill, the sponsor, Assemblyman Anthony Imperveduto, commented that:

The bill would bring the provisions of New Jersey's workers' compensation law regarding who selects medical service *providers into compliance with the provisions of the laws of the majority of states*. Under current New Jersey law, an employee is required to visit the physician of his employer's choice, unless the employer refuses to provide treatment, in which case the employee may select the physician. *New Jersey is among the 17 states that currently have laws permitting the employer to select the attending physician in workers' compensation cases*. Of those state laws, four permit an employee to change physicians after a waiting period and five permit a State agency to change the selection. Of 32 states

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which permit the employee to choose the physician; three require the employee to select the physician from a list provided by a state agency; three require that the employee select a physician from a list provided by the employer; and the other 26 states, like this bill, give [35] a free choice of physicians to the employee.

The New York State Workers' Compensation Board provides for personal choice, as stated by the Board:

The injured or ill worker who is eligible for workers' compensation will receive necessary medical care directly related to the original injury or illness and the recovery from his/her disability. The worker is *free to choose any physician*, chiropractor, podiatrist, psychologist (upon referral from an authorized physician), outpatient clinic of a hospital or health maintenance organization authorized to give medical care by the Chairman of the Workers' Compensation Board.

Preferred Provider Organizations (PPO's) are allowed to provide workers' compensation coverage if they offer five providers in every medical specialty and three hospitals (exceptions granted by the Workers' Compensation Board). *If the injured worker is dissatisfied with his/her medical provider after initial treatment, he/she may select another authorized provider outside the PPO after 30 days of initial treatment.*

The cost of necessary medical services is paid by the employer or the employer's insurance carrier. The doctor may not collect a fee from the patient. When appropriate, claimants will be awarded reimbursement for automobile mileage to and from a health care provider's office.

If the injured worker's compensation claim is disputed by the employer or insurance carrier, the doctor may require the claimant to sign form A-9. This will guarantee that the worker will pay the medical bills if the Workers' Compensation Board disallows the claim

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or the worker does not pursue it.

#### E. **Pennsylvania Model**

While the Pennsylvania system is generally viewed as stacked against the ordinary worker, it does have some redeeming elements that stand in stark contrast to the New Jersey Compensation rules. In New Jersey, medical care and temporary workers' compensation pay checks can be cut off unilaterally by the

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insurance company with no warning and dubious rationale (i.e. cost savings). In Pennsylvania, the

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insurance company must first file a motion to either terminate or reduce treatment or payments. The

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onus is on the insured to prove to the court both a legal and a medical rationale for ending treatment, a much fairer and more ethical approach to the working man or woman, as compared to New Jersey's all powerful insurance agent, randomly stopping medical treatment in mid-course.

Under the current New Jersey system, I have had treatment cut off for workers as they were wheeled into surgery; I have had seizure medication cut off mid-treatment for a New Jersey petitioner; I deal weekly with insurance company independent examiners whose *raison d'etre* is to countermand the treating surgeon's instructions and unilaterally cut off all medical treatment. I have seen physical therapy

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cancelled after major surgery, contrary to the surgeon's order, and the only recourse in New Jersey is a motion to restore benefits, which may take up to thirty-five days to be listed and up to four months to be tried. New Jersey is home to a backwards, failed system of workers' medical care, of undeniable cruelty to the ordinary worker.

The Pennsylvania rules only allow termination of treatment *after* three steps are taken. These are basic due process and procedural measures to protect the worker:

- (1) Exam;
- (2) Respondent motion to terminate or modify treatment or benefits; and  
[40]
- (3) Court hearing.

An insurance company may attempt to stop an injured worker's compensation benefits. The first step in the process to terminate benefits is to send the worker to a physician to undergo an Independent Medical Exam (IME). If the physician determines that the worker can perform either the same "pre-injury" duties of his employment or modified duties, then the insurance company may file a *Petition to Terminate*,

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*Suspend or Modify Benefits*. These petitions are described by the Pennsylvania Workers' Compensation Legal Center as follows:

**Petition to Terminate Compensation Benefits:**

When an employer files a Petition to Terminate Compensation Benefits, the employer is asking the Bureau of Workers' Compensation to stop compensation payments for a particular reason. The reason may be stated in the petition. Many times, employers file this petition on the basis of a physician's affidavit that states the worker is no longer injured and can return to work. The injured worker has a right to defend the petition. If the worker does not attend a hearing, then payments may be stopped. If the worker

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doesn't report back to work, the job could be lost.

