



Winter 1996

## **A Comparison of Workers' Compensation in the United States and Mexico**

Renee L. Camacho

### **Recommended Citation**

Renee L. Camacho, *A Comparison of Workers' Compensation in the United States and Mexico*, 26 N.M. L. Rev. 133 (1996).

Available at: <https://digitalrepository.unm.edu/nmlr/vol26/iss1/7>

# A COMPARISON OF WORKERS' COMPENSATION IN THE UNITED STATES AND MEXICO \*

## INTRODUCTION

Job-related accidents and diseases are an inevitable part of every society. Workers are routinely injured, die, or become sick while working or because of conditions related to their jobs. These injuries and sicknesses have an impact on the workers, their families, and the society as a whole. Different countries have addressed this problem in different ways. The United States has a system of state-based laws under which most employers are required to purchase insurance which will pay for the statutorily mandated benefits which injured employees are to receive. Mexico has a national system in which employers are required to pay into the social security system. This national social security system then pays for sicknesses and injuries suffered by workers. These two systems are quite similar and yet have significant differences. On the theory that one can learn a great deal by studying the legal systems of other countries, this author feels that a comparison of the two systems would be beneficial to readers from both Mexico and the United States.

In comparing different legal systems, it is important to keep in mind the different components of a legal system. One author has broken a legal system down into six distinct components: legal extension, legal penetration, legal culture, legal structures, legal actors, and legal processes.<sup>1</sup> Legal extension refers to the reach of the law and the aspects of social life that the law proposes to control. Legal penetration is the extent to which the law actually controls aspects of social life. Legal culture refers to society's attitudes about the nature of the law and the proper operation a legal system. Legal structure is the group of courts, legislatures, etc. that perform the work of the legal system. Legal actors are "the professional roles played by participants in the legal system . . . ."<sup>2</sup> Finally, legal processes are the legislative and administrative actions, judicial proceedings, etc.<sup>3</sup>

This comment will give a comparative overview of the workers' compensation systems in the United States and Mexico.<sup>4</sup> While the workers' compensation system in the United States will be discussed in general, it is often difficult to make generalizations due to the diverse state systems

---

\* The author wishes to express her gratitude to Professor Margaret Montoya, at the University of New Mexico School of Law, without whose class this paper would never have been written.

1. John H. Merryman, *The Convergence (and Divergence) of the Civil Law and the Common Law*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 195, 222 (Mauro Cappelletti ed., 1978).

2. *Id.*

3. *See Id.*

4. In Mexico, the term workers' compensation is not used. The general term is *riesgos de trabajo* or job risks. However, for the sake of simplicity, this paper will refer to the systems in both countries as workers' compensation.

within the country. Therefore, in dealing with the United States, this paper will mostly concentrate on the workers' compensation system in one state, New Mexico.

This comment will first address the historical, cultural, and theoretical differences which have led to the workers' compensation systems in the two countries. The comment will then explore and compare three of the major components of the two workers' compensation systems: legal extension, legal penetration, and legal processes.

In looking at legal extension, the comment will explore the content of the actual workers' compensation laws, including who is covered and for what they are covered. In legal penetration, the comment will address who actually collects workers' compensation and for what injuries or sicknesses they collect. Finally, the comment will explore the processes by which people file and collect on workers' compensation claims, especially those claims that are originally denied.

### HISTORY AND STRUCTURE OF WORKERS' COMPENSATION SYSTEMS

The different histories and cultures of Mexico and the United States give some insights into the theories behind the workers' compensation laws and why the laws have developed differently.

#### A. *Mexico*

The thirty years before the Mexican Revolution were marked by a repressive dictatorship headed by Porfirio Díaz. Díaz was extremely concerned about bringing foreign capital into Mexico and saw the enfranchisement of the labor class as a danger to his plans. Therefore, workers were severely repressed and had almost no rights.<sup>5</sup> During this period, the Mexican government committed many abuses against the people, especially the farming class and urban workers. Because of these abuses, after the Revolution, which began in 1910, the Mexican people wanted a major change in the structure of the government. The Constitution of 1917 was the embodiment of this change.<sup>6</sup> It was a reenactment of constitutionalism as a protective instrument of the integral dignity and liberty of human beings.<sup>7</sup> The Mexican Constitution is considered extremely progressive for its time and contains the first major statement of "social guarantees," including workers' rights, in Mexico.

Article 123 of the Constitution gives extensive rights and protection to workers. This comment reflects the idea that society is based upon

---

5. See PASTOR ROUAIX, GENESIS DE LOS ARTICULOS 27 Y 123 DE LA CONSTITUCION POLITICA DE 1917 21-22 (1984).

6. See ADVISORY COMMITTEE BUREAU OF NATIONAL AFFAIRS, INC. AND EL COMITE ASESOR DE RELACIONES INDUSTRIALES PARA EL MANUAL DE POLITICA Y PRACTICA EN MEXICO, MEXICO: POLITICA Y PRACTICA LABORAL—LABOR POLICY AND PRACTICE 54 (John V. Schappi & Paul F. Shaw eds. & Doreen H. Torres trans., 1985).

7. ENRIQUE ALVAREZ DEL CASTILLO, EL DERECHO MEXICANO DEL TRABAJO COMO PRODUCTO DE LA PRIMERA REVOLUCION DEL SIGLO XX 24 (1986).

the concept of work, and that if people are obliged to work in order to live a useful, dignified life, then society has certain obligations toward the workers. In exchange for a person's work, society has the obligation to provide him with the means to guarantee his life, his health, and a decent standard of living for him and his family.<sup>8</sup>

The following are examples of some of the provisions of Article 123: workers have the right to collective representation; a minimum wage is to be set; the work day is limited to eight hours (seven hours for night shifts); overtime is to be paid at double the regular wage and may not exceed nine hours in one week; children under fourteen years old may not be employed; workers under sixteen years old may only work for six hours a day, may not work at night, and may not work in dangerous or unhealthy jobs; workers are entitled to at least one day of rest each week; pregnant women are guaranteed six weeks of vacation before their due date and six weeks of leave after they give birth, with full salary and the right to return to work after the leave; equal work is to be paid equally without determination of gender or nationality.<sup>9</sup>

