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Navigating Occupational Health Rights: The Function of Illegality, Language, and Class Inequality in Workers' Compensation

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Navigating Occupational Health Rights: The Function of Illegality, Language, and Class Inequality in Workers' Compensation

Abstract

[Excerpt] In this chapter, I argue that although undocumented status has little formal bearing on the ability of workers like Jose to access key rights such as workers' compensation, illegality shapes every aspect of occupational health and the claims-making experience. I interrogate three key factors of institutional inequality: 1) undocumented workers' position within the labor market; which shapes risk of injury and eligibility for coverage; 2) the ability of undocumented workers to navigate their claims through the workers' compensation bureaucracy; and 3) undocumented workers' disenfranchisement from the welfare state and their limited options following disability.

Within each of these institutional spaces, I highlight the ways that undocumented status also intersects with the other axes of vulnerability that shape immigrants' lives. I build on Rathod (2010), who questions the tendency to position immigration status as the over-riding factor determining the lives of undocumented workers, and argue that we must also attend to those "corollary regimes" that also impact their lives. According to Rathod, "understanding immigration status in context allows for consideration of intersections between status and these other attributes and experiences (280)." I focus especially on the role of language and economic precarity, which I argue are key aspects of the racial experience for Latino immigrant workers in the United States. I argue that the full effect of these factors cannot be understood independently of undocumented status.

Keywords

illegal immigration, occupational health, undocumented workers, worker rights, workers compensation

Disciplines

Benefits and Compensation | Immigration Law | Labor and Employment Law | Labor Relations | Migration Studies | Workers' Compensation Law

Comments

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Navigating Occupational Health Rights

The Function of Illegality, Language, and Class Inequality in Workers' Compensation

Shannon Gleeson

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Introduction

One summer evening, I waited with a team of public interest lawyers for our final client of the evening. Jose, a seasonal farm laborer, finally arrived, visibly suffering from the pain of an injured shoulder, and frustrated by his inability to access his workers' compensation benefits. Jose had been fighting for over a year. He was initially told that his pain was due to arthritis, but was eventually diagnosed with separated tendon. This, coupled with his chronic back pain from two decades of working in the fields, meant that he would likely never return to work. Unemployed, uninsured, illiterate, and undocumented, Jose had few alternatives.

Jose handed us a pile of papers related to his case. In that pile we uncovered multiple claim forms, insurance company notices, doctor reports, medical records, and several blank applications for disability and unemployment benefits. Buried at the bottom of this pile was a blank I-9 form, the employment verification form that all workers are required to complete when they are first hired. Undeterred, the lawyer explained that according to California law, his undocumented status should pose no real deterrent, and that it was illegal for his employer to retaliate against him. Then, we turned to Jose's immediate concern: his urgent need for medical care and some form of income.

In this chapter, I argue that although undocumented status has little formal bearing on the ability of workers like Jose to access key rights such as workers' compensation, illegality shapes every aspect of occupational health and the claims-making experience. I interrogate three key factors of institutional inequality: 1) undocumented workers' position within the labor market; which shapes risk of injury and eligibility for coverage; 2) the ability of undocumented workers to navigate their claims through the workers' compensation bureaucracy; and 3) undocumented workers' disenfranchisement from the welfare state and their limited options following disability.

Within each of these institutional spaces, I highlight the ways that undocumented status also intersects with the other axes of vulnerability that shape immigrants' lives. I build on Rathod (2010), who questions the tendency to position immigration status as the over-riding factor determining the lives of undocumented workers, and argue that we must also attend to those "corollary regimes" that also impact their lives. According to Rathod, "understanding immigration status in context allows for consideration of intersections between status and these other attributes and experiences (280)." I focus especially on the role of language and economic precarity, which I argue are key aspects of the racial experience for Latino immigrant workers in the United States. I argue that the full effect of these factors cannot be understood independently of undocumented status.

This chapter proceeds as follows. I first begin by providing readers with an overview of the key insights of critical race theory (CRT) and social stratification scholarship for understanding the production and function of institutional inequality. I then situate the contemporary issue of illegality in these literatures, which I argue have extensively examined the lack of rights afforded to undocumented immigrants, while insufficiently attending to the function of illegality in more permissive policy regimes where rights exist on the books. I present the workers' compensation system in California as one such policy arena that provides an important lens for understanding the institutionalized function of undocumented immigration status. Next, I unpack the logic of the U.S. workers' compensation system, and describe the various gatekeepers that claimants such as Jose must confront. I highlight how economic precarity, language and undocumented status intersect before, during, and after a workers' compensation claim is filed.

Literature Review

Critical Race Theory, Illegality, and Institutional Inequality

While some scholars have argued for the declining significance of race as a social determinant of inequality (e.g. Hirschman 2004), scholars ranging from critical race theorists and social stratification scholars have argued for a more nuanced understanding of how racial inequalities have become institutionalized (Carbado and Gulati 2003; Gomez 2012). Claims of racial progress, the importance of merit, and of a new colorblind society now cured by the passage of civil rights legislation have been challenged on both methodological and theoretical grounds (Delgado and Stefancic 2001, 105). These scholars challenge the dominant anti-discrimination model, which "conceives of racism and racial discrimination as individualized, aberrational, and capable of remedy within the current legal framework, "and instead view racism as "institutionalized and endemic and, thus, frequently immune to antidiscrimination law and policy,, (Barnes 2010; Gomez 2010, 488). Within the field of sociology many scholars have issued similar calls to renew, not to eliminate, race from the study of social life, positing that the unequal distribution of life chances to different racial groups can be traced to institutional inequalities that are intensified, not ameliorated, by the market (Fischer et al. 1996).

