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A WORLD OF HURT

For Injured Workers, a Costly Legal Swamp



Nicole Bengiveno/The New York Times

Carlos Pabon, left, hurt on the job in 1997, spent years seeking workers' compensation.

By N. R. KLEINFELD and STEVEN GREENHOUSE
Published: March 30, 2009

The hurt workers wait on benches at the Queens office of the New York State Workers' Compensation Board.

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A World of Hurt
'Meatball Justice'

A New York Times examination of New York State's workers' compensation system, uncovered a universe of delays, suspicion and questionable rulings.

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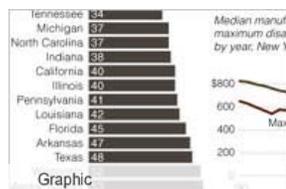


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A lawyer-client conference in the waiting area of the compensation board's Queens office.

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Nicole Bengiveno/The New York Times

Dr. Robin Herbert, a specialist in occupational medicine at Mount Sinai Medical Center in Manhattan.

People like Hopeton Watkis, 64, a laborer, who lost two teeth when he fell and hit a wheelbarrow.

Or Rajcoomar Jagan, 50, a construction worker, who injured a leg falling off a scaffold.

Or Vicki Marquez, 32, a retail sales associate, who hurt her elbow hauling clothes.

They come to the board seeking authorization for medical treatment and replacement wages — in short, a quick and fair resolution from a system set up to replace fractious court fights between employers and employees.

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What they find instead is a subbasement of the legal world, a \$5.5 billion-a-year state-run bureaucracy that, an examination by The New York Times found, struggles to treat workers with due speed, protect employers from fraud or mute tensions in the workplace.

These struggles are particularly evident each day in Queens, the state's busiest hearing office, where The Times spent 18 months attending hearings, reviewing cases and interviewing participants, virtually none of whom defended the system as efficient.

At some hearings, as judges looked on, lawyers chatted on cellphones, cracked bawdy jokes or read newspapers during

testimony. Expert witnesses seemed biased to the point of caricature. Claims dragged on, but hearings seldom exceeded a few blurred minutes, rarely proved conclusive and were conducted in baffling shorthand.

N.Y./REGION

A World of Hurt: Anatomy of a Case

Vera Rutherford's carpal tunnel disability case lingered in New York's workers' compensation system. As she waited for a resolution, her life was on hold.

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Mr. Watkis waited two years to get his front teeth fixed. Ms. Marquez had to postpone elbow surgery for a year until the board allowed it. Mr. Jagan exhausted three years trying to get compensated, only to be denied all benefits, a decision that stunned even some insurance company lawyers.

"Comparing Supreme Court, say, to this is like comparing a hospital to a MASH unit," said Anthony Pizza, a lawyer for insurance companies. "A lot of it is meatball justice."

Workers' compensation systems across the country are troubled, and [reform efforts are under way here](#). But New York, a pioneer of the concept and home to the nation's second-largest system, has some signature claims to dysfunction and is widely recognized as the most adversarial.

Though its commissioners largely function as a legal tribunal, most are not lawyers but relatives or allies of politicians, appointed usually without regard to experience in the field.

Though many cases turn on medical evaluations, the board has not had its own medical director for nearly a decade. Decisions are often driven by the opinions of doctors certified by the state as so-called independent medical examiners. Yet claimant lawyers and treating doctors say these examiners often understate workers' ailments to win business from the insurers who pay them.

Fines for infractions are usually small, and some insurers ignore paying them for years without consequence. A few months ago, New York City agreed to produce \$1.1 million in penalties, some years overdue.

Workers are known to fabricate claims, while employers can be equally uninhibited about pressuring injured workers against filing for compensation, or punishing them if they do.

And everywhere the system tolerates delays that can make the injured wait months or years for money and care. Statewide, in about one in six cases, insurers dispute that injuries are real or were suffered on the job. Until recently, these cases had averaged nearly nine months to resolve. And many of them remain unresolved years later.

Even unchallenged cases plod on. A.I.G., the insurance company, said a review of its 2007 New York cases found that those involving missed work took on average 802 days to reach a final stage, 30 percent longer than in the rest of the country.

A recent task force study found that when insurers reject a medical procedure, say, an operation, it takes more than three or four months for the board to settle the dispute. The delay can mean that injuries heal slowly or improperly, and in 75 percent of those cases, the worker's need for the procedure is upheld.