Section XIV of Article 123 deals with workers' compensation. The Section reads:

Businesses will be responsible for work related accidents and professional illnesses of workers, suffered by motive of or during the exercise of the profession or job which the worker does; therefore, employers will have to pay the corresponding indemnity, according to whether the consequences are death or simply temporary or permanent incapacity to work, according to what the laws determine. This responsibility will exist even in the case in which the employer contracts the work through an intermediary.<sup>10</sup>

The provisions of the Constitution regarding labor were codified in the Federal Labor Law which was enacted in 1931. A new Federal Labor Law went into effect as of May 1, 1970. This law, as was the 1931 law, is in essence a protectionist measure for workers, considering them as the weaker element in the employer-worker relationship. Finally, on May 1, 1980, substantial reforms to the procedural aspects of the Federal Labor Law were passed, rendering the Law even more protective of the worker.<sup>11</sup>

Title nine of the Federal Labor Law is entitled "Riesgos de Trabajo" and deals with the regulations regarding workers' compensation. The workers' compensation system is a federal program and is administered as part of the Social Security Institute. Employers are required to pay a bimonthly fee for each employee to the Mexican Institute for Social Security (IMSS). "Two thirds of the fee is paid in from employer funds

---

8. *Id.* at 30.

9. CONST. tit. VI, art. 123 (Mex.).

10. CONST. tit. VI, art. 123, § 14 (Mex.).

11. MEXICO: POLITICA Y PRACTICA LABORAL—LABOR POLICY AND PRACTICE, *supra* note 6, at 54-55.

and one third from employee contributions."<sup>12</sup> The amount of the payment is based on the degree of risk of a company's activity and on the number and seriousness of job-related accidents suffered by workers in each particular company. This payment ends the employer's liability for job-related injuries and illnesses. The IMSS then provides workers with medical assistance and indemnization of salary when they are injured.<sup>13</sup> A worker is still entitled to compensation from IMSS even if the employer has not registered the worker and made the payments to IMSS. However, the employer is then required to reimburse IMSS for all monetary and other compensations which it paid to the worker.<sup>14</sup>

### B. *United States*

Workers' compensation in the United States largely grew out of the consequences of the Industrial Revolution. The rapid expansion and development of manufacturing, the development of dangerous heavy machinery and high-speed industrial processes, and the employment of large numbers of inexperienced, unskilled workers was accompanied by an enormous increase in work related accidents.<sup>15</sup> Although injured workers and the families of workers killed on the job were officially entitled to bring tort actions against their employers, workers were generally unable to receive adequate compensation.<sup>16</sup>

Workers were often unable to obtain compensation because of the cost and complexity of bringing a tort action and because of the powerful defenses available to employers. One reason for the high cost of bringing a tort action was that the adversarial system made it necessary for an employee to hire an attorney.<sup>17</sup> This was difficult if not impossible for many workers, especially considering that the employee would not receive any compensation until the matter was settled. If an employee did bring a tort action, three main defenses allowed employers to escape liability for breaching their duty to provide a reasonably safe place to work and reasonably safe tools, appliances, and working materials. "First, under the fellow servant rule, an employee could not recover damages from the employer if another employee had contributed to the injury [suffered] . . . . Second, under the principle of contributory negligence, the injured employee could not recover damages if he had in any way negligently contributed to his own injury."<sup>18</sup> Finally, under the "assumption of risk" doctrine, an employee could not collect damages in many instances because

---

12. 1 JOHN C. FOX & GARY E. MURG, *LABOR RELATIONS LAW: CANADA, MEXICO, AND WESTERN EUROPE* 277 (1978).

13. See MEXICO: POLITICA Y PRACTICA LABORAL—LABOR POLICY AND PRACTICE, *supra* note 6, at 94.

14. See *Id.*

15. ORIN KRAMER & RICHARD BRIFFAULT, *WORKERS COMPENSATION: STRENGTHENING THE SOCIAL COMPACT* 1 (1991).

16. *Id.*

17. *Id.* at 2.

18. *Id.* at 14.

she was held to have assumed the risk of injury from the customary and observable dangers attendant upon the job.<sup>19</sup>

Such difficulties made it very unlikely that employees would be adequately compensated for their injuries. One early twentieth century study of workers killed on the job found that in thirty-seven percent of the cases, the families of the deceased workers received no compensation at all and that in another forty-two percent of the cases, the families received less than \$500.<sup>20</sup> Although relatively few disputes were settled in favor of the employees, employers were still troubled by the large judgments that were occasionally rendered against them.<sup>21</sup>

The first workers' compensation system in the United States was a federal statute adopted in 1908, which provided federal workers with a limited workers' compensation program. In 1911, Wisconsin passed the first effective state workers' compensation law. However, to avoid concerns of unconstitutionality, the program was elective. By 1911, ten states had adopted workers' compensation laws, and by 1917, the number of states had increased to thirty-seven. With Mississippi's enactment of a workers' compensation law in 1949, all fifty states had workers' compensation systems.<sup>22</sup> These systems have changed considerably over the years. Legislatures have made many changes to the laws so that more employees and more types of injuries and illnesses are covered. Occupational disease and mental stress are two of the areas in which coverage has been significantly expanded.<sup>23</sup>

Although workers' compensation laws in the United States vary from jurisdiction to jurisdiction, the basic theory behind the laws is the same. According to one author, workers' compensation serves three important social purposes:

- \* By promptly providing workers with medical and disability benefits and establishing with reasonable certainty employer liability, it cushions the effects of work-related injury and illness.
- \* By requiring employers to pay compensation, it forces them to incorporate the costs of work-related injuries and illnesses into services and products, thereby creating a significant incentive to improve occupational health and safety conditions.
- \* By delivering no-fault benefits through an administrative process, workers' compensation is designed to create a relatively litigation free system, permitting the delivery of benefits with low administrative costs.<sup>24</sup>

Worker's Compensation laws thus attempt to correct the societal problems caused by work-related accidents and the previous tort-based compensation

---

19. *Id.* at 14-15.

