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C. DAVOLI
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RUTGERS LAW SCHOOL SYMPOSIUM WORKERS' COMPENSATION IN THE 21ST CENTURY DEMISE OF THE GRAND BARGAIN - ?

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(Practitioners perspective - Workplace Injury Law & Advocacy Group (WILG)[1]

CHALLENGES OF THE CHANGING LEGAL STRUCTURE OF WORKERS' COMPENSATION AND THE CHANGING WORKFORCE:

Not much can be added to Emily Spieler's excellent and very thorough symposium 'Issue Paper' providing a historical and legal overview of developments in state workers' compensation systems. Her historical review and summary of current issues confronting the Nation's state systems should be required reading for every workers' compensation practitioner concerned about the current 'death spiral' of the century old "Grand Bargain". Whether such a system of social insurance survives in the 21st century or continues its decline and eventual demise, in substantial part, depends on the adaptability and resilience of the current $98 billion dollar workers' compensation industry that has allegedly evolved.[2] Notwithstanding rhetoric often espoused that the principle mission of the "industry" is the welfare and best interests of the injured worker, reality experienced from battles in the trenches over ever-eroding benefits amidst ever-increasing and more onerous administrative and dispute resolution proceedings, when coupled with increasing medical and

[1] WILG Supplemental Report & Commentary to*" The Status of Workers' Compensation in the United States-Revisiting the Grand Bargain",* A Special Report, January 2016.

[2] Noted from media coverage of the 2016 National Workers' Compensation Convention & Expo in Dallas, Tx. The "Industry" is described as a composition and assortment of medical treatment providers and suppliers, physical and mental therapists, medical utilization review services, employer risk managers and claims adjusting services including TPA's, insurance vendors, medical bill review companies, vocational rehabilitation and medical case management services, investigative and surveillance services, financial management and annuity companies, MSA/CMS assessment services, life-care planners, state and local governmental agencies, attorneys for both defense and claimant's along with paralegals, training services, etc.

employer costs in many states, makes a more compelling argument supporting a higher priority for survival and profitability of the "industry" rather than the welfare of injured workers and their families. The fact is that workers' comp insurance is still the second most profitable line of insurance next to auto liability insurance, and neither the insurance market nor industry are likely to surrender and roll over to eagerly accommodate a cheaper and more efficient scheme of covering liability to employers and employees for work related injuries and occupational diseases.

From a social and political policy perspective, two fundamental building blocks conceiving worker's compensation via the "grand bargain" should still be relevant today: (1) the system as an alternative to a tort and fault based system for recovery from work-related injuries, on balance, is more humanitarian and potentially more expeditious, and, theoretically, still economically feasible in spreading the risk among employers as a cost of managing employee injuries inherent in any business, with the added incentive of encouraging a safer workplace to mitigate the cost of injuries and workers' comp.; and (2) workers' compensation is essentially a private sector liability, with cost of the system borne by employers and not shifted to the public sector.[3]

Unfortunately the morality and humanitarian intent of workers' compensation has politically evaporated, in part, by a number of factors, including: the insurance industry's persistent and methodical demonization of injured workers encouraging a public perception of injured workers as second class citizens who embellish their disability for unwarranted financial gain; by employers who prioritize business profit over employee safety and welfare; and, by administrative bureaucracies and political systems that inhibit equal justice and fair dealings by not providing adequate benefit provisions, impartial oversight, nor efficient dispute resolution systems. One good example of political apathy insensitive to the morality underpinnings of workers' compensation was the State of Connecticut's rejection of adding PTSD as a compensable employee injury following the horrific Sandy Hook Elementary School incident. Another example, is the West Texas fertilizer plant fire and explosion that caused ten fatalities, including first responders; however, despite the employee fatalities and destruction of a neighboring community, the non-insured (non-

[3] "The American workers' compensation system is distinguishable from public social insurance in it essentially private nature…and its mechanism of unilateral employer liability.." Larson, *WC Law*, Sec 3.

subscriber) fertilizer plant merely surrendered their million dollar liability policy, declared bankruptcy, and slithered away from their liability to those workers killed and injured in the incident.