Zachary S. Weiss, the chairman of the compensation board since late 2007, said that given the scope of what needs to be done, change must be incremental.

"There are millions of things I would like to correct and I'd like to correct them all immediately, and I can't," Mr. Weiss said.

State officials do say that as imperfect as it is now, the system used to be much worse. Before he resigned, Gov. [Eliot Spitzer](#) managed to pass a law that sliced costs and gave workers more money. Until then, New York's system had achieved the neat trick of being both among the most expensive for business and the stingiest to workers.

The board has recently found an interim medical director. But the intended overhaul has yet to deliver on many of its other goals and does not address some of the most stubborn flaws.

"There are still many issues that need to be dealt with," said Joel Shufro, executive director of the [New York Committee for Occupational Safety and Health](#) and a labor advocate. "How it will play out will not be known for a number of years."

One target for improvement is basic record keeping. No one has ever documented, for example, the extent of worker fraud, though accounts of bogus claims have dominated news accounts of workers' compensation for years.

Actually, while the system has a lengthy history of being cheated by employees who exaggerate injuries, experts say they believe more substantial fraud and misbehavior are woven through the process in less obvious ways that hurt workers.

"This is a terrible thing to say," said Dr. Robin Herbert, co-director of the occupational and environmental division at [Mount Sinai Medical Center](#), "but if I had a health problem at work, I'm not sure I'd file a workers' comp claim. It's the Wild West of [health insurance](#)."

Mary Jeffords, the head of Injured Workers of New York, an advocacy group, says she knows of numerous disabled workers so ground down by the process that they begin to unravel.

"I've talked to workers that held a gun to their head as we talked," she said.

Waiting for Help

George Vasilescu's reaction was immediate. He tossed his head back, thumped his feet.

"No more," Mr. Vasilescu, who is deaf and mute, signed. "I beg you. No more."

Mr. Vasilescu, 64, a hotel steward who hurt his back, neck and wrist, had just been told by his lawyer that the judge wanted him back for another medical exam, another hearing, another delay, after four years churning through the system.

It is a good day at the Queens hearing office when there is only one such outburst.

Few people think about workers' compensation until they wrench their back or lose a thumb and become one of the roughly 140,000 new cases filed statewide each year. Those with minor injuries often sail through the process.

But so many workers have been so frustrated or mistreated that they don't even submit claims

when they are injured. Instead, they improperly use regular medical coverage. Or they apply only for [Social Security](#) disability or welfare. Costs rightly borne by employers are then billed to the general public.

All that is flawed with the system can be witnessed daily inside the stubby building at 168-46 91st Avenue in Jamaica, one of three dozen redoubts statewide where cases get heard. It doesn't take long there to grasp how proceedings have devolved into something out of Kafka, who was himself once a compensation claims examiner.

Cases are delayed for any of myriad reasons, or no reason. When the Workers' Compensation Research Institute recently studied speed of payment among 15 states, it found New York the slowest to pay workers their first check.

"These people are not chattel," said Neil Abramson, a claimant lawyer. "They're human beings."

In Queens, it often takes four to six months from the time of injury to get before a judge, a period during which a worker may not receive care or wages. Typically cases are decided piecemeal — months can pass before both sides even agree on how much a worker earned — and so that first encounter may begin a procession of hearings that become stretched-out wars. Any appeal had once meant another six to nine months for a ruling, though since the board made recent changes many have been coming much quicker.

Three-quarters of the appeals are by insurers.

An insurer appealed, for example, when Ms. Marquez sought surgery for her injured elbow in 2007. The appeal, which the board found particularly weak, meant the surgery did not get approved until a year later.

To accelerate cases, the board has increasingly allowed some involving lesser injuries to be decided by a claims examiner, instead of a judge. The examiners are not required to have legal or medical training, or even a high school diploma, and lawyers and judges say their decisions often contain errors. Judges must review the rulings, but some admit it often gets done hastily.

Largely because of delays and litigiousness, only about a third of the state's 66,000 active licensed doctors take compensation cases. One of those who does, Dr. Miron Fayngersh of Brooklyn, said he had 41 outstanding bills for a single case, one a year old.

"The percentage of denials is worse in workers' comp than in any other area in my experience," said Dr. Robert Goldberg, former head of the Medical Society of the State of New York.