**Petition to Modify Compensation Benefits**

When an employer files a Petition to Modify Compensation Benefits, the employer is asking the Bureau of Workers' Compensation to reduce the amount of money an injured worker is receiving. The reason may be stated in the petition. The reason is usually because the company doctor concludes that the injury is not as disabling as it previously was, and has released the worker to a modified or light duty job. The employer has a modified job available for the worker; however, the worker is rejecting it because the requirements to perform the job exceed the physical restrictions placed on the worker by the physician. The worker has a right to defend the petition. If the

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worker doesn't attend a hearing, then payments may be reduced.

**Petition to Suspend Compensation Benefits**

When an employer files a Petition to Suspend Benefits, the employer is asking the Bureau of Workers' Compensation to suspend payments for a particular reason. The reason may be stated in the petition, and may include the injured worker's failure to comply with certain requirements of the Workers' Compensation Act. Usually, the employer has a different job available for the worker that the worker is rejecting even though it pays the same amount as the pre-injury job paid. The worker has the right to

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defend the petition. If the worker does not attend a hearing, then payments may be [44] suspended.

The determination of whether compensation benefits will continue is then made by a Workers' Compensation Judge, who may need to hold three or four hearings before making this decision. [45]

As a stopgap to bring a semblance of equity for New Jersey workers, the above Pennsylvania motion practice should be adopted to protect our workers from the ex parte cut-off of medical treatment experienced in the majority of New Jersey claims.

### E. Gephardt Plan

The Gephardt plan is a system for universal health care. This plan "will not only ensure that all working families have access to quality health care, but will offer both business and state and local governments relief from health insurance costs while offering significant economic stimulus. The proposal will pump [46] more that \$280 billion into the economy over the first three years."

### F. Terminator Model

Arnold Schwarzenegger, the new California Governor has suggested a radical fix to California's failed system. Schwarzenegger stated several key points, including:

- Working with the legislature to:
  - Implement guidelines that are objective and enforceable and create well-defined networks of providers.
  - Adopt the AMA guidelines for impairment ratings, thereby eliminating excessive payouts for permanent disabilities.
  - Adopt an Independent Medical Review process to reduce litigation and judicial involvement.
- Initiating a comprehensive review of the State Compensation Insurance Fund to determine its financial condition and taking action as necessary.
- Appointing a new team to the Division of Workers' Compensation and making [47] cost containment a primary objective.

Schwarzenegger's plan intended to fix the runaway worker's compensation system in California. In 1995, workers' compensation cost Californians \$9.5 billion; today, this cost has risen to an [48] estimated \$29 billion. Moreover, insurance premiums in some instances have increased 200 to 250 percent since 1999, and they are two to three times more expensive than the national [49] average. [50] The legislature's solution barely redresses this crisis.

The *Miami Herald* reported recently on key provisions of the proposed comprehensive health plan revision in California:

**Disability Ratings** - Would set up a three-tier system to rate the severity of workers'

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permanent disabilities. Workers who couldn't return to work would be rated based on the nature of their injury, their age, occupation and their adaptability to perform a "given job." Under tier two, injured workers who returned to their jobs, refused to return to work or were fired for a non-injury reason would be rated based on the nature of the injury only. In tier three the worker's injury, age and occupation would be considered if the worker was offered a different job that was within reasonable commuting distance and paid at least 85 percent as much as the old position. Currently evaluators can use a number of factors,

including the injured workers' capacity to compete in an open job market.

**Cure Or Relieve** - Would define the requirement for workers' compensation to "cure or relieve" a job-related injury by requiring the worker to receive medical treatment that was, among other things, based on "high-grade, evidence-based" medical guidelines, was "clinically appropriate and effective" and "not more costly than alternative treatment likely to produce equivalent results." Supporters say the definitions will result in less litigation. Critics say the definitions could lead to "artificial restraints" and HMO-type cost restrictions on treatments for injured workers.

**Physician Choice** - Would allow an injured worker to pick his or her own physician for treatment only if the employer agreed. Supporters say the change would stop "doctor shopping" by workers' attorneys to get favorable disability ratings. Critics say the change would deny workers a basic right and result in bad medical treatment by a "company doctor."

**Independent Medical Review** - Would use outside physicians to settle workers' comp medical disputes. The physician-reviewer's decision would be binding. Supporters say the change would allow physicians, instead of state workers' compensation judges, to make medical decisions. Critics say it would allow a doctor who had only reviewed medical records to make a decision on "what treatment the worker is eligible for the rest of his or her life."