Prompted in large part by the changes in the U.S. demography over the last four decades, one branch of critical race theory-LatCrit-advocates applying this institutional lens to the broader population of under-represented minorities, and in particular Latinos. Drawing on intersectional theories of stratification that examine how multiple forms of subordination-such as race, gender, sexual orientation, disability, nationality and citizenship-work in tandem (Crenshaw 1991, 2011), LatCrit scholarship emerged in the mid-1990s with a call to move beyond the black-white paradigm of understanding race inequality (Aoki and Johnson (2008). Like CRT, LatCrit sought to historicize our

contemporary understandings of the immigrant experience by tracing the developments of foreign and domestic policy in the United States (Delgado 2012).

Throughout this field, scholars have examined racial inequality from an institutionalized perspective that is simultaneously embedded in formal advances in rights. Intent, Haney Lopez (2000) argues, is in fact not the major driving force of inequality today (1757). In his analysis of jury selection in Los Angeles, Haney Lopez challenges the view that human behavior is consciously motivated, arguing instead that the rules and norms of an organization structure individual action. Lucas (2008) similarly argues that though we are no longer in the era of "condoned exploitative relations,, characteristic of Jim Crow, racial inequality persists in the current era of "contested prejudice." Important legal victories have been won, and the rhetoric of race and gender inequality is no longer as inflammatory as it once was, yet the legacies of this previous era still impact the everyday experience of blacks and women.

By extension, there are a few reasons why scholars must apply these lessons to our understanding of immigrant inequality. First, the immigrant experience in the United States is not race-neutral, and race has directly shaped which immigrant groups are today granted legal entry versus being criminalized (Ngai 2004). Secondly, competition in the split labor market between immigrants and other native-born low-wage workers has implications for both communities, as employers adopt "divide and conquer" strategies in an attempt to drive down the conditions of work across an industry (Bonacich 1972, 2008). Lastly, the creation of highly homogenous vulnerable labor markets (like farm labor) impacts not only workers, but also entire families and communities in areas such as housing (Nelson 2008), education (Telles and Ortiz 2008), and political life (Golash-Boza 2006).

Undocumented immigrants face a constant threat of deportation in the United States. The emerging arena of "cimmigration" research focuses on the increasing connection between immigration law and criminal law (Stumpf 2004). In order to meet the current quota of 400,000 deportations year,

the federal government has devolved significant enforcement powers to local law enforcement entities, which proponents refer to as legitimate "force multipliers" (Kobach 2005). Concerns over the use of racial profiling as a tool for apprehending suspected undocumented immigrants has spurred heated debates and scrutiny from the courts (Olivas 2007; Lee 2009, 2011; Carbado and Harris 2011). The workplace, too, has become a central site for immigration enforcement, via employer sanctions, Social Security No-Match Letters, e-Verify, and IRS audits. Griffith (2011, 2012) refers to this expanding enforcement arena as "immigration" law.

Beyond immigration enforcement, undocumented immigrants lack a range of key rights afforded to citizens and other documented immigrants. As such, Carbado (2011) calls on CRT to examine the function of the law for the lives of racialized immigrants, in arenas such as "welfare law, employment law, family law, and criminal law and procedure" (1638). For example, in most states, undocumented students face several barriers to accessing higher education. Since the passage of the 2005 REAL ID Act, undocumented workers cannot get driver's licenses anywhere but four states. The recent Obamacare legislation excludes coverage for most undocumented immigrants. Further, undocumented workers are prohibited under the Immigration Reform and Control Act of 1986-the same law that granted amnesty to nearly three million undocumented immigrants-from legally working. As such, if they are illegally fired, they have limited access to back pay and can't get their job back, even if their employer knowingly hired them without papers and is accused of wrongdoing (Fisk et al. 2005). These same workers have no access to unemployment, federal disability, or social security benefits. These restricted rights are the focus understandably-of much of the extant research on the immigrant experience.

The ongoing focus on the devastating effects of immigration enforcement is imperative, as is an examination of the benefits withheld from undocumented immigrants. Yet, the provision of rights to undocumented immigrants is not a panacea. This chapter examines the on-going inequalities that

remain even in a key permissive rights regime for undocumented workers: workers' compensation law. I argue that just as critical race scholars have highlighted the limits to rational anti-discrimination laws, so too must immigration scholarship adopt a lens of institutional inequality for understanding the experiences of undocumented immigrants.

I follow the recommendation of Light (2012), who argues that to understand the position of immigrants vis-a-vis healthcare in the United States, we must also understand the "deep institutional ambivalence" of the U.S. immigration system, which is "reflected in categorically unequal statuses in response to political views and demands for labour" (p. 29). Similarly, to understand the experiences the immigrant and undocumented workers' compensation, I first locate these claimants' structural position within the labor market, then interrogate how undocumented status intersects with language ability and economic precarity as they attempt to navigate the claims bureaucracy, and assess the limited options available to disabled undocumented immigrants once they leave the labor market.

The Logic and Function of the Workers' Compensation System

To begin, it is necessary to understand the benefits available for undocumented workers in the United States. The workers' compensation system was one of the first widespread social insurance programs in the United States (Fishback and Kantor 2006). Following the general path of devolution of social welfare provision to state governments, workers' compensation in the United States is a decentralized system. With the exception of the state of Texas, where a third of employers are non-subscribers (Betts and Geeslin 2006), all other U.S. states mandate workers' compensation coverage. In all states except Wyoming, undocumented workers have access to workers' compensation benefits (Yoon et al. 2013). Though some benefit restrictions exist, California's workers' compensation system is one of most inclusive towards undocumented workers.