One case that seems to exemplify the broad faults is that of Richard Frank, a forklift driver for [New York City Transit](#). After he had a work accident in 1991, the agency prolonged his case for years, ignoring judges' orders, according to court rulings.

After a September 1995 hearing was adjourned because his employer had furnished illegible evidence, Mr. Frank told his lawyer "the Transit Authority is going to kill me." That night he died of a [heart attack](#). He was 50.

For a decade, the agency then contested whether his widow was due death benefits, until an appeals court ruled in 2005 that his death had been caused in part by the agency's "unlawful coercion" and "disgraceful conduct" in resisting his claim.

Claimants who typically wait months to talk to a judge are surprised by the lightning speed of hearings. Eight minutes is typical. A trial can run a half-hour to an hour. Some matters finish in a minute or two. Often workers don't even get to speak. Sometimes they wait outside while their lawyers perform.

Vera Rutherford, a [substance abuse](#) counselor whose carpal tunnel case had plodded along for two years, asked, "Is it normal for a person to go in there and say nothing and have people decide their life for them?"

One day, Fernando Tenorio, a school safety officer hindered by a [knee injury](#), emerged from his hearing, dazed by its velocity: four minutes flat.

For months, Mr. Tenorio had received no money. Now, his lawyer, Mark Allen, explained to him,

the case was adjourned for another few weeks for an investigation, though he would be paid something while waiting.

As Mr. Allen put it, "Six weeks is like tomorrow around here."

But Mr. Tenorio blurted out, "There're some other things I want to tell you." He had lost his apartment and was cooped up in his brother's basement; his bank account was empty.

Mr. Allen halted him: "Forget about personal. They don't think of you as a person. They think of you as a file with a dollar sign on it. They don't care if you can't put food on the table or put braces on your daughter. You're thinking of this logically. I stopped thinking that way a long time ago. This is comp."

Ambitious Assurances

New York's workers' compensation system was born in 1914, an idea of great promise that grew in part from great tragedy, the [Triangle Shirtwaist Factory fire](#) that killed 146 garment workers in 1911.

The state, one of the first to adopt such a program, founded the system on a simple bargain. Hurt workers, who previously had to prove their employer's negligence in court to get compensated, now would get medical care and wage benefits automatically. In turn, they would be barred from filing suit.

At its most basic, that no-fault insurance system is the same today. Essentially, companies buy compensation insurance and their premiums underwrite the cost of running the system and all claims. Virtually all employers must carry coverage.

Hearing rooms across the state are filled, not with office workers, but with people who make biscuits or work construction or strip beds: physical laborers who often live just above society's safety nets.

These workers confront a law that is maddeningly complex. In its barest form, it requires workers to report an injury to their employer within 30 days, then file a claim with the compensation board. If the insurer doesn't object, it is generally required to begin medical and wage benefits within a few weeks.

But if information is missing, as is common, the clock doesn't start until it is submitted, so payments often start much later. Disputed cases are frequent, require judicial intervention and can take months or years to resolve.

There are no cost-of-living adjustments, so payments can lag behind wages. A plumber who has New York's longest-running claim, from a back injury in 1937, gets all of \$6 a week.

Given its tortuous nature, it's no wonder the system has figured in some of New York's noir moments. For 16 years in the 1940s and 1950s, George Metesky, the so-called Mad Bomber, concealed bombs around New York in a rage precipitated by the rejection of his claim.

Changes introduced in 2007 mean that for the first time since 1992 the maximum weekly benefit will rise, in stages, from a flat \$400 to what will next year and thereafter be indexed to two-thirds of the state's average wage, a cap of about \$760. But the reform also ended payouts that could last a lifetime for workers with permanent partial injuries, like an impaired back. Now these awards generally expire within 10 years.

Those adjustments were designed to correct a longstanding paradox of the New York system: how it could be one of the most expensive for employers yet have one of the lowest payouts to workers. Experts say that although the wage benefit was low, insurance rates were steep because the state, unlike many others, had no time limit on payments for permanent partial disabilities.

New York not only had a high level of these injuries, it also had one of the more litigious processes, which further drove up costs.

Today, even with the payout increases, New York lags behind many states. Injured workers in Iowa can get about double New York's limit.

John F. Burton Jr., professor emeritus at the Rutgers School of Management and Labor Relations and an expert on workers' compensation, feels that systems nationwide have become less fair to workers, in part because the political balance has tilted toward management.