20. *See id.* at 15.

21. *Id.* at 2.

22. *See* KRAMER & BRIFFAULT, *supra* note 15, at 16.

23. *Id.* at 17-23.

24. *Id.* at 2.

by holding that employees will be compensated "for the economic consequences of work-related injury, illness, and disease without regard to the fault of the employer or the employee."<sup>25</sup>

### LEGAL EXTENSION—WHO AND WHAT THE LAWS COVER

Because of the diverse state laws in the United States, it is difficult to compare Mexican law with all of the state laws in the United States. Thus, this section will compare the major provisions of the Mexican Federal Labor Law and the workers' compensation law in New Mexico. Due to the complexity of the laws, all of the specific provisions cannot be examined. This comment, therefore, will attempt to look at the most important provisions in a way that makes possible a comparison between the two countries. For the convenience of the reader, the major points of comparison are set out in the form of a table in Appendix A.

#### A. Mexico

Mexican Federal Labor Law applies to all workers in Mexico except those working in family owned shops.<sup>26</sup> It defines "occupational injury," *riesgo de trabajo*, to mean any accident or disease to which workers are exposed in the course of their employment, or any consequence thereof.<sup>27</sup> Occupational injuries are then subdivided into industrial accidents and occupational diseases. "Industrial accident," *accidente de trabajo*, is defined as any organic injury or functional disturbance, immediate or subsequent, or death, occurring suddenly in the course of the employment or in consequence thereof, irrespective of the place and time where it occurs.<sup>28</sup> This includes accidents occurring when the worker is proceeding directly from his home to the workplace and vice versa.<sup>29</sup> "Occupational disease" *enfermedad de trabajo* is defined as any pathological condition arising out of the continued action of a cause which has its origin or motive in the work or in the environment in which the worker is obligated to give his services.<sup>30</sup>

Workers who suffer an occupational accident have a right to receive (1) medical assistance and surgery, (2) rehabilitation, (3) hospitalization, (4) medicine, (5) necessary prosthesis and orthopedic material, and (6) the indemnity fixed by Federal Labor Law.<sup>31</sup> The indemnity due to the worker is the most complicated part of the code to interpret. The worker's daily salary is used as the base figure for the indemnity.<sup>32</sup> This base may

---

25. *Id.* at 1.

26. See L.F.T. tit. IX, art. 472 (Mex.).

27. *Id.* at art. 473.

28. *Id.* at art. 474.

29. *Id.*

30. *Id.* at art. 475.

31. *Id.* at art. 477.

32. L.F.T. at art. 484.

not be less than the minimum wage however, nor more than double the minimum wage.<sup>33</sup>

If the accident produces a temporary disability, the indemnity is the full payment of the salary for the period during which an employee is unable to work. This payment is made from the first day of the disability and lasts until the incapacity is declared permanent and the appropriate indemnity is determined.<sup>34</sup> If the accident produces a permanent partial incapacity, the indemnity is a certain percentage of the worker's salary, determined by the table of incapacity valuations.<sup>35</sup> Section 514 of the Federal Labor Code contains an *extensive* list of incapacities (409 different incapacities) and the percentage of salary to be paid for each type of incapacity.<sup>36</sup> The corresponding percentage of the salary is paid for 1,905 days of work. If the accident produces a permanent total incapacity, the indemnity is a quantity equivalent to 1,905 days of full salary.<sup>37</sup> If the accident produces the death of the worker, the indemnity is two month's salary to cover funeral expenses and a quantity equal to 730 days of salary.<sup>38</sup> The salary portion of the indemnity is paid to eligible dependents, such as a surviving dependent spouse or dependent children.<sup>39</sup> The law also allows for a dependent non-spouse to collect if the person lived with the worker as a spouse for the five years preceeding the accident or had children with the worker, providing that neither party was married.<sup>40</sup>

The workers' compensation payments must be made even though (1) the worker explicitly or implicitly assumed the risks of the job, (2) the accident occurred because of the negligence of the worker, or (3) the accident was caused by the imprudence or negligence of a fellow worker or a third person.<sup>41</sup> Also, full benefits must be paid even if the worker had a previously existing condition such as an idiosyncrasy, physical defect, poisoning, or chronic disease.<sup>42</sup> Furthermore, the indemnity may be augmented up to twenty-five percent in the following cases of inexcusable conduct of the employer: (1) when the employer has not fulfilled the laws and regulations regarding the prevention of occupational injuries; (2) when the employer, having had previous accidents, has not adopted adequate methods to avoid their repetition; (3) when the employer has not adopted the preventive recommendations of the commissions created by the workers and employers, or by the work authorities; (4) when the workers made known to the employer the danger and the employer did not adopt adequate methods to avoid it; and (5) when similar circum-

---

33. *Id.* at arts. 485-86.

34. *Id.* at art. 491.

35. *Id.* at art. 492.

36. *Id.* at art. 514.

37. *Id.* at art. 495.

38. *Id.* at arts. 500, 502.

39. *Id.* at art. 501.

40. *Id.*

41. *Id.* at art. 489.