While an in-depth description of the workers' compensation claims bureaucracy would take volumes, the process generally proceeds as follows: Following a worker's injury, employers are required to file a formal report with their insurer, who then coordinates treatment and compensation. Based on medical expertise provided by a private pre-designated medical provider network, and on some occasions a state-approved physician, the goal is to return the injured worker to their original state of health, or to provide payment to compensate for any permanent disability they may suffer. Consequently, palliative care and treatment geared towards long-term rehabilitation-such as chiropractic sessions, or mental health services-can be challenging to access. Throughout this process, injured workers may rely on assistance from an attorney who can help them with basic tasks such as translating a document or requesting medical records, as well as for more complex ones like providing representation at a hearing or settlement conference.

In exchange for agreeing to carry workers' compensation insurance, employers are protected from being sued by their injured employees, and workers are technically covered regardless of fault. When all goes well, an injured worker-even if they are undocumented-need only report an injury to his or her employer, who then submits the claim to their insurer, who in turn coordinates the treatment and compensation the worker requires. But, like other rights arenas, workers' compensation benefits are not automatically conferred, and must be pursued vigorously.

Yet the process is often not so smooth. Employers may retaliate against workers who report their injuries. Though the law technically prohibits such retaliation, "at-will" employees have few protections, and employer reprisals can be very difficult to pursue and prove. Centralized human resources bureaucracies and subcontracted labor arrangements can also obfuscate the supervisory chain and make it difficult for workers to pursue a claim. Contingent workers often are not covered either because their employer is not compliant, or because their non-traditional work arrangement is

exempted from coverage (Quinlan and Mayhew 1999; Quinlan 2004; Nicholson et al. 2008).

Undocumented workers have few protections if they are fired for reporting an injury.

As in any other insurance market, employers have clear incentives to minimize worker claims. Yet, it is too simplistic to understand employer reticence towards formal reporting as the only hurdle to claims-making. Even in cases where employers are fully cooperative, their interests do not always align with that of their insurer, and claimants can develop adversarial relationships with insurance adjusters as well (Strunin and Boden 2004). Two general principles guide an insurer's decision-making. First, insurers want to be certain that a claimant's injury was caused while the worker was employed at the covered job. This can prove difficult for workers who hold multiple jobs, seasonal workers, and those who have toiled for decades in dangerous jobs with no access to preventative health care.

Over time, Duncan (2003) argues, the workers' compensation system has replaced a test of civil liability (the ability to sue one's employer) with this arbitrary quantification of medical observation. Industrial doctors provide rational expertise, and their role is to corroborate the existence of a worker's injury, and to evaluate the extent of a worker's resulting impairment. Crucially, these doctors must certify the existence of a "medically verifiable injury" that occurred "out of and in the course of employment" (p. 456). To verify the conditions and extent of their injury, insurers may even subject claimants to video-recording and monitoring of their daily activities.

The adjudication of claims within the workers' compensation system relies on a series of "mundane decision-making" processes (MacEachen 2000). This system privileges medical assessments such as "restrictive range of motion" or "limited ability to bear weight," while injured workers' more subjective experiences are filtered out. This approach, critics argue, leads to "systematic disrespect and humiliation of work-injured claimants" (Parrish and Schofield 2005, 33). Rooted in market principles of cost-savings, the overall goal of the workers' compensation system is not to rehabilitate a worker to

health, but to "minimize industrial conflict and maximize capital accumulation, while simultaneously managing the conduct of the injured worker" (Duncan 2003, 454). Ultimately, the goal is to return a worker to their "bodily, vocational, and social status quo ante" as determined by a team of administrative, legal, and medical experts (455).

In order to be successful, claimants often seek the assistance of an attorney to navigate the gauntlet of workers compensation. Attorneys are particularly crucial for immigrant claimants, who can face significant communication barriers with insurers, doctors, and bureaucrats (Rudolph et al. 2002). Attorneys can also simply educate injured workers regarding those rights they may think they have, but don't, or what Eliasoph (2008) refers to as "phantom legal rights."

Yet attorneys' incentives do not always square with their clients. Workers' compensation attorneys are entitled to a fixed percent of final settlement costs, to be shared amongst all attorneys a claimant retains throughout the course of a claim (approximately 15 percent in California). Consequently, attorneys may forgo cases whose settlement amounts are too modest, rely on a barely manageable caseload to increase their compensation, or draw cases out in hopes of achieving more favorable settlements. The result is often overloaded attorneys who have little incentive to maintain close communication with their clients over the lengthy course of their claim.

In addition to employers, insurers, doctors, and attorneys, government bureaucrats represent a final set of gatekeepers who operate as both system regulators and claimant advocates. Staff at the Division of Workers' Compensation (DWC) monitor the adjudication of claims, audit insurers, and create disability ratings. Though barred from providing legal advice, information and assistance officers can provide services as far ranging as orienting workers to the ins and outs of workers' compensation, to translating and deciphering insurance notices for claimants, and aiding a claimant whose employer or insurer refuse to communicate or cooperate.

This complex gatekeeping apparatus produces a gross imbalance of power between the claimant and several parties that, as Lippel (2007) describes, represent a series of "big machines" that seek to control the injured worker, control his future, control costs, control his body, control his appeal, control the return to work process, control his behaviour at work, or at occupational therapy, or at the doctor's office, and, in the case of clandestine surveillance, control his personal life and that of his family. (p. 435)

Within this context, undocumented, contingent and limited-English proficient workers are at a particular disadvantage.

Methods

This research relies on three primary sources of data: 1) participant observation at a workers' compensation advising clinic from December 2010 to March 2013 in Santa Cruz County (24 clinics total), where I observed advising sessions and volunteered as a legal interviewer; 2) participant observation at workshops for injured workers provided by the California Department of Industrial Relations Division of Workers' Compensation (DWC) at three different offices in Northern California from December 2008 to April 2012 (24 workshops total); and 3) in-depth follow-up interviews with injured workers who attended DWC workshops, key government staff and non-profit legal advocates.