**Apportionment** - Would make it easier for an employer to prove a worker's previous injury or condition contributed to a new work-related injury, thus reducing the amount the employer must pay in worker' [sic] compensation benefits. Would allow an employee to

[51]

be rated no more than 100 percent disabled, despite a series of injuries.

New Jersey should also appoint a committee for comprehensive reform, but with a goal of making fair, cost effective, health care delivery as job one, possibly with a new type of effective independent medical review process, akin to the Canadian model of a medical decision board composed of medical doctors,

[52]

not lawyers or judges.

#### G. **OSHA Enforcement: Prevention and Safety – stepped up enforcement to ensure a safe work place.**

Enforcement of a safe work environment and safe work conditions could prevent innumerable injuries and disease, from brain encephalopathy to toxic paint exposure to cancer from asbestos exposures.

[53]

Massive pulmonary problems (26% of adult onset asthma is traceable to the workplace ) and extensive chemical exposures and safety lapses lead to debilitating injuries and chronic disease. In the author's experience, the worker with a lifetime debilitating pulmonary condition usually receives a small award of money from the workers compensation court, if lucky (i.e., pulmonary Section twenty dismissal

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with a small payment), while workers with no real objective problems clog the dockets with de minimus disability claims.

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Why not put the onus on prevention by requiring strict compliance with Federal Clean Air safety statutes [55]

and workplace exposure guidelines for toxic chemical exposures? While the government has set limits on individual toxic exposure to a myriad of chemical substances, no extensive research has been conducted for real world mixtures of toxic chemicals and their concomitant effects and toxicity to humans.

We should as a society protect the health of our workers by beefing up OSHA and PEOSH state and federal inspections, ensuring a safe working environment for all. The government must monitor all air quality, chemical exposure limits, and safe machinery.

Currently, only a few individuals in a limited number of OSHA offices serve to monitor all workplaces in [56]

New Jersey. Money and manpower for prevention would save twice the cost of payments made later for debilitating injuries and chronic occupational and pulmonary disease.

### CONCLUSION

A national health care plan or enforced participatory scheme imposed from above may be the only hope for our states' and our nation's workers. Comprehensive and affordable health insurance and guaranteed temporary wage replacement are primary building blocks to future improvement in the life of our nation's thirty-five million working poor. We must change our workers' compensation health care delivery system and join the ranks of the modern industrial nations.

For thirty-five million Americans, America is not the richest nation on earth nor is it even in the top twenty. We must do more than ask why, we must analyze, organize and change the law. We must act! As a first step, we must replace the present New Jersey Workers' Compensation health care delivery system with the goal of making fair, cost effective, health care delivery as job one.

Until a comprehensive reform of New Jersey's Worker Compensation system is instituted, small steps, and limited reforms should be undertaken. The new democratic majority must pass legislation enabling the injured worker to choose a doctor of his or her own choice, a doctor the patient can have full confidence in, a doctor not beholden to the hidden agenda of an insurance company.

[1]

Jay H. Bernstein is certified by the Supreme Court of New Jersey as a Workers' Compensation Attorney, and has specialized in Emergency Motions for Medical and Temporary Benefits. Mr. Bernstein has served as a founding member of the New Jersey Bar Association Mass Disaster Relief Program and as a former clerk to the Minister of Justice in Israel, conducted comparative legal research contributing to the drafting and introduction of new legislation before the Law Committee of Parliament. Mr. Bernstein served as a legal intern in the U.S. Congress for Congressman Torricelli, participating in nationally televised House hearings on Dioxin exposure and environmental issues, and organized a Congressional Human Rights Campaign. Mr. Bernstein currently supervises the Workers' Compensation Department of ~~Sprack & Cannon, located in Iselin, NJ~~ Kirsch Gelband & Stone, in Newark NJ. (M)

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[2]

“30% of the U.S. working population earns under \$8.70 per hour (\$18,000 per year); the poverty level for a family of four. Three fourths of the working poor are white, high school educated, some college educated, and a good percentage are women with families to support. None have access to health coverage or even sick or personal days. They are doing jobs essential to our economy but stuck in their jobs with no upward mobility, no health insurance, yet the mainstream of society and white.” Beth Shulman and Annette Bernhardt, *Leonard Lopate Show* (Nat’l Public Radio broadcast, Sept. 22, 2003), available at <http://www.wnyc.org/shows/lopate/episodes/09222003>. Shulman is the author of *The Betrayal of Work: How Low-Wage Jobs Fail 35 Million Americans* (The New Press 2003); Bernhardt is the Director of the Brennan Center for Justice, NYU Law School.