42. *Id.* at art. 481.



stances of the same gravity as those mentioned above occur.<sup>43</sup> Employers are excused from the obligations of the workers' compensation laws however, if (1) the accident occurred when the worker was intoxicated, (2) the accident occurred when the worker was under the influence of a drug or narcotic (unless the drug is prescribed by a physician and the employer was given notice of the drug use), (3) if the worker purposely caused the accident, by himself or with the help of another person, or (4) the incapacity is the result of a fight or suicide attempt.<sup>44</sup>

### *B. United States—New Mexico*

The Workers' Compensation Act (Act) in New Mexico<sup>45</sup> applies to all employers who employ four or more workers, except those who employ domestic servants and farm and ranch laborers.<sup>46</sup> Furthermore, the Act applies to all employers who are engaged in activity required to be licensed under the provisions of the Construction Industries Licensing Act, notwithstanding the number of employees.<sup>47</sup> The term "worker" is defined as "any person who has entered into the employment of or works under contract of service or apprenticeship with an employer, except a person whose employment is purely casual and not for the purpose of the employer's trade or business."<sup>48</sup> A person who performs services as a qualified real estate agent is not considered an employee of the person for whom such services are provided.<sup>49</sup>

When a worker is injured, subject to the provisions of the Act, the employer must provide the worker with reasonable and necessary health-care services from a health care provider.<sup>50</sup> The health-care is to continue for as long as medical or related treatment is reasonably necessary. The worker is also entitled to compensation due to the inability to work.<sup>51</sup>

Permanent partial disability is "determined by calculating the worker's impairment as modified by his age, education and physical capacity . . . ."<sup>52</sup> Sections 52-1-26.1 to 52-1-26.4 of the Act set out a detailed set of rules regarding this modification.<sup>53</sup> The length of time a worker can receive partial disability benefits ranges from a minimum of seven weeks to a maximum of 700 weeks.<sup>54</sup>

---

43. L.F.T. at art. 490.

44. *Id.* at art. 488. The fact that employers are not responsible for providing workers' compensation benefits when the injury results from a fight indicates something about the cultural values of Mexico. This author speculates that the provision indicates an attitude that a person who engages in a fight is responsible for the consequences and is not entitled to help from other people. It is also possible that the provision is meant to discourage fighting in the workplace.

45. See N.M. STAT. ANN. § 52-1-1-70 (Repl. Pamp. 1991 & Supp. 1995).

46. N.M. STAT. ANN. § 52-1-6.

47. *Id.*

48. N.M. STAT. ANN. § 52-1-16(A).

49. N.M. STAT. ANN. § 52-1-16(B).

50. N.M. STAT. ANN. § 52-1-49(A).

51. See N.M. STAT. ANN. §§ 52-1-41 to -46.

52. N.M. STAT. ANN. § 52-1-26(C).

53. See N.M. STAT. ANN. §§ 52-1-26.1 to -26.4.

54. N.M. STAT. ANN. §§ 52-1-42 to -43.

For a total disability, a worker receives two-thirds of his weekly wage during the period of the disability.<sup>55</sup> However, the compensation received cannot exceed eighty-five percent of the state average weekly wage and may not be less than a minimum of thirty-six dollars a week (unless the worker's total weekly salary is less than thirty-six dollars).<sup>56</sup> Based on the state average weekly wage, compensation for 1994 injuries cannot exceed \$333 per week.<sup>57</sup> Furthermore, no compensation benefits are paid for any disability which lasts for seven days or less.<sup>58</sup> Even if the disability lasts for longer than seven days, benefits need not be paid for the first seven days unless the disability lasts for more than four weeks.<sup>59</sup>

For a total disability resulting from primary mental impairment (a mental illness involving no physical injury), the maximum period of compensation is 100 weeks.<sup>60</sup> For a total disability resulting in secondary mental impairment (a mental illness resulting from a physical impairment), the maximum period for compensation is 100 weeks or the maximum period of compensation allowable for the disability produced by the physical impairment, whichever is greater.<sup>61</sup> For all other permanent total disabilities, the worker receives compensation benefits for the rest of her life.<sup>62</sup>

In compensation for a death, payment includes funeral expenses not to exceed \$3,000 and compensation for the worker's dependents. While the regulations regarding dependents and what they are to receive are quite complicated, the general rule is that dependents receive two-thirds of the worker's weekly salary so long as they remain eligible dependents.<sup>63</sup> The maximum period of recovery is 700 weeks.<sup>64</sup>

The Act provides exclusive remedies, and no cause of action outside the Act may be brought by an employee or dependent against any employer for any matter relating to the occurrence of any injury or death covered by the Act.<sup>65</sup> Employees are entitled to compensation under the Act for any personal injury (or death) accidentally sustained in the following conditions:

A. at the time of the accident, the employer has complied with the [Act's] provisions thereof regarding insurance; B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and C. the injury or death is proximately

---

55. N.M. STAT. ANN. § 52-1-41(A).

56. *Id.*

57. See NEW MEXICO WORKERS' COMPENSATION ADMINISTRATION ANNUAL REPORT FOR 1993, H (1994).

58. N.M. STAT. ANN. § 52-1-40.

59. See *id.*

60. N.M. STAT. ANN. § 52-1-41(B).

61. *Id.*

62. N.M. STAT. ANN. § 52-1-41(A).

63. See N.M. STAT. ANN. § 52-1-46.

64. *Id.* See also N.M. STAT. ANN. §§ 52-1-43 & 52-1-47.

65. N.M. STAT. ANN. § 52-1-9.

caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.<sup>66</sup>

An employee is not entitled to compensation for accidents occurring while the employee is on her way to assume the duties of employment or after leaving such duties when the proximate cause of the accident is not the employer's negligence.<sup>67</sup>

It is no defense to a claim for workers' compensation that:

- A. the employee, either expressly or impliedly, assumed the risk . . .;
- B. [] the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and C. [] the injury . . . [or] death was caused, in whole or in part by the want of ordinary care of the injured employee where such want of care was not willful.<sup>68</sup>

However, no compensation is due if the injury or death was caused by the intoxication or drug use of the worker or was willfully suffered by him or intentionally inflicted upon himself.<sup>69</sup>

#### LEGAL PENETRATION—WHO COLLECTS AND FOR WHAT

The workers' compensation laws in both Mexico and the United States are well established and quite thorough. The fact that the codified laws appear to give many benefits to workers, however, does not always mean that the systems work in the way in that they are intended. Often, variables that are not apparent from reading the laws themselves influence how deeply the laws actually penetrate into society. This section will examine who actually collects workers compensation in Mexico and the United States, and on what types of claims they collect. Again, because of the diverse systems in the United States, the bulk of the information for the United States will deal specifically with New Mexico.