Notwithstanding the realistic irrelevance of the humanitarian and social justice objective in today's workers' compensation schemes, the most significant development in policy and practice in the past two and half decades has been the cost-shift of liability from employer's to the public sector. Obviously, the most egregious example of cost-shift is in the state of Texas, the only state where workers' compensation is not compulsory for all employers, where 38% or 119,000 employers are so-called "non-subscribers" resulting in nearly 500,000 employees covered neither by workers compensation nor health insurance for work-related injuries.[4] Texas non-subscriber employers (including Wal-Mart) employ and estimated 1.9 million workers. Furthermore, the significance of the cost-shift issue has been acknowledged by OSHA, who concluded in their analysis reported in March 2015 that employers today are only covering 21% of costs for workers' injuries.[5]

Regardless of the 26 year old non-subscriber cost-shift model in Texas, that state has not been deterred by significant tort judgments against employers, nor influenced by the estimates that the cost-shift of medical expenses alone in Texas is nearly $400 to $600 million annually.[6] Further evidence that Texas is entrenched in support of their non-subscriber cost-shift model, was the recent decision by the Texas Supreme Court in *Austin v. Kroger Texas, LP, 465 S.W. 3d 193 (Tx 2015*) holding that a defense similar to assumption of risk with employers having no duty to warn of "open and obvious" dangers at work was valid in cases of non-subscriber tort liability. Thus, contrary to Emiliy Spieler's admonition "As long as tort immunity is strong, the Grand Bargain is alive and well"[7], Texas employers have not been restrained by risk of injured employee liability by embracing a fault-based system; especially larger employers, like Wal-Mart, who apparently have assessed the financial risks of tort liability against the costs of a workers' compensation benefit

[4] Source – Texas Commissioner of Insurance.
[5] OSHA – *"The Costs of Failing to Protect Workers on the Job*", March 2015, p.6.
[6] Property Casualty Insurers (PCI) Report – *"Cost Shifting from Workers Compensation Opt-Out Systems: Lessons from Texas and Oklahoma*" June 6, 2016
[7] Emily Spieler , Rutgers Symposium Issue Paper "Work Injury and Compensation in Context, 1900-2016", September 23, 2016.

system, regardless of the impact those work injuries may have on their employees or the cost-shift to Texas taxpayers.

While recent attempts have been made to replicate the Texas employer-cost-shift model in other states, primarily through so-called "opt-out" legislative initiatives in Oklahoma, South Carolina, Tennessee, and has been discussed in Georgia, North Carolina, Alabama, Kansas, N. Dakota , and other states, to date, all attempts to adopt a modified non-subscriber/out-out/cost-shift model, while at the same time retaining exclusivity/tort immunity, have been legislatively rejected or ruled unconstitutional primarily on equal protection grounds. The most recent decision was Oklahoma's ruling in *Vasquez v. Dillard's* ruling the entire "opt-out" scheme was unconstitutional because it gave employers the ability to provide inequitable treatment for injured workers.[8] However, as a prospect of further legislative response, the court in *Vasquez* did acknowledge *"This court has long recognized that the protection of employees from the hazards of their employment is a proper subject for legislative action….The legislature, in exercising such power, is free to eliminate the workers' compensation system entirely, abolish exclusive remedy protections for employers, and leave workplace injury claims to the courts. However, the legislature is not free to substantially reduce benefits for some injured workers under the guise of an "opt-out" system and force such injured workers to remain within the system through the use of exclusive remedy"*.[9] In short, you can't have it both ways.

As we have seen reiterated in recent state supreme court decisions, the constitutional lynchpin of American workers' compensation systems hinges on the fundamental principle of the "Grand Bargain" that requires "significant….and reasonable…" employee benefits in exchange for employer immunity and exclusivity of workers' comp. as the sole remedy for an employer's fault or negligence.[10] That same principle was embraced by the 1970 Federal OSHA Act, which recognized the necessity of "adequate, prompt, and equitable systems of workers'

[8] *Jonnie Yvonne Vasquezz v. Dillard's Inc*, 216 OK 89, Sept. 13, 2016.

[9] Concurring pinion conclusion by Justice Colbert, *Dillard's Inc. v. Johnnie Vasquez and the Workers' Compensation Commission, 2016 OK 89, pp. 26-27.*

[10] …the use of workers' compensation laws in place of constitutionally guaranteed tort remedies, must provide "significant" benefits and any substitute considerations must provide a "reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise…", *New York Central v. White, 243 US 188, 37 S.Ct.247, 61 L.Ed.667 (1917).*

compensation…"[11] while also providing for a Federal initiative to establish minimum state benefit and statutory schemes later articulated in the recommendations of the 1972 President's (Nixon) Commission on State Workers' Compensation Laws.