[3]

See U.S. Dep’t of Labor, Office of Workers’ Compensation, DEATH ON THE JOB: THE TOLL OF NEGLECT (2001), available at <http://www.aflcio.org/yourjobeconomy/safety/wc/upload/comptable.pdf> (table covering all 50 states).

[4]

*Id.*

[5]

*Id.*

[6]

*Id.*

[7]

See A424, 211th Leg. (N.J. 2004), at [http://www.njleg.state.nj.us/2004Bills/A0500/424\\_I1.pdg](http://www.njleg.state.nj.us/2004Bills/A0500/424_I1.pdg). The statement included in Bill A424, by Assemblyman Anthony Impreveduto, primary sponsor, compares New Jersey to other states:

Under current New Jersey law, an employee is required to visit the physician of his employer's choice, unless the employer refuses to provide treatment, in which case the employee may select the physician. *New Jersey is among the 17 states that currently have laws permitting the employer to select the attending physician in workers' compensation cases. Of those state laws, four permit an employee to change physicians after a waiting period and five permit a State agency to change the selection.* Of 32 states which permit the employee to choose the physician: three require the employee to select the physician from a list provided by a state agency; three require that the employee select a physician from a list provided by the employer; and the other 26 states, like this bill, give a free choice of physicians to the employee.

*Id.* (emphasis added). Of the seventeen states that have laws permitting the employer to select a doctor, nine place limitations on this choice, thereby leaving eight states that deprive the worker of any choice of doctor.

[8]

Sahar Dar, *Universal Access to Health Care: An Intentional Comparison*, THE NATION’S HEALTH, May 2002, available at <http://www.apha.org/journal/nation/accesstocareexclus502.htm>.

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[9] Thomas Dennison, *Haphazard Health Care*, SYRACUSE UNIV. MAG., Fall 2003, at 24.

[10] See Jon L. Gelman, *Integrated Health Care Proposed*, 1 WORKERS' COMPENSATION NEWS, Aug. 7, 2003, at <http://www.gelmans.com/FrontEnd/ReadingRoom/vwArticle.asp?ArticleId=339&PracticeAreaId=-1>.

[11] *Id.*

[12] As a matter of course, insurance companies conduct a "CIB" (Central Index Bureau), a search of the claims history of a plaintiff who has brought a lawsuit against its insured. This can lead to some very damaging information.

[13] ATLA Convention Seminar, Atlantic City, April 2001, Workers' Compensation Seminar. The Honorable Judge Bolstein is a former respondent insurance company attorney.

[14] Information from testimony taken by the author before the Honorable Judge Apy, JWC, Toms River, New Jersey, on motion to enforce an order for medical and temporary benefits, and the first motion for "fraud" alleged *against* an insurance company in the New Jersey Workers' Compensation Court. Testimony of Insurance Company Adjuster and Supervisor, case name redacted to protect petitioner, Spevack & Cannan Law Office.

[15] Deposition of Dr. Patel, past Newark Police Department authorized treating doctor, wherein Dr. Patel admitted to twelve failed attempts at passing board certification test. Case Name Redacted to protect petitioners' privacy. Deposition on file with Law Office of Spevack & Cannan.

[16] Critical assessment of author, after twelve years of motion practice in most venues of the New Jersey Workers' Compensation Court system.

[17] Author's experience as employee of Freeman & Bass, Newark, New Jersey from 1991 to 1994, and Horowitz & Horowitz, Perth Amboy, New Jersey from 1994 to 1996.

[18] Author's experience dealing with majority of Respondent's Bar in the New Jersey Workers' Compensation Court, 1991 to 2004.

[19] *Dar, supra* note 8.

[20] *Id.*

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Ministry of Health, Labour and Welfare, *Providing Health Care for All People Without Worries*, at <http://www.mhlw.go.jp/english/org/policy/p34-35.html>.

[28] Dar, *supra* note 8.

