

## **World Trade Center In-Depth Series (Part 2): The Disease Within**

Risk and Insurance

October 1, 2007

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*Disasters like Sept. 11 create hundreds of disease claims, but workers' comp systems are structured to reject these claims. Rescue, recovery and cleanup workers stand little chance of seeing a dime in compensation.*

On the day after the attack on the World Trade Center, public officials and union executives hastened to prepare for a legal and financial tsunami to hit the New York state workers' compensation system.

Their first thought was about direct victims of the attack, the building occupants and rescue workers killed or injured in the collapse. Their assumption, never seriously challenged afterward, was that these victims, every last one, were entitled to workers' comp.

Art Wilcox, a senior official of the New York state chapter of the AFL-CIO, recalls the initial horror. Even with the final figures, the "death load was equal to 10 years of normal deaths."

On Sept. 12, 2001, with the nation still in shock, a shaken Wilcox and other executives met with Robert Snashall, the former chief of the New York Workers' Compensation Board.

"We talked about how we were going to handle the claims process," says Wilcox. "In New York, like a lot of states, without a body or death certificate, it was hard to file a workers' comp claim. We worried about staffing the board."

Wilcox foresaw potential problems in assuring proper coverage for claims arising from rescue, recovery and cleanup of the site. "Around the 13th," he recalled in a telephone interview, "we had meetings with Senator (Hillary Rodham) Clinton among others, to figure out how much federal dollars we needed. We also talked with Mt. Sinai (Medical Center) to start doing medical monitoring with federal money."

Also, he says, "We talked about uninsured workers, as well as covering volunteers working down there. How does one determine compensability for them?"

This all happened the first week after the attack. But much of what was initially

conceived of in those early discussions failed to materialize. About the only part of the plan that was implemented successfully was paying claims for victims of the collapsing towers.

When a workers' comp system fails to function, workers suffer; and the race is on to find money elsewhere to pay for medical care and disability. This is precisely what has come to pass.

## **THE "DEAD ELEPHANT"**

Lawyers, unions and lawmakers today are seeking funding solutions in the billions of dollars through a lattice of federal grants, liability awards and disability pensions to make up for the gaping holes left by the workers' comp system.

The collapse of the workers' comp system is the dead elephant in the room no one wants to mention.

Causes of "death":

- Agonizingly slow administration of claims.
- Barriers for disease claims--the very claims that disasters will create.
- The proclivity for people to seek financial relief for work-related conditions through tort litigation and federal assistance.

To understand the tortuous flaws in the state workers' comp system, follow the case of Carl Smith. Smith was working and living some 30 miles east of Lower Manhattan in Long Island at the time of the attack. A few days later, he was instructed to report to ground zero, where he worked as a truck driver for most of the time through December 2001.

Smith would occasionally notice body parts caught in debris as operating engineers dumped the remains of the towers into his truck.

Visual shock, plus the smell of corpses, can provoke a psychological reaction in someone not trained to deal with those sights and smells.

In early 2003, the Mt. Sinai Medical Center monitoring program examined Smith and found he was displaying symptoms of heavy mental stress. He wasn't alone. The Mt. Sinai program later reported that half of the Sept. 11 rescue, recovery and cleanup workers it examined had post-traumatic stress disorder symptoms.

By 2005, two years after the initial diagnosis, PTSD began to manifest itself more clearly. "I was coming home in the afternoon, and there was a truck in front of me, and I began to see body parts hanging out of the truck," recalls Smith, now a resident of

Upstate New York near Cooperstown, home of the Baseball Hall of Fame.

Sure enough, that year Smith, whose real name is being withheld on advice of his attorney, Scott Clippinger, was re-diagnosed with PTSD by a new clinical team. He was diagnosed with PTSD yet again in April of 2007 in a Liberty Mutual-financed independent medical examination.

The past four years have not been easy for Smith. Between 2003 and 2007, he was hospitalized after a suicide attempt and disabled from work for a year, and his earnings have declined by about half from what they were before Sept. 11.

### **A CLAIM DENIED**

In September 2004, three years after the Sept. 11 attacks, Smith filed a workers' comp claim with Travelers, the workers' comp insurer covering Smith's employer at the time, Freeport, N.Y.-based Seville Central Mix Corp.

Despite the PTSD diagnoses issued earlier, in 2003 by the Mt. Sinai monitoring program and again in 2007 during the independent medical exam sponsored by Liberty Mutual, Travelers denied Smith's claim.

The denial, according to the claim documents made available by Clippinger, was based on the absence of medical evidence, the absence of evidence that its policy covered Smith's employer, and the absence of a documented employee-employer relationship.