"In general, it's not economics that is driving this," he said. "It's that employers have gotten the upper hand."

In New York, average premiums have fallen over the last dozen years (though they vary enormously among employers), as have claims. But the perception reigns, driven in part by insurers, law enforcement and the news media, that the system is expensive because it is bloated with embroidered claims.

Fraud does occur, not only when workers feign injuries, but also when they stay out five weeks when four would suffice. In 2007, the authorities arrested a bus driver, receiving compensation for a hurt shoulder, who Brooklyn prosecutors [said had been touring Europe as a drummer in a rock band](#).

But experts believe far more money is siphoned by employers that illegally underpay premiums by underreporting the size of their work force or by doctors who fabricate bills.

Some defects are addressed by the latest changes. For example, "rocket docket" rules are being applied to speed up initially disputed cases, and while not everyone has embraced them, some progress has been made.

"We want our comp system to do so much," Mr. Weiss said. "And it should do so much. And it does so little."

As head of the compensation board, Mr. Weiss, who earns \$120,800, directs the system, which employs 1,500 people. The other commissioners earn \$90,800 and primarily rule on appeals that bubble up from local offices.

Commissioners often work from home, reviewing opinions generated for them by board lawyers. Just five of the current 11 commissioners are lawyers.

Last year, after a dozen years as a commissioner, Michael T. Berns wrote a book titled "Behind the Closed Doors," which he describes as a kind of apology for a system where, he said, workers suffer in part because some commissioners know too little about the relevant law, work just a few hours a week and do not read many of the decisions they sign.

"The whole push is a numbers production," he said. "Quality is irrelevant."

The board members are appointed by the governor in a process long regarded as dominated by politics.

Commissioner Candace K. Finnegan is a former personnel director for a state psychiatric facility, and also a close friend of [Libby Pataki](#), the wife of former Gov. [George E. Pataki](#). Ellen O. Paprocki had been assistant director of the New York State Fair, and is also the daughter of John O'Mara, who was an adviser to Mr. Pataki.

Frances M. Libous, a former nurse, is married to Thomas W. Libous, a ranking Republican state senator. Mark D. Higgins, recently appointed by Gov. [David A. Paterson](#), is a longtime union official and brother of Representative [Brian Higgins](#), an upstate Democrat.

"It is political employment for the politically connected," said Richard A. Bell, a commissioner. He once served as the board's executive director, and his wife worked as an executive assistant to Mr. Pataki.

While politics is a factor in appointments, several members said those selected are nonetheless qualified.

For years, judges and lawyers say, politics also played a role in who got hired as district administrators to run the system's 11 district offices. The posts, created a decade ago by state lawmakers, paid \$104,080 a year. But critics said the administrators' duties were light and little different from those of the district managers they were brought in to supervise.

This month, the board simply did away with district administrators, leaving two regional administrators in their stead, millions of dollars having been spent to no clear end.

Injured and Indigent

Carlos Pabon, a parks department manager and an Army veteran, hurt his back and neck when someone opened a door into him in a Bronx storeroom in 1997 and knocked him down a flight of stairs. Tossed into the cumbersome workers' compensation system, he has never left.

Initially, the system took care of his injuries and Mr. Pabon, now 50, stayed on the job, earning up to \$60,000 a year. But his pain worsened over time, he said, and he began to miss days. In the summer of 2006, his doctors advised him to stop working.

New York City arranged for him to get an independent medical exam. That doctor felt that Mr. Pabon's doctors were wrong. He had no disability. He could do his job without restriction.

In January 2007, the wage benefits he had been receiving stopped because of the independent doctor's report.

Michael Serres, Mr. Pabon's lawyer, sought to challenge the doctor by having him testify. But nearly a year would go by before he did.

In the meantime, Mr. Pabon, who said he wrestled with grinding pain, could not live on a tiny military pension and the slim disability income of his fiancée, Grace James. The bank seized his car. He reached the limit on his credit cards and pawned his jewelry. He went on welfare.

In November 2007, the city's doctor finally testified. He stood by his report. Another hearing in Queens was scheduled.

The matter was still unresolved last year when a city marshal arrived at Mr. Pabon's apartment with an eviction notice. It was [Valentine's Day](#). Mr. Pabon was eight months behind on the rent.