[29] Longshore and Harbor Workers' Comp. Act, 33 U.S.C. § 907 (1984), *available at* <http://www.oalj.dol.gov/public/lgshore/refract/lhwca.htm#907>. The statute states in relevant part:

(a) General requirement. The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

(b) Physician selection; administrative supervision; change of physicians and hospitals. *The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided.* If, due to the nature of the injury, the employee is unable to select his physician and the nature of the injury requires immediate medical treatment and care, the employer shall select a physician for him. *The Secretary shall actively supervise the medical care rendered to injured employees, shall require periodic reports as to the medical care being rendered to injured employees, shall have authority to determine the necessity, character, and sufficiency of any medical aid furnished or to be furnished, and may, on his own initiative or at the request of the employer, order a change of physicians or hospitals when in his judgment such change is desirable or necessary in the interest of the employee or where the charges exceed those prevailing within the community for the same or similar services or exceed the provider's customary charges. Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.*

(e) Physical examination; medical questions; report of physical impairment; review or reexamination; costs. *In the event that medical questions are raised in any case, the Secretary shall have the power to cause the employee to be examined by a physician employed or selected by the Secretary and to obtain from such physician a report*

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containing his estimate of the employee's physical impairment and such other information as may be appropriate. Any party who is dissatisfied with such report may request a review or reexamination of the employee by one or more different physicians employed or selected by the Secretary. The Secretary shall order such review or reexamination unless he finds that it is clearly unwarranted. Such review or reexamination shall be completed within two weeks from the date ordered unless the Secretary finds that because of extraordinary circumstances a longer period is required. The Secretary shall have the power in his discretion to charge the cost of examination or review under this subsection to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk, in appropriate cases, or to the special fund in section 44 [33 U.S.C. § 944].

33 U.S.C. § 907 (emphasis added).

[30]

33 U.S.C. § 908(c), available at <http://www.oalj.dol.gov/public/lgshore/refract/lhwca.htm#908>.

[31]

See generally N.J. Workers' Comp. Law, N.J. STAT. ANN. § 34:15-12 (West 2000). Subsection (c) lists various injuries and the number of weeks' compensation for those disabilities. Paragraph (22) then provides a catchall for any injuries not specifically listed in the statute:

In all lesser or other cases involving permanent loss, or where the usefulness of a member of any physical function is permanently impaired, the duration of compensation shall bear such relation to the specific periods of time stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule. In cases in which the disability is determined as a percentage of total and permanent disability, the duration of the compensation shall be a corresponding portion of 600 weeks.

[32]

See N.J. Mar. 1, 2004, as amended, *Schedule of Disabilities and Maximum Benefits Schedule of Amputation and* [http://www.njleg.state.nj.us/2004/Bills/A0500/424\\_11.pdf](http://www.njleg.state.nj.us/2004/Bills/A0500/424_11.pdf)

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See Gelman, *supra* note 10.

[34]

See A424, 211th Leg. (N.J. 2004), available at [http://www.njleg.state.nj.us/2004/Bills/A0500/424\\_11.pdf](http://www.njleg.state.nj.us/2004/Bills/A0500/424_11.pdf) (allowing employee selection of physician and medical services under workers' compensation).

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See A554, 210th Leg. (N.J. 2002), at [http://www.njleg.state.nj.us/2002/Bills/A1000/554\\_11.HTM](http://www.njleg.state.nj.us/2002/Bills/A1000/554_11.HTM) (emphasis added).

[36]

See N.Y. State Workers' Comp. Bd., *Medical Benefits (WC)*, at <http://www.wcb.state.ny.us/content/main/onthejob/wc03006.htm> (emphasis added).

[37]

Based on author's twelve years of experience in the New Jersey Workers' Compensation System. No provision exists to protect workers from arbitrary unilateral cut off of benefits. Title 34, chapter 15, article 28.1 imposes a twenty-five percent penalty for negligent delay of thirty days in payment of

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temporary workers' compensation benefits, but this provision is rarely enforced by the Court.

[38]

See Pa. Workers' Comp. Legal Ctr., *Petitions to Terminate, Modify, or Suspend Workers' Compensation Benefits*, at <http://www.workcomplegalcenter.com/types/petitions.html>.

[39]

See *id.*

[40]

*Id.*

[41]

*Id.*

[42]

*Id.*

[43]

*Id.*

[44]

*Id.*

[45]

*Id.*

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Gelman, *supra* note 10.