##### A. *Mexico*

Unfortunately, statistical data as to workers' compensation claims seems to be almost nonexistent in Mexico. The data that is available simply provides the number of people who suffered work-related injuries and the number of work days that were lost because of those injuries. There were 519,273 workers injured in 1991, including 1,299 fatalities<sup>70</sup>. Of these, 517,964 of the injured workers lost work days because of their injuries, and a total of 12,538,000 work days were lost.<sup>71</sup> The average number of work days lost because of work-related accidents was twenty-four. The number of injured workers and the number of work days lost

---

66. N.M. STAT. ANN. §§ 52-1-9(A) to 52-1-9(C).

67. N.M. STAT. ANN. § 52-1-19 (Repl. Pamp. 1991).

68. N.M. STAT. ANN. § 52-1-8(A)-(C).

69. N.M. STAT. ANN. §§ 52-1-11 to -12.

70. INTERNATIONAL LABOUR OFFICE, 1993 YEAR BOOK OF LABOUR STATISTICS, Tbl. 29 (52d ed. 1993).

71. *Id.*

has been fairly constant in Mexico over the last five years, the period for which the data is available.<sup>72</sup> Unfortunately, Mexico has not broken down the number of injured workers by industry.<sup>73</sup> Therefore, it is impossible to determine which industries have the most injuries and what kind of injuries occur most frequently.

Although the data does not specifically state that the injured workers received compensation under the workers' compensation system, such a conclusion may be inferred. It is unlikely that the government would count workers who were denied compensation for their injuries in the category of injured workers because the government would be claiming that their injuries were not work-related.

While it is hard to find statistical information regarding who received workers' compensation and for which injuries they received it, it is helpful to look at workers' personal experiences with the system and how their problems were handled. Gerardo Gonzalez is an example of a worker who was not provided with the compensation to which he was entitled.<sup>74</sup> When four of Mr. Gonzalez's fingers were cut off by a saw while working at a Ciudad Juarez lumber company, his boss told him that he would be fired if he disputed the company's statement that the accident happened off the job.<sup>75</sup> This type of thing often happens because of the way in which the IMSS calculates each company's payments for workers' compensation. The IMSS calculates the fee that each company must pay based partly on how many injuries and illnesses the workers of the company have suffered.<sup>76</sup> Consequently, the companies have a great incentive to under-report the number of injured workers.

It is also helpful to look at how well known the workers' compensation law is. If workers do not know what their rights are, it is very unlikely that they will be able to exercise those rights. One example of making the information available to the workers is a recently published book entitled *Manual de Mis Prestaciones y Derechos Laborales*.<sup>77</sup> This book gives, in comic-book form, a brief overview of many different areas of workers' rights in Mexico.<sup>78</sup> The book shows a cartoon relating to each topic and then gives a brief written explanation of what the workers' legal rights are.<sup>79</sup> It also cites to the Federal Labor Code for those who want to get more detailed information.<sup>80</sup> The book does an excellent job of explaining workers' rights in a way that is fairly complete and yet would be comprehensible to most workers. Comic books are very popular in Mexico and are an ideal way to disseminate information to workers

---

72. *Id.*

73. *Id.*

74. See Linda Robinson, *Reaching to the South: Free Trade Alone Cannot Bring Mexico and the United States Together*, U.S. NEWS & WORLD REPORT, Mar. 1, 1993, at 43.

75. *Id.*

76. *Id.*

77. MANUEL SOLANA RIVERO, *MANUAL DE MIS PRESTACIONES Y DERECHOS LABORALES* (1994).

78. See *id.*

79. See *id.*

80. See *id.*

who may not have high levels of education. Because the book was just published in 1994, there is no evidence as to how widely it was distributed or read, but the idea of the book is a creative, and hopefully successful, way of attempting to inform workers of their rights.

### *B. United States*

Nationally, workers' compensation payments have increased dramatically since the 1970s. In 1978, state and federal workers' compensation programs paid out a total of \$9.7 billion in benefits (\$5.9 billion in cash benefits and \$3.8 billion in health care benefits).<sup>81</sup> By 1983, the level of benefits payments had increased to \$22.9 billion.<sup>82</sup>

Despite the increase in benefits paid, workers are not always able to collect for all of their injuries. One of the most difficult types of injury for workers to collect on is occupational disease. There are various reasons that make it difficult to collect for occupational diseases. Sometimes, workers do not realize that their illnesses are work related. Even when they do realize the connection, the employee usually has the burden of proving that the disease is work related. This can be difficult, expensive, and time consuming due to the nature of the medical evidence needed. Other workers are afraid to file claims when they are still employed, for fear that the claim will jeopardize their jobs.<sup>83</sup> The following are two first-hand accounts of workers' difficulties with, and distrust of, their employers and the workers' compensation system.

#### *Ben, repairman, chemical plant*

I know a lot of people who have gotten sick, and a couple who have died of cancer. I'm positive it's work-related. But how can you prove it? There are people right now who are finding out they have serious problems. I'm sure the company knows it's from work, but they'll say, "We wouldn't work with anything that causes problems." A guy was overcome by hydrogen sulfide and was rushed to the hospital. He comes back the next day. What do they do to make him happy? Give him a nice desk job. He sat at that desk for a week, putting papers in the files. Had his street clothes on. I told him, "You ought to get a form and turn it into the compensation board and get a case number on it. You told me that you had headaches. Tell them what happened just in case two years down the road you start getting sharp pains or something in your head. At least then you'll have a case number on it." But he sat over there, doing his paperwork. Compared to what he was doing before, it's a dream job. He's getting \$10 an hour to file papers. That's typical, they do that to everybody.<sup>84</sup>

---

81. Robert J. Lampman & Robert M. Hutchens, *The Future of Workers' Compensation*, in *NEW PERSPECTIVES IN WORKERS' COMPENSATION* 113, 114 (John F. Burton, Jr. ed., 1988).