While the '72 Commission had short term success in achieving some relative consensus of benefit levels and administrative statutory schemes in the states, during President Reagan's term, a little over a decade later, the US Department of Labor was stripped of their capacity to monitor and track state compliance with the Commission's recommendations. Whether by design or coincidental to the absence of Federal reporting and oversight, from the mid-80's to now there has been a methodical 'corrosion'[12] of state workers' compensation benefits and an assortment of administrative schemes enacted in the states described as the so-called "race to the bottom".

In addition to replicating benefit reductions and tightening benefit eligibility from state to state, in every state now, except Alabama, workers' compensation administration and quasi-judicial dispute resolution are handled under Executive Branches of state governments. In effect, in many states, such an administrative arrangement sets up a 'fox guarding the chicken house' type scenario in terms of assuring judicial and constitutional due process. As a result, the impartiality and independence of politically appointed workers' compensation hearing officers and/or commissioners has frequently been questioned. Imposition of executive branch administrative rule making is often politically motivated, usually to sidestep legislative and judicial oversight to dictate bureaucratic dispute resolution procedures, application of arbitrary disability impairment guides, conservative medical treatment guidelines and medical utilization rules and drug formularies, arbitrary medical fee schedules, and procedural hearing rules of evidence often inconsistent with requirements of constitutional due process. An injured worker's

[11] "…the vast majority of American workers, and their families, are dependent on workers' compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that full protection of American workers from job-related injury or death requires adequate, prompt, and equitable systems of workers' compensation as well as an effective program of occupational health and safety regulation…" 1970 OSHA Act.

[12] "Corrosion" is more appropriate term describing the methodical and intentional depletion of benefits over time, since diminished benefits and constitutional breeches have been caused by unnatural forces, rather than simply "eroded" over time.

access to medical providers and attorney involvement are discouraged and inhibited with restraints of choice and unreasonable fees for services. Long-standing principles of "take your victim as you find him" have been mitigated by the enactment of 'primary contributing' causation rules that eliminate a work accidents aggravation or exacerbation of pre-existing medical conditions. Further, co-morbidity factors rather than the work accident are now the prevailing focus explaining an injured workers continuing disability.

In short, employee benefit systems are no longer swift, predictable, nor adequate. As a result of developments over the past two decades in the so-called "race to the bottom" of benefit and statutory schemes, some state constitutional challenges have begun to revisit the fundamental intent of workers compensation and are beginning to define what constitutes "reasonable" and "adequate" as intended and agreed to in the "Grand Bargain". Much of these constitutional challenges are discussed in Professor Spieler's symposium issue paper. However, of particular note are recent cases of *Castellanos , Westphall*. and *Stahl (progeny of Padgett)* in Florida, and *Injured Workers Association of Utah v. State of Utah*, *Rodriquez* in New Mexico, and *Reinhart* in Oklahoma.

In Florida, the same fundamental issue of 'adequacy' and equal protection raised in *Vasquez*, is the essence of the case of *Daniel Stahl v. Hialeah Hospital.*[13] However, *Stahl* goes one step further (like *Padgett*[14]) by challenging the entire constitutionality of Florida's workers' compensation system which had repealed in 1990 employee 'opt-out' options and enacted exclusivity, and subsequently methodically cut benefits for two decades including enacting attorney fee restrictions. Despite originally accepting review of a lower appellate court's rejection of *Stahl's* arguments , the Florida Supreme Court unanimously decided not to review the case, which has now been petitioned to the U.S. Supreme Court.[15]

In *Castellanos*[16], Florida ruled the attorney fee schedule passed in 2009 is invalid because it eliminates the right of a claimant to get a reasonable attorney's fee, a right

[13] *Daniel Stahl v. Hialeah Hospital, et.al., FL SC 15-25, Review Dismissed April 28, 2016*.
[14] *Padgett v. State of Florida, 11thJCC-Miami/Dade, 11-13661 CA 25, August 14, 2014*.
[15] *Daniel Stahl v. Hialeah Hospital, et.akl.,SCOTUS docketed July 21, 2016. FL 1stDCA-1D14-3077, March 25, 2015*. [Note: WILG – Amicus Curiaie Filed August 16, 2016].
[16] *Marvin Castellanos v. Next Door Co., et.al. (FL SC 13-2082, April 28, 2016) 5--2 decision*.