Smith's medical care for his mental condition has been funded by a Teamster's union health insurance fund.

Seeking to verify that Smith was indeed employed by Seville Central Mix at the time of the World Trade Center cleanup, the Workers' Compensation Board sent out an investigator to visit Smith at his home in Freeport, Long Island, on three separate occasions, in 2005, 2006 and 2007.

Despite three visits by board auditors, Smith's case never moved any faster.

For its part, Travelers says it is doing what it can to speed the administration of World Trade Center claims, according to Todd Mattiello, vice president of workers' comp claims.

"To ensure consistency in coverage application and in the way that all claims are managed, Travelers has consolidated to one central office the workers' comp claims for workers that were involved in the cleanup at the World Trade Center," wrote Mattiello.

But Travelers wasn't the only carrier with doubts about the veracity of Smith's claim. At one point as many as four other insurers--AIG, Liberty Mutual, the New York State Insurance Fund and the World Trade Center Volunteer Fund--sent lawyers to defend

themselves against this claim, according to Smith.

Smith's attorney thinks that a settlement is probable in 2007.

How could a claim with four years' worth of medical documentation take nearly three years to settle?

One factor is the slow-moving New York State Workers' Compensation Board.

Even with an extra \$175 million in federal funds to streamline its operations and fund volunteers' claims, 48 percent of the 10,182 World Trade Center-related claims were still awaiting insurer processing, according to a mid-2004 audit of the board.

Another factor is the warren-like insurance arrangements of many contractors, subcontractors and holding companies engaged at ground zero. Insurers can delay resolving a claim simply by fighting over who owns it.

## **CLAIMS RESISTANCE**

Way back in 2001, it was exceedingly difficult to file a disease claim in New York state. This was so by design.

The state, one of many relying on legislation dating back to the 1970s, had purposely set up legal barriers to prevent disease claims from flooding the workers' comp system.

Workers with symptoms of disease, according to law, could expect compensation only if the disease was inherently a part of their job, not simply a particular assignment.

Cheryl Wood, general counsel at the Workers' Compensation Board, explained the provision using the following example: "If people are removing asbestos in the building and the secretary acquires an asbestos-related disease, there is no coverage because working with asbestos is not inherently a part of secretarial work."

Thus, the physical and psychological exposures to workers involved with the rescue, recovery and cleanup at ground zero could hardly be considered inherent in usual cleanup or demolition work.

Extinguishing toxic fires and removing body parts isn't part of the day-to-day job description of a fireman or a police officer no matter how brave, even in New York City. Hosing down building lobbies and exteriors laced with asbestos isn't an everyday job for cleanup crews hired by contractors.

But for claims filed by Sept. 11 rescue, recovery and cleanup workers, disease figures into at least 75 percent of the them.

A task force created by New York Mayor Michael Bloomberg estimates that 5,500

workers, for example, will need ongoing care for respiratory diseases, and that 13,900 workers will need care for mental conditions.

Will they be heard within the workers' comp system? Perhaps.

Jonathan Bennett, of the New York Council on Occupational Safety and Health, which has been supporting workers in their search for compensation, says, "Many would-be claims are abandoned because personal-injury lawyers see no way to be compensated for handling medical-only claims."

An indication of the uphill fight to obtain compensation for disease claims is buried in an appendix of the Bloomberg task-force report.

"The city is obligated to challenge a high portion of workers' comp claims as late and/or lacking medical evidence," the report says.

A two-year limit on filing claims after the event in the case of an acute injury, or recognition of the disabling condition in the event of disease, provides yet a further impediment to obtaining compensation.

Aware of the difficulty of moving disease claims forward, workers or their attorneys were filing claims as accidental injuries.

"We advised (primarily immigrant) workers to file their claims as injuries," said executive director of the NYCOSH, Joel Shufro.

This advice was dispensed on the premise that the collapse of the World Trade Center towers triggered accidents.

Someone working on ground zero or in a Lower Manhattan office would thereby claim an injury from the fall of the towers days or weeks after they began work.

On Aug. 14, 2006, New York enacted a "Sept. 11" bill in order to sweep aside some of these barriers to compensation. This amendment to workers' comp statutes declared that any conditions arising out of rescue, recovery and cleanup would be construed as accidental injuries.

The act also created a special registry--unprecedented in workers' comp history in New York and, according to workers' compensation expert John Burton, never used by any other state's workers' compensation system.

Individuals have until Aug. 14, 2008, to enter their names on the registry without challenge. Once on the registry, a worker could at any future time file a workers' comp claim.

More than 11,000 individuals have entered their names, according to Wood, a number

roughly equal to the number of workers who have filed claims. The board could not report the degree of overlap between the two lists.

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