82. Michael J. Moore & W. Kip Viscusi, *Have Increases in Workers' Compensation Benefits Paid for Themselves?*, in *BENEFITS, COSTS, AND CYCLES IN WORKERS' COMPENSATION* 1, 2 (Philip S. Borba & David Appel eds., 1990).

83. See MICHAEL S. BROWN & DOROTHY NELKIN, *WORKERS AT RISK: VOICES FROM THE WORKPLACE* 143 (1984).

84. *Id.* at 143-44.

*Kitty, industrial painter, university*

A guy working with epoxy lost four pints of blood through his nose. He was in the hospital three weeks and nearly died. Then he sits across the table from me telling me that he was lucky, because other painters have gotten much sicker. He couldn't prove that it was the epoxy, so he couldn't get disability or compensation. It was pretty damned obvious to anybody that the epoxy had done it because he started hemorrhaging at work through his nose and had to drive himself to the hospital. They packed him from the back of his throat all the way up to stop the bleeding with tubes through his nose, and the whole bit. But he can't prove it was epoxy because there's no deposits in his body. I told him he should get a better lawyer.<sup>85</sup>

In New Mexico, the Department of Labor has kept detailed statistical records of workers' compensation claims since 1987.<sup>86</sup> Those statistics give a fairly good idea of who is making claims for workers' compensation and for which injuries they are making claims.

In 1993, total workers' compensation costs were \$184.5 million dollars, down by 12.1% from 1992.<sup>87</sup> The statewide number of indemnity claims also declined, from 8,000 in 1992 to 7,530 in 1993.<sup>88</sup> This decline occurred despite a four percent increase in employment and a slight increase in the number of on-the-job accidents reported.<sup>89</sup> There were 37,436 reports of accidents.<sup>90</sup> Of those accidents, 7,530 led to workers' compensation claims for indemnity, and 14,540 of the accidents led to claims for medical services only.<sup>91</sup> Thirty-seven on-the-job fatalities were reported during 1993, and, to date, sixteen of those fatalities have been determined to be compensable.<sup>92</sup>

Several groups of people seem to be at a higher risk of suffering work-related injuries. Over forty-two percent of compensable injuries were suffered by workers who had worked for their present employers for less than one year.<sup>93</sup> Men sustained sixty-nine percent of compensable injuries reported in 1993 even though they made up only fifty-seven percent of the work force.<sup>94</sup> The workers at greatest risk of injury were men between twenty and forty years of age.<sup>95</sup>

Mining and construction had the highest percentage of reported injuries per 100 workers.<sup>96</sup> Construction workers filed 3.2 claims per 100 workers, and mining workers filed 2.8 claims per 100 workers.<sup>97</sup> The next two

---

85. *Id.* at 144.

86. See New Mexico Workers' Compensation Administration Annual Report for 1993 (1994) [hereinafter 1993 ANNUAL REPORT].

87. *Id.* at 41.

88. *Id.* at 31.

89. *Id.* at 31, 44.

90. *Id.* at 31.

91. *Id.*

92. 1993 ANNUAL REPORT, *supra* note 86, at 59.

93. *Id.* at 56.

94. *Id.* at 54.

95. *Id.*

96. *Id.* at 50.

97. *Id.*

highest categories were transportation/utilities (2.1 per one hundred) and manufacturing (1.8 per one hundred).<sup>98</sup> However, because of the high levels of employment in certain industries, the industries with the highest rate of injury did not necessarily have the highest overall number of injuries. The services industry had the highest number of claims, with 1,576 claims being filed in 1993.<sup>99</sup> The retail trade industry had 1,357 claims filed, and the construction industry had 1,136 claims filed.<sup>100</sup>

Sprains and strains were by far the most common type of injury or illness reported, making up 53.1% of all claims.<sup>101</sup> As to the type of injuries that led to workers' compensation claims, back injuries were the most common injury.<sup>102</sup> In 1993, there were 2,053 claims for back injuries.<sup>103</sup> This represents 27.3% of the total claims. Wrist and/or hand injuries were the next most common, making up 16.6% of all claims.<sup>104</sup> Other sizeable categories include multiple parts (10.1%), knee injuries (8.8%), and trunk injuries (8.2%).<sup>105</sup>

In the category of occupational illness injuries, there were a total of 318 claims filed.<sup>106</sup> These represent only 4.2% of the overall claims.<sup>107</sup> The most common claim of this type was inflammation of joints and muscles, which made up 40.3% of all occupational illness claims.<sup>108</sup> Carpal Tunnel Syndrome (28.9%), systemic poisoning (8.8%), and mental disorders (6.3%) are other categories of common occupational illness claims.<sup>109</sup>

## LEGAL PROCESSES—HOW THE CLAIM SYSTEM WORKS

In order to complete an overview of workers' compensation in Mexico and the United States, it is important to briefly examine how the two systems are administered. This section will examine the workers' compensation systems of Mexico and New Mexico in an attempt to determine how the process of filing a claim works and what recourse workers have if their claims are denied.

### A. Mexico

As previously explained, the workers' compensation system in Mexico is administered by the Social Security Institute (IMSS). Employers pay a certain fee for each employee, and then the IMSS is responsible for providing any compensation that is due to the workers.<sup>110</sup> Because the

---

98. 1993 ANNUAL REPORT, *supra* note 86, at 59.

99. *Id.*

100. *Id.*

101. *Id.* at 47.

102. *Id.* at 46.

103. *Id.*

104. 1993 ANNUAL REPORT, *supra* note 86 at 46.

105. *Id.*

106. *Id.* at 48.

107. *Id.*

108. *Id.*

109. *Id.*

110. See JOSE DAVALOS, DERECHO DEL TRABAJO I 414 (4th ed. 1992).

employers' liability ends once they have paid the fee to the IMSS, the parties to any dispute over compensation would be the employee or his dependents and the IMSS, not the employer.