The workers' rights clinic where I conducted this research serves a predominantly agricultural community, though many claimants were also employed in a wide range of other occupations, including transportation, hospitality and food services, construction and landscaping. 16 By the time they arrived at the law center, claimants had typically either been fired, were too injured to return to work, or were

simply unable to find new employment with their injury. Nearly all the clinic's clients are Latino population that experiences disproportionately higher rates of occupational injuries/illness-and most are monolingual Spanish speakers. While the law center does not query clients on their immigration status, claimants commonly choose not to provide a social security number on their intake form. Because the program does not rely on federal funding, they are not restricted from serving undocumented clients. Common injuries of clients who visited this law clinic include hernias from lifting heavy pallets of produce, broken bones from falls on misty mornings in the fields, back or hip strains from years of picking, and chemical burns from pesticide use.

I also attended 16 sessions for Spanish-speaking injured workers from 2008 to 2012, as well as 8 English-language sessions starting in 2012. Here I observed the presentation given by the state "information and assistance" officer, as well as questions posed by claimants in the audience. Finally, I drew on in-depth interviews conducted with 16 workers' compensation claimants recruited from these workshops, as well as formal interviews with the state-wide director of the Division of Worker's Compensation, three information and assistance officers for this region, and legal staff and volunteer attorneys at six workers' rights clinics who service low-wage workers in the San Francisco Bay Area.

Findings

In the following findings section, I examine the experience of injured Latino immigrant workers who I encountered before, during, and after their workers' compensation claim. I begin by discussing the considerations that an injured worker must weigh when deciding whether to file a workers' compensation claim. Next, for those workers who do choose to move forward, I examine the institutional barriers within the workers' compensation system that emerge throughout the life of a

claim. Lastly, I interrogate the decisions that claimants must consider at the end of a claim, as they consider how to reintegrate back into the labor market and manage permanent disability.

Before the Claim: Conditions Shaping Occupational Injury and Reporting Behavior

To understand the role of illegality in the claims-making experience for workers like Jose, it is insufficient to examine the formal ways in which immigration status is inscribed in the formal law. Undocumented status shapes workers' exposure to risk and injury, the costs associated with pursuing a claim if they are injured, and their likelihood of qualifying for benefits. An undocumented workers' precarious position in the labor market, the few protections afforded to at-will employees, and strict rules of eligibility for workers' compensation coverage, also influence their ability to seek compensation and benefits following an injury.

Immigrant workers in the United States as a whole are disproportionately situated in dangerous jobs (Walter et al. 2002; Ahonen and Benavides 2006; Orrenius and Zavodny 2009; Passel and Cohn 2011), and die at higher levels than do their native-born counterparts (Loh and Richardson 2004). Undocumented workers are over-represented in low-wage sectors such as agricultural, landscaping, residential construction, and food service (Passel 2006), and they are more likely to hold contingent positions that can make claims-making difficult (Gunderson 2000; Bobo 2008; Fine and Gordon 2010; Kerwin and McCabe 2011). These industries are poorly regulated (Bernhardt et al. 2008), more likely to produce workplace violations (Bernhardt et al. 2009), and less likely to provide affordable health insurance, sick and vacation pay, and paid family leave (Kalleberg 2011).

The agricultural industry especially relies heavily on undocumented work (an estimated 50 to 80 percent of the labor force). Less than 2 percent of workers in crop production are covered by a union contract (Hirsch and Macpherson 2012), and the seasonality of the industry can leave workers unemployed for months at a time (NCFH 2012). Agriculture has the second highest rate of occupational

injury and illness, and alongside construction, mining, fishing, and hunting, is one of the industries with one of the highest rate of fatal injury and illness according to the Bureau of Labor Statistics. However, unlike these other industries where catastrophic risks are often apparent and visible, pesticide exposure can be a latent risk that doesn't manifest for years, and which farmworker advocates have struggled to get occupational safety and health authorities to prioritize. Farmworkers can rotate through multiple companies throughout the year, and they can have a difficult time proving which employer is liable for the specific incident that led to injury. Workers may endure an injury for months before reporting it, weighing the stakes of claims-making.

Though California law requires all employers to carry workers' compensation insurance, there are many incentives to deter claims. In some cases, this resistance can be quite overt. One foreman became enraged when his employee reported his injury, and claimed (falsely) that since this worker did not file a report immediately following the injury, he was ineligible for benefits. He then counseled the worker to find another construction job, and to report the injury to that employer. Undocumented and fearful of the implications of engaging in such fraud, the injured worker refused. Fearful of losing his job, but also in need of medical care, he continued to press his employer. While the report was filed, his hours were slowly reduced. Though this worker was eligible to file an employment discrimination claim, in a recessionary environment, and with little evidence to prove otherwise, his chances of winning his job back were slim due to his undocumented status and at-will position (Yoon et al. 2013).

Following an injury, it can be extremely difficult for workers in highly physical industries like construction to find work. Workers who abide by formal health and safety regulations can be branded as troublemakers whose productivity is suspect. For example, one field worker explained that, though she is required to wear a brace to protect her injured back, she never wears it when soliciting work each season. "I don't wear it, otherwise no one wants to hire me!" As a result, workers regularly endure unsafe work conditions and delay reporting injury to remain competitive in a precarious labor market,

and to avoid upsetting their employer. Workers were acutely aware of their limited options, such as the food packer who explained, "Right now, there are big layoffs, there are no jobs, there are 20 people in line (to get one)." Another injured mother of two similarly explained her reluctance, "I have my kids ... I was scared, my family depends on my income."