In a bone-chilling wind, they left: Mr. Pabon, Ms. James, their child and another from Ms. James's previous relationship. A third child was at school. They juggled what they could carry, including their bird. After depositing the children with a relative, Mr. Pabon and Ms. James rode the A train all night. The next evening, they slept in the boiler room of an apartment house.

Soon, they landed in an echoing homeless shelter where they washed their clothes in the tub. Occasionally, Mr. Pabon stole food. "I took cookies, hard salami, half a pint of milk, cakes, doughnuts, small stuff," he said. "I stole a deodorant stick from Rite-Aid."

"I worked in the parks taking care of kids, making sure they didn't get hurt, being a role model," he said. "Here I am stealing things."

They moved from one shelter to another. Mr. Pabon began to have [nightmares](#) and imagined himself blowing up people. He and Ms. James bickered.

"Look at where we are," she told him one day. "What kind of man are you?"

The next hearing for Mr. Pabon, his 13th in a case in its 11th year, was set for April 1, 2008.

Mr. Pabon arrived by bus from the shelter. He was penniless.

"I feel so down. I mean, down on the ground," he told his fiancée.

"This could put someone in a mental hospital," she replied. "I can see myself sitting in a room in a straitjacket, rocking."

As the hearing approached, as often happens, the lawyers fashioned a deal. Mr. Pabon was offered \$265 a week. By the system's metrics, he was deemed about 33 percent disabled.

The calibrations of disability can be arbitrary. Few doctors are trained to gauge how injuries restrict a person's particular work capability. Some workers with frightful injuries are judged 75 percent disabled. But a professor, or an accountant, can often continue a career. Laborers judged 25 or 50 percent disabled often are stuck. Who hires a laborer who can manage half a job?

Mr. Pabon had expected \$400 a week, the limit for a case of this vintage. Yet he accepted.

"I need money now," he said.

After the lawyer's fee, Mr. Pabon would get a back-payment check of \$11,921. Once he satisfied his most pressing creditors and bought clothes for his family, he expected to have maybe \$7,000 left.

He still would be unable to work and without a home.

John Vos, the lawyer for the insurer, saw the deal as an effort "to meet in the middle." He said he had no idea how injured Mr. Pabon was — "I'm not a doctor" — and that the cyclical hearings were simply the norm.

Compensation cases are like serials without endings. Over the next eight months, Mr. Pabon was sent to two more insurance exams, had two more hearings, got his rate raised to \$350 because of continuing depression and had a kidney removed.

He continues to live in a shelter.

Joking and Settling

The compensation lawyers in Queens are a clubby bunch. Often they go to greasy spoons for burgers and pizza, claimant and insurer alike, piling into the van of Ed Hilfer, a claimant lawyer.

Few students in law school imagine a career as a workers' comp lawyer or judge. For most, it is an accidental destination. Many say they chose it because of the hours. Hearings go from 9 to 4, and judges and lawyers often fly out the door minutes after their last case.

Fees for claimant lawyers are set by judges and come out of awards to workers. Insurer lawyers get paid whatever they negotiate. Rewards for claimant lawyers in Queens typically arrive in dribs and drabs of \$50 and \$100 fees, augmented by sweeter windfalls from settlements.

For both sides, it is a volume business: the more hearings, the more fees, thus the incentive to keep cases alive.

For workers, a lawyer can be an essential brace. In Queens, though, a claimant is commonly represented by a firm that specializes in workers' compensation law, not an individual. So if there are six hearings, a different lawyer might handle each one. Sometimes a freelancer steps in when the assigned lawyer is overloaded.

As a result, some hearing lawyers have never spoken to the client, and have barely studied the file. The same hasty preparation is often true for the insurance lawyer and the judge. Even preparation for trial testimony might get done in a few [stuttering](#) moments in the waiting area.

During one hearing, a claimant's lawyer asked his client a question in Spanish. That went poorly, since the man was Armenian.

"There was a judge I was talking to and he said there are only two ways in my court that your fees would be cut: if you're not friendly or if you're not willing to compromise," said Mr. Pizza, the insurance company lawyer. "I said, 'What if you're not prepared?' He said that doesn't matter."

Between hearings, the lawyers' room has the feel of a college social club. Lawyers play pinochle. Watch hockey fights on YouTube. Joke about judges, like the "Cruise Director," whom they mock for roaming the halls. Or they check the "meat chart," which lists awards for lost body parts, based on a grisly schedule that codifies missing limbs with weeks of wages.