The employers, however, do have the responsibility of giving written notice of any accidents within twenty-four hours to the Secretary of Labor, the Labor Inspector and to the Permanent Conciliation Board or the Conciliation and Arbitration Board.<sup>111</sup> The notice must contain (1) the name and address of the business, (2) the name and address of the worker, along with his job description and his salary, (3) the place and time of the accident, along with an explanation of what happened, (4) the name and address of any persons who witnessed the accident, and (5) the place in which the victim received, or is receiving, medical attention.<sup>112</sup> Furthermore, in the case of a death, the employer has the duty to give the notice as soon as the death is known and to include the name and address of any person who might have the right to collect an indemnity for the worker's death.<sup>113</sup>

At this point, the IMSS takes over. If there is no dispute over the injury and the compensation that is due, then it is a simple administrative matter. It is only when there is a dispute between the parties that problems occur. While there are several ways in which a worker can seek to come to an understanding with the IMSS, the most important process is that which takes place when the IMSS and the worker are unable to come to a mutual agreement.

If the worker (or the dependents of a worker who suffered a fatal injury) feels that she has not been given the compensation that is due to her under the Federal Labor Law, she may file a written complaint with the Conciliation and Arbitration Board (*Junta de Conciliación and Arbitraje*).<sup>114</sup> This complaint may be filed up to two years after the accident occurred.<sup>115</sup> The worker must state the occurrences which are the basis of the complaint and may add any evidence that she feels is relevant.<sup>116</sup>

Within twenty-four hours of receipt of the complaint, the Board must set a time and date for a conciliation hearing, which is to occur within fifteen days.<sup>117</sup> This hearing consists of three parts: (1) conciliation, (2) complaint and answer, and (3) offer and admission of evidence.<sup>118</sup> In the conciliation phase, the parties must come to the hearing without lawyers or other representatives.<sup>119</sup> The Board attempts to work with the parties to allow them to come to a mutual accord. If such an accord is reached,

---

111. L.F.T., tit. IX, art. 504 (Mex.).

112. *Id.*

113. *Id.*

114. *Id.* at art. 871.

115. *Id.* at art. 519.

116. *Id.* at art. 872.

117. *Id.* at art. 873.

118. *Id.* at art. 875.

119. L.F.T. at art. 876.



the process ends. If no accord is reached, the hearing then goes on to the next phase.<sup>120</sup>

In the second phase, the worker is given the chance to state his complaint.<sup>121</sup> If any material item is missing from the complaint, the worker may rectify the mistake at this time.<sup>122</sup> The IMSS must then answer the complaint, admitting or denying specific items of the complaint.<sup>123</sup> If the parties are in agreement as to the facts of the case and the only disputed issue is a question of law, the hearing ends at this point.<sup>124</sup>

If the parties are not in agreement as to all the facts, the Board then admits or rejects the evidence that each party has to offer.<sup>125</sup> A stage of "development"<sup>126</sup> of evidence then follows, after which the parties may make their arguments to the Board.<sup>127</sup> After this stage, the hearing is declared closed, and within ten days, a member of the Board prepares a written decision.<sup>128</sup> The decision contains, (1) a summary of the complaint and the answer, (2) a statement of disputed facts, (3) a list of admitted and "developed" evidence and the Board's evaluation of the evidence, indicating the facts that should be considered proven, (4) the conclusions that follow from what has been alleged and proved, and (5) the points that have been resolved.<sup>129</sup>

The Board then votes on the proposed decision, and the parties are notified of the results.<sup>130</sup>

#### *B. United States—New Mexico*

In New Mexico, the general procedural aspects of filing a worker's compensation claim are codified in the Workers' Compensation Act.<sup>131</sup> A worker claiming to be entitled to compensation from an employer must give written notice to the employer of the accident within fifteen days after the worker knew, or should have known, of its occurrence.<sup>132</sup> However, no written notice is required when the employer, any superintendent, foreman, or other agent in charge of the work in connection with which the accident occurred had actual knowledge of its occurrence.<sup>133</sup> The employer must post a sign explaining the notice requirement and provide forms upon which written notification can be made.<sup>134</sup> The employer, or his insurer, then must

---

120. *Id.*

121. *Id.* at art. 878.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at art. 880.

126. The phrase used in the statute is "desahogo de pruebas."

127. *Id.* at art. 84.

128. *Id.* at art. 885.

129. *Id.*

130. *Id.* at arts. 888-90.

131. See N.M. STAT. ANN. §§ 52-1-1 to -70.

132. N.M. STAT. ANN. § 52-1-29(A).

133. See *id.*

134. N.M. STAT. ANN. § 52-1-29(B).

pay the employee the compensation due in installments.<sup>135</sup> The first installment must be paid within thirty-one days after the occurrence of the disability, and remaining installments are paid twice a month.<sup>136</sup> "In all cases where the employer or his insurance carrier deny that an alleged disability is a natural and direct result of the accident, the worker must establish [the] . . . causal connection . . . ."<sup>137</sup>

If the employer or his insurer fails or refuses to pay a worker any installment of compensation to which the worker is entitled under the Act, the worker must file a claim within one year after the employer or his insurer's failure or refusal to pay compensation.<sup>138</sup> The claims process is set out in the Workers' Compensation Administration Act, which created the Workers' Compensation Administration.<sup>139</sup>

Under the Workers' Compensation Administration Act, if the parties are unable to reach an agreement concerning the worker's disability, either party can file a claim before the Workers' Compensation Administration. Employers or insurance carriers may also file petitions to reduce or terminate benefits or to settle disputes regarding rehabilitation or attorneys' fees.<sup>140</sup> After the claim is filed, a Mediation Conference is scheduled. The Mediation Conference is an attempt to settle the matter quickly with a solution that is acceptable to both sides. The mediator must issue a Recommended Resolution within ten working days after the Mediation Conference is completed (and within sixty days of when the complaint was filed).<sup>141</sup> Each party then has thirty days in which to reject any or all of the Recommended Resolution, stating the reasons for the rejection.<sup>142</sup> A filing of this objection takes the claim to the next level, the Formal Hearing.<sup>143</sup> If any party rejects any part of the Recommended Resolution, all issues can be relitigated at the Formal Hearing.<sup>144</sup>