Consequently, many workers do not complain about unsafe work conditions, and delay reporting their injuries. For example, a woman who worked at a popular ethnic market explained the conditions that eventually led to her injury. "There were big pots of tamales and drinks that we had to transfer to the tables They wouldn't let us drink water or go to the bathroom." After working in these conditions for months, she complained to her supervisor. She was given a warning in return. When she protested, her supervisor told her to leave if she was unable to comply with the job's requirements. Unable to afford to lose her job, she continued working in pain for weeks, until she could no longer continue. After returning home from a shift one day, she began to experience extreme nausea and headaches, and she went to the emergency room. That evening she was underwent surgery for a hernia. When she returned to work and was unable to resume the taxing demands of the position, she was fired for "insubordination."

Employers may also capitalize on a worker's limited English ability to deter claims-making. For example, one Spanish-dominant injured worker reported her injury to a human resources representative, who then asked her to sign a form in English, or face termination. When she requested to take the form with her to be translated, the HR representative refused. When the worker did not relent, the manager immediately took her badge, led her off the facility, and told her not to return until she was ready to sign. When this worker acquiesced her willingness to forgo her claim in exchange for the ability to return to work, her employer refused to rehire her.

Such practices of retaliation can become institutionalized, go far beyond a rogue manager, and become a common cost-saving practice within the firm. "I've been working here for eight years, dumping (produce), packing (boxes), and fastening (loads)," one produce worker explained. "I don't have any education, and never went to school. Slowly, over time, I started to hurt." Workers in this plant were under high surveillance, and admonished when they complained. "The foreman would watch us, and force us to carry even two boxes at a time." As all workers were subject to the same oppressive conditions, complaining was admonished not only by the supervisor, but also co-workers who relied on each other on the packing line. "We all have to do it, we all earn the same." In order to maximize efficiency, supervisors concentrated workers in one position, where repetitive tasks can contribute to injuries. When this worker complained, she was told bluntly, "If you don't like it, there's the door. Leave." Her back pain became so severe that she was unable to keep up with the pace of work, and was issued repeated warnings. When she eventually filed a formal report for her injury, the company's human resources representatives denied the conditions of her injury, withheld the forms necessary to open a workers' compensation case, and refused communication with the worker or her doctor.

When employers refuse to comply with their workers' compensation requirements, an attorney can become crucial, but difficult to retain. In these instances, the efforts of even pro-active workers can be thwarted. For example, after suffering a chemical burn, one food production worker immediately demanded medical care from her supervisor and requested that a formal report be filed. The supervisor sent her home, and then denied that the event ever happened. In order to file a claim of gross negligence, she would have had to subpoena the material safety data sheets for the chemical that burned her in order to prove that she had suffered ill harm. She, however, could not find any attorney willing to invest the time and resources to do this. Ultimately, her case stalled, and she was left to pay her medical bills and wonder about the long-term effects of her chemical exposure.

Contingent workers such as those in these "brown-collar jobs" also very often do not have access to employer-provided health insurance either because the benefit is not offered, or the premium they are asked to pay is prohibitively expensive (Saucedo 2009). Over half of low-income noncitizen immigrants are uninsured, and those who are unauthorized are ineligible for public health insurance, with the exception of emergency room care (Ku 2006; Portes et al. 2009). As a result, injured workers often must either pay for care out of pocket, or rely on community health clinics, which are often inconsistent in their ability to serve patients with occupational injuries. Lack of access to preventative medical care can be catastrophic, as it was for one worker suffered a lacerated finger. His delay in reporting and seeking medical care led to a costly amputation, which compelled him to file a report.

Throughout the Claim: Navigating the Bureaucracy and Negotiating Rights

Successfully filing a claim is only the beginning of a worker's quest to access medical treatment and compensation for their occupational injury. There are various gatekeepers in the workers' compensation system-including employers, insurers, medical experts, attorneys, and bureaucrats-which each have competing interests in the outcome of an injured workers' claim. For limited English speakers, and those with low levels of education and experience with U.S. bureaucracies, this can be a particularly daunting system to navigate.

Formally, there are several rights and services afforded to immigrant claimants trying to navigate the workers' compensation system in California. Undocumented immigrants in California have the right to get medical treatment and to receive temporary and permanent disability payments, regardless of their status. Claimants with limited English ability are also entitled to interpretation services and bilingual correspondence. However, these services are not automatic, and claimants must demand and pursue these resources. The detritus of paperwork and correspondence can grow

monumental across various insurance, medical, and government bureaucracies. I encountered professionals such as researchers, engineers, and even a former occupational health case manager who struggled to advocate for themselves. Low-wage, undocumented and limited-English proficient claimants struggled even more.

Once a workers' compensation claim has been set in motion, the first step is to confirm the cause of the occupational injury. While the fault of an injury has no bearing on a worker's ability to access benefits, insurers will scrutinize an injury to make sure it is work-related. This sectioning off of a claimant's occupational and general health can confound many injured workers. Orthopedic injuries are frequently attributed to past jobs, as are hernias and back pain. Long-term effects such as high blood pressure were also frequently deemed unrelated to occupational injuries. In particular, claimants were discouraged from "psych claims" as they were known, which are notoriously difficult to quantify and tie to a specific injury.