The rate for an arm is 312 weeks of wages. A leg gets 288, a big toe 38, the index finger 46. Rates fluctuate by state, for no apparent reason. Lose an index finger in Idaho, it's 70 weeks.

Despite the esprit de corps, the opposing lawyers have clashing worldviews about the system.

A few years ago, Mark Allen represented a delivery driver who had injured his back lifting packages. The next day, the man told his manager the pain was so bad it hurt when he pulled on his socks. The insurer said: not a work injury; he must have hurt himself putting on his socks.

"If you fell out of a tree when you were 5 and you have a knee injury when you're 55, they'll say it was the tree," Mr. Allen said.

On the insurer side, Nicholas Rupwani typifies the many lawyers who view the system as a worker fraud trough. One day he recounted the case of a pet store clerk bitten by a rat who said her injuries had been serious and the experience traumatizing. Yet, Mr. Rupwani noted, her [MySpace](#) page showed her throwing darts in a bar and indicated she might start a pornographic Web site.

Mr. Rupwani said he felt bad for workers who suffer crushing injuries — but not too bad. "If you're a secretary with a torn [meniscus](#) who is losing her house, go back to work," he said. "It might hurt, but people work through the pain."

When workers moan during hearings about family strife and ruin, he said, "that's when I tune out." His theory is that the more people broadcast their situation, the more likely they are fakes.

"Sometimes the claimant is sitting next to you and doing this quiet sobbing," Mr. Rupwani said. "That's when I usually recommend that the insurer put them under surveillance."

He said he recommended surveillance about once a day.

Both sides talk about how inconsistent decisions are. "The law allows some leeway," said Mr. Pizza, "but there shouldn't be eight different ways of doing things. 'I won't allow depositions,' 'I will allow depositions,' 'I'll only allow 15 minutes a witness.' You shouldn't put justice on a time clock."

A popular option in the last decade is a cash settlement under which workers close their cases in exchange for a lump payment to cover living expenses and medical bills.

For some workers, a settlement might allow them to start a business or get a degree. For others, they are economic quicksand, one-time payouts that some people find hard to resist. A state task force found that those who accept them are typically lower-paid workers, with average wages of about \$19,000.

Insurers relish settlements because they end their exposure. Claimant attorneys relish them, too. They typically extract a 10 to 15 percent cut.

But do workers know what they're choosing?

The lawyers routinely say clients are "adults." But the compensation system is so puzzling that even a Queens judge abandoned her own case years ago out of frustration. And there are lawyers in Queens, regulars at the hearing office say, who undersell settlements, pushing low-ball deals on workers just to pocket a quick payday.

No comprehensive studies have examined the impact of settlements, though limited academic studies tend to find them problematic.

"If it were my case, I wouldn't take one," said Thomas Gleason, a former executive director of the board who is now a deputy executive director of the State Insurance Fund, New York's biggest workers' compensation insurer. "Some guys get \$50,000 or \$60,000 and go out and buy a new car — or go to the casino."

Jorge Manzano, 31, a lumber company driver who hurt his back lifting a cement bag, was offered a settlement in 2007. His lawyer negotiated a \$12,500 payment, but Mr. Manzano felt that was insufficient and hired a new lawyer.

At a hearing, his new lawyer asked, "What do you want?"

He said, "Like double."

The insurance lawyer agreed to \$20,000. After a legal fee of \$3,000, Mr. Manzano would get \$17,000.

His lawyer, who knew almost nothing about the case, made a quick fee, the insurer concluded its exposure and the compensation board closed one more file.

And Mr. Manzano?

He said he plucked the \$25,000 number out of the air. His friends warned him not to settle. What if he needed surgery? After all, he could barely hold his daughter. "I'm like an old man," he said.

But his motivation, as it so often is in the compensation universe, was simply to escape the stultifying system.

"I don't want to come here and feel like I'm begging," he said. "Frankly, I'll take just about anything, just so I don't have to see this place ever again."

A version of this article appeared in print on March 31, 2009, on page A1 of the New York edition.

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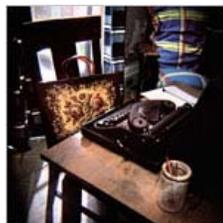
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