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Associated Press, *Schwarzenegger's Workers' Compensation Plan*, MIAMI HERALD, December 28, 2003, available at <http://www.miami.com/mld/miamiherald/business/758/6776.htm?template=contentModules/printstory.jsp>. The reforms in California passed the legislature on April 16, 2004, thus limiting the choice of medical care to a pool of pre-approved doctors. "The reform package . . . makes workers accustomed to picking their own doctors choose instead from physicians authorized by employers and insurance companies". Jim Wasserman, *Legislature Overhauls Workers' Comp; Governor to Sign Bill Monday*, MIAMI HERALD, Apr. 15, 2004. The draconian California reforms still are more enlightened than the New Jersey system. In New Jersey, the worker does not even have the benefit of choice of a pool of doctors, but must accept the doctor assigned by the insurance carrier. See also, Jim Wasserman, *Governor, Democrats Set on Revising Workers' Comp Plan*, MIAMI HERALD, Apr. 15, 2004, at 8A.

[48]

Wasserman, *Legislature Overhauls Workers' Comp; Governor to Sign Bill Monday*, *supra* note 47. It is notable that a national program sponsored by the Robert Wood Johnson Foundation was enacted in October of 1995 to encourage innovation in the "delivery and financing of the medical care portion of workers' compensation". Univ. of Mass. Med. Sch., *Workers' Compensation Health Initiative*, at <http://www.umassmed.edu/workerscomp>. Six million dollars was made available through this program "to support demonstration and evaluation projects testing innovations in the delivery and financing of the medical care portion of workers' compensation." *Id.*

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[49] Wasserman, *Legislature Overhauls Workers' Comp; Governor to Sign Bill Monday*, *supra* note 47.

[50] *Id.*

[51] *Id.*

[52] *See Dar, supra* note 8.

[53] Jon L. Gelman, *Occupational Asthma*, 1 WORKERS' COMPENSATION NEWS, Oct. 30, 2003, at <http://www.gelmans.com/FrontEnd/ReadingRoom/vwArticle.asp?ArticleId=397&PracticeAreaId=2> (citing study in Ahmed A. Arif et al., *Occupational Exposures Associated with Work-Related Asthma and Work-Related Wheezing among US Workers*, 44 AM. J. INDUS. MED. 368 (2003)).

[54] N.J. STAT. ANN. § 24:15-20 states that "[a]fter a petition for compensation or dependency claims has been filed, and the petitioner and the respondent are in dispute concerning the amount of settlement of the controversy, a judge of compensation may . . . enter 'an order approving settlement.'"

[55] Occupational Safety and Health Standards, 29 C.F.R. § 1910.19 (1997) (regarding regulation of Asbestos, Vinyl Chloride, and other air contaminants).

[56] OSHA maintains only four offices in New Jersey: Avenel, Hasbrouck Heights, Marlton, and Parsippany. OSHA Offices, State of New Jersey, at <http://www.osha.gov/osmdir/nj.html>. With limited staff and budget, OSHA does not effectively monitor New Jersey businesses for compliance with Health and Safety standards.

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### PROFILE OF: Jay Bernstein



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**Biography:** Specializes in workers' compensation law, and has won more than three hundred court orders for emergency surgery and medical treatment. He began his legal career as a legal clerk with the Ministry of Justice, in Jerusalem Israel. Returning to America, he served as a Federal Legal Aid Attorney, successfully fighting for housing and shelter for homeless children in New Jersey. Jay received a commendation for excellence from the US Army, Judge Advocate General's Corps, Fort Knox, Kentucky, and interned with the United States House of Representatives, Foreign Affairs Committee. There he conducted a human rights campaign to aid victims of Soviet repression. Jay journeyed to Moscow, Kiev, Leningrad and Tashkent to report on human rights violations, with reports disseminated world wide, in the New York Times and Jerusalem Post. After completing basic training, Jay served as a volunteer in the Israeli Defense Forces, aiding the US and Israeli efforts during the Scud missile attacks of 1991, and received a commendation from the Minister of Defense. Currently his career is devoted to protecting injured Workers. Having built a solid reputation, with over 17 years experience in the Workers' Compensation Court, he has been Certified by the Supreme Court of New Jersey as a Workers' Compensation Law Attorney. Jay has successfully won more than 300 Court Orders for Emergency medical care and surgery, and is devoted to securing basic rights for all workers and employees. His high regard in the field is evidenced by his appointment to the New Jersey Bar Association "Mass Disaster Legal Response Program", where Jay has worked with FEMA and the RED CROSS to aid hurricane victims, flood victims, and victims of the Sept. 11th Terror Attacks.

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