Treatment within the workers' compensation system relies on a series of medical specialists who can isolate the specific injury that a worker has experienced. Workers have the freedom to select a specialist from the insurer's "medical provider network." This selection is perhaps one of the most consequential decisions a claimant makes, however, selecting a favorable specialist from this list can be a shot in the dark without guidance. Workers I encountered were frequently sent to "jack in the box clinics," which deal almost exclusively with industrial patients, and which were frequently criticized by attorneys, state bureaucrats and injured workers alike for their lack of personalized attention and conservative disability assessments. One exasperated truck driver who had suffered a back injury was unable to get a determination of disability from his doctor at one of these facilities. Without this determination, his insurer refused treatment or compensation. ³⁴ Though his employer was sympathetic, there was little he could do to help.

A worker's more subjective experience of pain does not have inherent value in this system. Unless it translates into measurable physical or psychological impairment, it is not compensable. This can cause immense confusion for injured workers and their caregivers. For example, one hernia patient was told that because the pain could not be recorded on the MRI, it had no compensable value.³⁵ State bureaucrats standardize these physician evaluations, adjusting them by occupation and age according to the effect on a worker's "diminished future earning capacity." For undocumented workers in low-wage manual jobs, these assessments are modest at best.

Though even literate and English-speaking workers struggle to navigate this bureaucracy, those injured workers who do not speak English have an infinitely harder time. One claimant explained the challenges he faced communicating with his insurer, "Everything is in English ... If you don't have much to say, then I guess it doesn't matter ... but I do." This inability to challenge and negotiate insurance determinations can compound over time. For example, one housekeeper who had fallen and suffered various orthopedic impairments was left with only \$520 a month in her final compensation. Eventually, her insurer stopped approving her therapy and pain medications, citing extraordinary expense. After repeated phone calls and letters, she was unable to reach a Spanish-speaking adjuster for help getting treatment, and she was notified that her case would be closed within 10 days. She was counseled to obtain a private attorney, but warned that at this late stage of her claim, one would be difficult to find. This worker expressed helplessness and frustration at the adversarial nature of the claims process, which Lippel (2012) and others reiterate is exacerbated especially for women, and racialized and linguistic minorities.

Local attorneys can serve as important intermediaries in the workers' compensation system. They bring a wealth of knowledge of the legal and administrative bureaucracy, and they can also help workers select a specialist and navigate the insurance company. Attorneys can intervene if a doctor becomes uncommunicative with a claimant, and will do the administrative legwork to ensure that

records are being sent to the insurance company. An attorney is not required for any of these steps. "But it's very hard to do any of this," one attorney explained to me, "if you're not represented."

Nevertheless, attorney-client relationships can become strained and difficult for immigrant clients to navigate. Attorney compensation is typically limited to 15 percent of a final settlement, and some lawyers may deprioritize less profitable cases, or may avoid those that have a slim chance of success. Spanish-speaking claimants may also struggle to find an attorney with release," provides a lump sum payment informed by actuarial estimates to cover the estimate future costs of medical treatment and related compensation. In this arrangement, the injured worker has total discretion over the use of their funds, but no on-going access to medical treatment. If the two parties cannot come to an agreement, or an appeal is filed, in the final scenario, an administrative judge hears the case and decrees an award. An attorney can be indispensable to navigate each of these options and to appeal any decisions.

Once a worker has been declared "permanent and stationary," permanent disability payments provide meager assistance. I met one produce packer who had suffered a chemical burn in his eye, and whose employer refused to follow his doctor's restrictions. Two years after his original injury, he continued suffering pain and vision loss, and was eventually offered a final settlement of \$9,000 if he returned to work, or \$11,000 if he left the company. This worker came to the law center hoping to fight for more, but frustrated that his attorney remained unresponsive and that he was unable to find a second doctor to re-evaluate his disability level. Given his injury's "age" and "low value," he would be unlikely to find alternative representation and should try to continue working with his current attorney.

After having gone through scores of doctors, lawyers, and insurance representatives, depression was common among the workers I encountered, whose lives began to crumble. For one injured truck driver, disability led to unemployment, then family breakup, bankruptcy, foreclosure, and eventually

repossession. These long-term effects of injury are not always easily quantifiable. Many of these workers emerge from the workers' compensation system feeling disposable. Looking back on his experience, one disabled worker explained,

there are times that I feel [bad] ... after having done a job that is actually valued pretty well ... I have always worked, it would only take me two or three days to find another job. I could soldier anything, all kinds of metal. This [now injured hand] could work 7-8 hours without hurting, so I got a second job ... I never thought I wouldn't be able to [work].

Once working two jobs at a craft he loved, he is now unemployed and injured, and unsure of where to turn next.

Occupational injury can also impact how workers view themselves as providers and contributors to society. Workers who were juggling multiple jobs prior to their injury may struggle to compensate for the change. Some are able to rely on co-workers for help, as did one restaurant worker who after two hernias had to ask amicable co-workers for help with lifting heavy items. For others, returning to their original position is no longer an option, like the agricultural worker who was offered \$12,000 to close her case with no medical treatment, and who now seven years later is unable to work due to debilitating pain. Within this context, claimants struggled to come to terms with their future prospects as workers. The cultural stigma attached to disability poses a further challenge, as does the reality of losing a social identity as undocumented immigrant defined by hard labor. One particularly exhausted claimant explained, "I see my life in very dark terms. My doctor told me that I'm never going to be able to work the same as before ... that I will always have limitations." After a severe case of tendinitis and a ruptured rotator cuff, he is unable to return to the fields.