the court said is a "critical feature" of the workers' compensation law. In effect, the fee limitation violates due process by installing an "irrebuttable presumption" that whatever fee the schedule comes up with is reasonable and by not providing any way for a claimant to refute the fee. The court added interesting commentary, "in reality the system has become increasingly complex to the detriment of the claimant who depends on the assistance of a competent attorney to navigate the thicket…". Further, without the right to an attorney who can earn a reasonable fee, the workers' compensation system can no longer "assure the quick and efficient delivery of disability and medical benefits to an injured worker".

Utah's Supreme Court constitutional repeal of that state's attorney fee restrictions was not based on a due process argument, but on the separation of powers doctrine establishing constitutional powers vested in their Judicial Branch of government. In Utah, the Supreme Court is vested with exclusive authority and jurisdiction to regulate the practice of law, which includes authority to regulate attorney fees. However, rather than establish a reasonable fee schedule, the court opted to allow attorneys and their clients latitude to determine the fee basis, wherein they stated "…we are persuaded at this time that the absence of a fee schedule will allow injured workers the flexibility to negotiate appropriate fees with their attorneys…fears about unscrupulous attorneys preying upon unsophisticated injured workers are exaggerated, as attorneys are still constrained by rules of professional conduct".[17]

In *Westphal* , the Florida Supreme Court directly addressed the issue of adequacy of benefits, by declaring the 104 week cap on TTD indemnity and restricting scheduled PPD awards thereafter until MMI is reached, as an unconstitutional "gap" in the Act's benefit provisions that is "not merely unfair, but is fundamentally and manifestly unjust". Based on the principle of constitutional revival of the last constitutionally valid version of the Act in 1991, the court then set a new max TTD of 260 weeks.[18]

Other recent state constitutional rulings affecting benefit limits and exemptions may be noted in *Rodriquez* and *Reinert*. In the *Rodriquez* ruling in New Mexico, the state supreme court held that the 100 year old employee exemptions for the class of farm

[17] *Injured Workers Association Of Utah v. State of Utah, (SC 2016 UT 21, May 18, 2016).*
[18] *Westphal v. City of St Peterburg (FL SC 13-1930, SC 13-1976, June 9, 2016).*

laborers and dairy farmers was unconstitutional, based on equal protection and due process grounds.[19] In Oklahoma, the Workers' Compensation Commission ruled as unconstitutional allowing deductions from medical and indemnity benefit awards for the costs of vocational rehabilitation and retraining, as the taking of a property right (award) without due process.[20] Both of these cases have implications to other states with similar benefit restrictions or provisions.

REASONABLE ALTERNATIVES TO WORKERS' COMPENSATION?

Whether the Grand Bargain and state workers' compensation systems have fulfilled their purpose and objectives may be moot as we adapt to 21st century employer and employee needs. Alternative benefit programs and new alternative insurance options not envisioned nor available a century ago could be modified to accommodate to a new system of benefits. The principles of a system providing for 'social justice' at the sole cost of employers may no longer be economically feasible nor desired by either business or labor, nor essential to the economic well being of the public at large. For example, one current proposal in Colorado providing for a constitutional amendment (Proposition 69) would install a system of universal health care; thus, negating disparity between work and non-work medical care needs or separate systems of health care to accommodate work accidents and occupational diseases. Perhaps such a 24-7 occupational health care plan is feasible as a replacement to our current workers' compensation model; especially, if coupled with an employer financed STD/LTD indemnity wage replacement benefit plan, which would remain in force as necessary even after termination of employment (?). However, the questions of who and how such a system would be financed, and whether such a system would displace a citizens constitutional right of redress for an employer's fault for work injuries and damages remains unclear.

Charles R. Davoli, esq
Louisiana Workers Advocate
For WILG – Workplace Injury Law & Advocacy Group

[19] *Rodriquez v. Brand West Dairy (2016 NM Lexis 150, June 30, 2016).*
[20] *Luke Reinert v. Harsco Corp*., OK Workers'Compensation Commision, CM2014-09799A