

## **World Trade Center In-Depth Series (Part 4): Out of the Ashes: Another Failure?**

Risk and Insurance

November 1, 2007

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*That government failed the rescue, recover and cleanup workers of Sept. 11 is doubtless. Whether all levels of government can learn from their mistakes before the next catastrophe is the real "if."*

Workers cannot be expected to bear the brunt of a local politician's hesitancy to call a hazard for what it is. Nor should they endure the misery of a workers' compensation system that is designed to frustrate the resolution of claims.

Future disease exposures will likely create hazardous environments for rescue and recovery. Healthcare centers may likely serve as transmission points for spread of a flu pandemic. Subways in which terrorists release deadly chemicals may become death chambers until cleaned.

The White House and U.S. Congress should convene a national commission to correct serious flaws in the protection of disaster rescue and recovery workers. Reforms in crisis management and in workers' compensation systems are desperately called for.

These reforms must include the legal authority of the federal government to assume direct control over workers' compensation administration.

Federal legislation is required to adjust federal participation in disasters to embrace these reforms. This means amending the Stafford Act of 1974, the principal guide to federal disaster assistance.

Reformed policies will do more than protect workers. They will diminish the need to create special mechanisms to deliver healthcare to workers. And they will reduce the urge for mass-tort and class-action litigation.

Liability suits were inevitable given the safety record of ground zero. How much they have been fueled by the inadequacies of New York's workers' compensation system to deliver timely benefits is difficult to assess.

The nation's national disaster response program has improved since Sept. 11. But reforms have not gone far enough to prevent safety and medical monitoring failures at ground zero, which is discussed further below. The federal government has already demonstrated the failure of state workers' compensation systems by creating a program to replace them for a group of 600,000 workers.

The legislative effort behind the enactment of federal regulation of work safety--the Occupational Safety and Health Administration was created in 1970--uncovered numerous criticisms of state workers' compensation systems, some of which had not been significantly improved since the 1920s.

A national commission needs to look simultaneously at worker safety and workers' compensation for these workers. This will set it apart from the Nixon-era National Commission on State Workmen's Compensation Laws, which did not address worker safety, and many national task forces on worker safety, which rarely address workers' compensation.

The federal government will pay for the great majority of rescue and recovery costs for future disasters of national significance.

In "When All Else Fails," a study of risk management in America by Harvard Business School professor David Moss, a proposal is made that the party in the best position to solve a risk problem should be the party with the most financial incentive to solve it.

If Washington is paying, it needs to use the power of the purse.

## **INCIDENT COMMAND**

The federal government needs to make its local disaster assistance contingent on local governments agreeing in the earliest feasible hour to allow incident command to escalate upward if warranted to the federal emergency management level. In an event of national significance, local and state governments should be required to explain why the Federal Emergency Management Agency should not take over.

FEMA has had crisis management policies in place for years. Since Sept. 11, the federal government has introduced two policies that strengthen these policies. One is the National Incident Management System, which went into effect in 2003. NIMS is a blueprint for unified incident command, logistics and other essential elements of managing crisis. The federal government today requires state and local governments to adhere to NIMS, even for local crises, as a condition for receiving disaster planning funds.

The Bush administration also issued a National Response Plan in 2004. The NRP is designed to improve the coordination of disaster intervention by multiple federal agencies.

A lynchpin to both policies is the concept of coordinating bureaucracies at all levels of government under rapidly changing crisis conditions.

Expectations at ground zero moved within days from rescue, demanding local public safety leadership, to recovery, for which other resources were required and made available. They came with the promise of federal financial support.

The administration of former New York Mayor Rudolph Giuliani fought successfully to retain control. The mayor assigned it to his Department of Design and Construction, which had no experience in dealing with a major hazardous site. Perhaps more ominous, it was not experienced in managing major crises of initially unforeseeable dimensions.

Federal personnel, on the other hand, took control of the Fresh Kills disposal site on Staten Island and the Pentagon site in the capital. There is no evidence of major safety lapses at these sites. Admittedly, ground zero was more charged with grief, anger and--initially--desperation to locate survivors. The Giuliani administration was never able to establish an effective safety regime at the site with respect to disease risk.

Neither NIMS nor NRP specify exactly how incident command is to be assigned. For a major disaster like the World Trade Center, command should escalate to the federal level, perhaps even beyond FEMA.