Many workers I encountered were devastated to find out that their employer was uninsured, a common occurrence in low-wage industries where immigrant labor is concentrated, and particularly

amongst Latinos (Nicholson et al. 2008). "Not knowing the system is hard enough, but not having an insurer is harder," lamented the state information and assistance officer. This was the case for one injured berry picker who spent months going between a doctor and physical therapist before she found out that her employer was uninsured.⁴⁶ Uninsured employer cases account for a quarter of all the workers served by this legal aid center's law clinic (CHSWC 2007). In California, injured workers whose employers are uninsured may be covered under the Uninsured Employers Benefit Trust Fund (UEBTF). However, the state's current fiscal crisis has drastically reduced the funds available through this program, along with reduced staffing and outreach capacity. In the fiscal year 2009-10, this fund paid out over \$38.6 million in primary uninsured claim costs (DWC 2012b), and another \$20 million in subsequent injuries (DWC 2012a).

Once a claim has ended or stalled, workers have limited options in the United States for accessing health care and maintaining an income. Unemployment payments provide meager assistance for workers, and since they are based on previous earnings quarters, may be unavailable for workers who cannot demonstrate reportable employment income. Seasonal workers and those in the informal economy are at a particular disadvantage. Options for undocumented workers are even more constrained. Undocumented workers are barred from receiving unemployment insurance altogether. If an undocumented worker has contributed to state disability account with the use of a false social security number, they may still apply for these funds, but are counseled to proceed cautiously. Despite high rates of tax payment (Lipman 2006), undocumented workers generally have no access to federal programs such as Medicare/Medicaid, Old-Age and Disability Social Security. In sum, undocumented workers' near-complete disenfranchisement from the welfare state renders leaves them with few options.

Conclusion

Throughout this chapter, I have examined the experiences of a predominantly Latino immigrant sample of low-wage workers' compensation claimants. I offer a critical lens that expands our understanding of the barriers associated with claims-making, and the structural and institutional dimensions of a claim. Rather than see the end-point of claims-making as the moment when an individual first mobilizes their rights, I argue that claims-making may be in fact a recurring process that workers have to re-engage continuously. For low-wage, non-English-speaking and undocumented immigrants, this process can be very challenging.

Through the example of workers' compensation—a privatized arm of the U.S. welfare state and a key bureaucracy governing workers' occupational and health rights—I examine the array of gatekeepers that shape the process of claims-making for undocumented workers. I focus on three stages of the workers' compensation claim where socioeconomic status, language, and legal status can pose intersecting challenges for injured workers: their structural position within the labor market, the ability to navigate the institutional rules and logic of benefits within the workers' compensation system, and access to the welfare state following disability.

Despite many attacks on labor rights and the welfare state from anti-labor interests, and even following a series of major reforms in 2004, workers' compensation continues to enjoy persistent support from employers. One explanation, McCluskey (2003) argues, is that employers and insurers see the central "no-fault" principle as an "economically efficient bargain," compared to the morally inferior one-way transfer of other forms of social welfare (p. 849). Consistent with Shklar's classic theory of American citizenship, workers' compensation rests on an understanding of wage work as a means to full membership in society, and views workers as rational agents who have earned these benefits, rather than receive them through charity (Shklar 1991; McCluskey 2003). Perhaps this is why the formal

provision of workers' compensation benefits to undocumented workers—who are valued solely for their economic function—has faced little debate.

Nonetheless, undocumented status plays an important, though often latent role throughout the workers' compensation process, just as critical race scholars have described the function of race. On the surface, undocumented status poses few instrumental barriers, perhaps because undocumented workers have nearly full access to workers' compensation benefits, state regulatory agencies are committed to enforcing their rights, and there are many legal aid centers available to help them. To be sure, undocumented status was rarely discussed as a barrier amongst the advocates I interviewed, nor did it emerge as a major concern during the legal advising sessions I attended.

Yet, upon closer investigation, undocumented status intersects with every element of the workers' compensation process. Undocumented injured workers are in a precarious position vis-a-vis the labor market, though they enjoy many workplace rights. All low-wage workers I encountered had some level of ambivalence about how their claim would impact their job security, and their ability to get another job. However, for undocumented workers this fear was multiplied, and limited English ability further accentuated challenges of low-wage work and injury.

Future research must continue to take up the empirical challenge of examining the function of these immigrant characteristics not only in arenas where immigrant worker rights are restricted, but also in permissive rights regimes that are inevitably impacted by the broader context of immigration enforcement. Undocumented status, I have argued, is not simply an instrumental characteristic that blocks individuals from accessing rights, but it is also collinear with a whole host of additional stratifying characteristics that should be examined in the context of specific institutional arenas, and throughout the overlapping policy regimes they intersect.

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Notes

1. All names in this article have been changed to preserve the anonymity of respondents.
2. Nonprofit workers compensation legal clinic, 2/24/11.
3. Specifically, Rathod outlines five factors that should also be considered alongside immigration status:
1) economic status and economic security, 2) language ability and literacy, 3) traditional and workplace culture, 4) gender, age and experience, and 5) worker resistance and autonomy.
4. With some very important exceptions (e.g. Saucedo 2009, Garcia 2012), the experiences of undocumented Latino workers remain under-explored in LatCrit.
5. Haney Lopez (2000) provides two guiding concepts: "racial institutions"-which he defines as "any understanding of race that has come to be so widely shared within a community that it operates as an unexamined cognitive resource for understanding one's self, others, and the-way-the-world-is" (1809), and "institutional racism;" which includes any "action influenced by racial institution" that in turn produces racial status harms (1811).
6. For example, California courts have ruled that undocumented workers are precluded from receiving vocational rehabilitation benefits (Yoon et al. 2013)
7. Like other "no-fault" insurance systems, workers' compensation removed the often costly need to disentangle the exact allocation of personal responsibility, liability, and blame (Schmidtz and Goodin 1998). However, critics argue that the development of this no-fault principle ultimately also came to represent "symbolically and politically a denial of responsibility of employers to prevent occupational injury" (Stone 1984, quoted in Spieler 1994, p. 1972).
8. California Labor Code Section 132a prohibits discrimination on the basis of a workers' compensation claim.