When the claim proceeds to the level of a Formal Hearing, it is assigned to a Workers' Compensation Judge.<sup>145</sup> Each party has the right to disqualify one Workers' Compensation Judge.<sup>146</sup> The Formal Hearing is essentially the same as any other trial except that it is a bench trial conducted before a Workers' Compensation Judge instead of in the district court. The claimant must personally appear at the formal hearing unless he or she has been excused by the Judge.<sup>147</sup> The Workers' Compensation Judge is statutorily required to issue a decision, consisting of a Compensation Order, Findings of Fact, Conclusions of Law, and, when appropriate, an order for the

---

135. N.M. STAT. ANN. § 52-1-30.

136. *Id.*

137. N.M. STAT. ANN. § 52-1-28(B).

138. N.M. STAT. ANN. § 52-1-31(A).

139. See N.M. STAT. ANN. §§ 52-5-1 to -22 (Repl. Pamph. 1991 & Supp. 1995).

140. See CARLOS G. MARTINEZ, NEW MEXICO WORKERS' COMPENSATION MANUAL 19-4 (1993-94).

141. *Id.* at 19-6.

142. *Id.* at 19-4, 19-5.

143. *Id.* at 19-4.

144. *Id.*

145. N.M. STAT. ANN. § 52-5-5(C).

146. N.M. STAT. ANN. § 52-5-5(D).

147. MARTINEZ, *supra* note 140, at 19-13.

payment of benefits, within thirty days after the conclusion of the hearing.<sup>148</sup>

Either party may appeal the decision by filing a Notice of Appeal with the New Mexico Court of Appeals within thirty days after the filing of the Workers' Compensation Judge's final order.<sup>149</sup> During appeal, an order may be filed with the Workers' Compensation Administration staying enforcement of the compensation order.<sup>150</sup> In reviewing a case on appeal, the court of appeals uses a "whole record" review and does not retry the case by making decisions regarding the credibility of witnesses or weighing the evidence.<sup>151</sup> While parties may request oral arguments, the court of appeals is likely to deny the request and decide the case based on the record and the parties' briefs.<sup>152</sup>

The court of appeals may affirm all or part of the Workers' Compensation Judge's decision, may reverse the decision, or may remand the case to the Workers' Compensation Judge to make a ruling on a particular issue.<sup>153</sup> If either party is not satisfied with the court of appeals decision, the final appeal is to file a Petition for a writ of certiorari with the New Mexico Supreme Court within twenty days of the filing of the court of appeals decision.<sup>154</sup> The Supreme Court then has thirty days to issue a writ of certiorari.<sup>155</sup> If the Supreme Court does not act on the petition within thirty days, the effect is the same as if the Court had denied the petition.<sup>156</sup>

### CONCLUSION

Overall, the systems of workers' compensation in Mexico and the United States have much in common. Nevertheless, there are important differences in the systems. Mexico has a nationally based system in which the employers pay into a national fund which then compensates injured workers. The United States has a state based system in which employers purchase insurance to cover their liability for workers' injuries. This comment has concentrated on comparing the workers' compensation law in New Mexico with that of Mexico. Hopefully, this has provided some useful insights into both systems and will encourage comparisons both between individual states and between states and other countries. By making such comparisons, we are able to see our own legal system from a different perspective—to see both the things that work and the things which might be improved.

RENEE L. CAMACHO

---

148. See N.M. STAT. ANN. § 52-5-7(B).

149. See N.M. STAT. ANN. § 52-5-7(C). See also N.M. STAT. ANN. § 52-5-8.

150. N.M. STAT. ANN. § 52-5-8(B).

151. See MARTINEZ, *supra* note 140, at 20-06, 20-07.

152. See *id.* at 20-11.

153. See *id.* at 20-13.

154. See *id.* at 20-14.

155. *Id.*

156. *Id.*

## APPENDIX A

A COMPARISON OF WORKERS' COMPENSATION IN MEXICO  
AND THE UNITED STATES

	MEXICO	UNITED STATES/ NEW MEXICO
Source of the law	The Constitution (Article 123) and the Federal Labor Law (Title 9)	State workers' compensation laws and federal laws (for federal employees)
How the compensation system operates	Employers pay an amount to the Social Security Institute (IMSS) which then assumes financial responsibility for injured workers	Employers buy insurance and the insurance company then pays for the costs of workers' compensation
To whom the laws apply	To all workers except those in family shops	To all employers who employ four or more workers, except those employing domestic servants and farm and ranch laborers
To what type of injuries the laws apply	Any accident or disease which workers are exposed to in the course of their employment (including on the way to and from work), or any consequence thereof	Any injury which is proximately caused by accident arising out of and in the course of the employment and is not self-inflicted (not including accidents while going to and from work)
What the workers receive	"Any necessary medical care, rehabilitation, and an indemnity	Any necessary medical care and an indemnity
What the indemnity is based on	The workers' daily salary, not less than the minimum wage and not more than twice the minimum wage	The workers' weekly salary - total indemnity may not exceed \$333 a week (85% of the state's average weekly wage)
When indemnity begins	Payment is made from the first day of the disability	Payment not made for first 7 days unless the inability to work lasts for four weeks
Indemnity for temporary total disability	Full salary while the employee is unable to work (or until the disability is determined permanent, then see below)	2/3 of the workers' salary while the employee is unable to work
Indemnity for permanent partial disability	A percentage of the worker's salary based on the table of valuations in the labor law (paid for 1,905 days of work)	A percentage of the worker's salary modified by his age, education and physical capacity (payments last from 7 to 700 weeks)
Indemnity for permanent total disability	Payment of 1,905 days of full salary	2/3 of the worker's wage for life (for a maximum of 100 weeks for disability resulting from mental impairment)
Indemnity for death	Two months salary for funeral expenses and payment equal to 730 days of full salary	Funeral expenses not to exceed 3,000 dollars and 2/3 of worker's salary while dependents remain eligible