The process of shifting control over ground zero to the feds might have happened as follows: Within a week of the towers' collapse, Mayor Giuliani, President Bush and New York Governor George Pataki might have agreed upon an individual to oversee rescue and recovery. This might have placed the key incident command decision beyond bureaucratic rivalries.

Their choice could well have been a local leader. But if the history of American disasters is a reliable guide, that individual would best have come from the ranks of the military. The person would have a solid background in environmental hazards, would have charismatic authority at least within the halls of government and would have a track record of coordinating intergovernmental bureaucracies.

## **MEDICAL MONITORING**

Washington's financial participation in rescue and recovery must also be contingent upon the implementation of a system to monitor workers' individual health risk.

Medical monitoring of workforces requires a big investment in outreach, education and logistics.

It is more than a doctor in a consulting room with a stethoscope. Medical monitoring is demanding upon local contractors, hospitals and public-health officials.

In New York, one of the leading centers of research and treatment in occupational diseases in the country, Mt. Sinai Medical Center was standing by to run a monitoring program. The city didn't call it in.

At least two isolated monitoring programs were in place at ground zero. One was run by FEMA, exclusively for its own employees. A much larger program was run by the New York City Fire Department for its own personnel. The department had a standing rule

from before Sept. 11 that its personnel must report to the department's health services unit for regular evaluations if they get medical care while on duty, require medical leave, file a workers' compensation claim or request retirement disability. The department also collected testing records of 11,000 of its 16,000-member workforce who had worked at some point at ground zero.

The federal government already runs a number of monitoring programs for particularly vulnerable workers. For example, OSHA has a program of regular medical monitoring of workers exposed to lead. The blood lead level is to be checked at least every six months, and the frequency increased to every two months if the level rises over a specified level. A medical examination is performed every year and whenever a worker experiences symptoms associated with lead poisoning.

The Superfund law of 1980 created the Agency for Toxic Substances and Disease Registry. The agency is responsible for determining whether people have harmful health effects from their exposure to hazardous substances. ATSDR maintains registries of people who have been exposed to industrial solvents, benzene or dioxin.

## **FEDERAL ASSUMPTION**

The Terrorism Risk Insurance Act requires workers' compensation insurance to include terrorism cover. This provision is currently a cruel joke upon heroic rescue and recovery workers. Not a single state could certify that the claims most likely to arise from a terrorist act--psychological and physical disease claims--could be paid on a timely basis, if at all. According to John Burton, the respected scholar on workers' compensation, the laws of most if not all states are stacked against the filing of disease claims arising out of a disaster.

Federal disaster relief should be contingent on states modernizing their workers' compensation systems with respect to disease claims. For states that do not reform and certify their systems to national standards, Washington should be prepared to take over the workers' compensation system for rescue and recovery workers.

Washington did this earlier this decade for 600,000 former employees of nuclear weapons manufacturing facilities. After decades of chronic failure of state workers' comp systems to resolve claims, Congress enacted a law funding the Department of Labor to administer and pay for these claims. What became the Energy Employee Occupational Illness Compensation Program has so far processed more than 20,000 claims.

New York state's system enables insurers to fight disease claims for years, arguing in part on the evidence, in part on causality, in part on prior exposure. The state workers' compensation board was ineffectual in trying to move the World Trade Center claims into a more expeditious pathway--if it really tried at all.

Jordan Ziegler, an attorney who represents, along with his associates in the firm of Brecher Fishman Pasternack Heller Walsh & Tilker, many World Trade Center

claimants, says that nothing was done to streamline the handling of these claims. Eventually, he predicts, many diseases from the rescue and recovery effort will meld into other work diseases that the claimants have or will acquire from work, and will no longer stand out as they do today.

The New York legislature belatedly enacted a law in 2006 which removes a statute of limitations and lowers evidentiary hurdles for World Trade Center disease claims. It fails to extend these provisions to any other disease claims in the state.

This transfer of claims over to a new, special purpose workers' compensation system run by the Department of Labor may appear draconian. Yet if the workers' compensation costs are to be borne anyway by Washington, at least the feds should use a system of compensation from which the most egregious barriers have been removed.

Safety controls collapsed at ground zero. They did not have to. Medical monitoring came far too late. It could have come sooner. The workers' comp system failed to respond in terms of coverage of disease. The collapse of safety controls and the late arrival of medical monitoring have almost certainly increased the toll of diseases. The barriers set up within the workers' comp system is in part responsible for the race for money from liability suits and from the federal government.

The lessons do not appear to have been learned, or at least not talked about, which puts Americans at risk for another such debacle.

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