9. With the exception of workers in Montana, "employees without a written employment contract generally can be fired for good cause, bad cause, or no cause at all" (Muhl 2001; NCSL 2012). With less than 8 percent of private sector workers currently covered by a union contract, and even lower levels in growing industries such as retail (5.5), accommodation and food services (2.5), and agriculture (2.5), most low-wage workers, and nearly all undocumented workers, in the United States have little job security (Hirsch and Macpherson 2012).

10. Workers' compensation premiums are indexed to firm size, the level of risk workers are required to engage in, and an employer's safety track record (Harrington and Danzon 2000).

11. Schmidt (1980) describes the creation of workers' compensation in the United States as the end result "of a massive and violent struggle between labor and capital in the late nineteenth century, and an ensuing effort by the business class to coopt, institutionalize, and bureaucratize this militancy" (p. 46). In fact at the turn of the twentieth century when workers' compensation mechanisms were being legislated, business groups were "distressed by the unpredictability and expense of injury-related litigation;" and along with progressive intellectuals and middle-class reformers, were strong supporters of pending reforms (Hacker and Pierson 2002, p. 290).

12. This process becomes high-stakes, and is compounded by the fact that low-wage workers also often do not have access to private health coverage, leading them often to rely heavily on the (more expensive) services provided by the workers' compensation system (Baker and Krueger 1993).

13. Similarly, the lives of welfare beneficiaries are often organized by a regime of legal rules invoked by officials who claim jurisdiction over the choices and decisions of welfare beneficiaries, but which individuals not on welfare would regard as personal and private (Sarat 1990, p. 344). The end result is an incredibly intrusive system of surveillance and discipline of the private lives of claimants (Gilliom 2001; Munger 2003).

14. In California, if a worker does not agree with their evaluator's assessment, there are provisions for appeal and getting a second opinion from a "qualified medical examiner" (QME), but this process can be tedious and time-consuming, and an attorney can be crucial for identifying promising versus problematic QMEs.

15. "Phantom rights" emerge not simply from a worker's 'legal acumen', but also the very "complicated and inaccessible legal regime that superficially promises more than it delivers" (Eliasoph 2008, 200). Similarly, in this research I found that many of the claimants who came to the legal clinic had overly optimistic expectations of their legal rights.

16. California is one of 13 states that do not exempt agricultural employers from providing workers' compensation coverage (Sengupta et al. 2012).

17. An estimated 9 percent of California workers are undocumented, as are 8.2 percent of the residents in the county where I conducted this research (Hill and Johnson 2011).

18. This center does not rely on federal Legal Services Corporation funds (LSC 2006), and as a result is able to serve workers without regard to their legal status.

19. www.scpr.org/blogs/politics/2013/02/26/12698/farmers-tell-congress-immigration-reform-means-tern/

20. Nonprofit workers' compensation legal clinic, 2/9/12.

21. Injured Worker Workshop, Division of Workers' Compensation, 12/11/08.

22. Nonprofit workers' compensation legal clinic, 11/18/10.

23. Injured Worker Workshop, Division of Workers' Compensation, 11/17/09.

24. Nonprofit workers' compensation legal clinic, 1/13/11.

25. Nonprofit workers' compensation legal clinic, 3/8/12.
26. Nonprofit workers' compensation legal clinic, 11/18/10.
27. Nonprofit workers' compensation legal clinic, 1/13/11.
28. Though the public perception is that unauthorized immigrants rely overwhelmingly on emergency room care, studies have confirmed that in fact immigrants are much less likely to use emergency rooms than native-born citizens (Cunningham 2006).
29. It was also not uncommon for workers to be billed by emergency rooms they had visited as a last resort. With few resources to navigate an insurer's reimbursement system, which discourages treatment from out-of-network providers, many clinics were simply unable to help patients.
30. Nonprofit workers' compensation legal clinic, 9/22/11.
31. Nonprofit workers' compensation legal clinic, 11/10/11.
32. Injured Worker Workshop, Division of Workers' Compensation, 6/11/09.
33. Interview, Division of Workers' Compensation, 5/8/09.
34. Nonprofit workers' compensation legal clinic, 9/22/ 11.
35. Injured Worker Workshop, Division of Workers' Compensation, 4/16/09.
36. Nonprofit workers' compensation legal clinic, 11/10/ 11.
37. Nonprofit workers' compensation legal clinic, 3/8/12.
38. Nonprofit workers' compensation legal clinic, 9/12/12.
39. Nonprofit workers' compensation legal clinic, 12/8/11.
40. Nonprofit workers' compensation legal clinic, 2/10/11.

41. Injured Worker Workshop, Division of Workers' Compensation, 2/19/09.

42. Injured Worker Workshop, Division of Workers' Compensation, 6/11/09.

43. Nonprofit workers' compensation legal clinic, 2/23/12.

44. Nonprofit workers' compensation legal clinic, 2/10/11.

45. Injured Worker Workshop, Division of Workers' Compensation, 3/6/12.

46. Nonprofit workers' compensation legal clinic, 2/23/12.

47. FY 2009-10 represented over 1,500 distinct cases, including over 200 occupational categories, the top three classes of workers included sales clerk (30), cook (38), construction (38), truck driver (101) and laborer (651) (DWC 2010).

48. Injured Worker Workshop, Division of Workers' Compensation, 2/9/09, 5/8/09.

49. These reforms vastly limited vocational rehabilitation benefits and limited many forms of medical treatment such as physical therapy. The 2012 California Senate Bill 863 instituted further sweeping reforms, including removing coverage for several mental health problems.

www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_863&sess=CUR&house=B&author=de_le%F3n