Lex and Verum

The National Association of Workers' Compensation Judiciary

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The State of the Association

By Hon. Michael Alvey*

First, I would like to convey what an honor and privilege it is to serve as president of the NAWCJ. Next, thanks cannot begin to cover the contributions of Hon. David Torrey, of the Commonwealth of Pennsylvania, for all of his efforts and accomplishments during his tenure as president. In addition to Dave's prolific writing and contributions to *Lex & Verum*, his timeless efforts on behalf of our organization are greatly appreciated. During Dave's tenure, the NAWCJ has participated in numerous national forums including the ABA Torts & Insurance practice section and the IAIABC, as well as being involved with training the new ALJs in Tennessee last year. Thanks again Dave for a job well done.

I would also like to express thanks and gratitude to John Lazzara, Ellen Lorenzen, Bob Cohen and especially Dave Langham. The tireless efforts of these individuals are greatly appreciated and have provided the cornerstone for our organization. Again, thanks for a job well done.

As I left the conference in August 2014 in Orlando, I was struck by the excitement among the attendees, not only for the program presented, but also for the opportunity to network with other jurisdictions and to be involved. Subsequently I developed nine committees and reached out to numerous adjudicators to become involved. Those committees and their chairs consist of the following:

1. Long-range Planning– Judge Jennifer Hopens, Texas
2. Curriculum– Judge Dave Langham, Florida
3. Conference– Judge Jane Rice Williams, Kentucky
4. Parliamentary– Chief Deputy Commissioner Jim Szablewicz, Virginia
5. Scholarship– Judge Ellen Lorenzen, Florida

Continued, Page 2.

State of the Association, from page 1.

6. Newsletter/*Lex & Verum*-Judge Luann Haley, Arizona
7. Website–Judge David Torrey, Pennsylvania
8. Moot Court-Judge Tom Sculco, Florida
9. Recruitment–Commissioner Roger Williams, Virginia

Thanks to all for your willingness to serve and for those who have agreed to serve on these committees.

If you were not contacted to serve on a committee and wish to do so, please contact me at (270) 687-7337 or Michael.alvey@ky.gov. Your assistance is welcome and greatly appreciated.

I look forward to serving you. If you have any thoughts as to how to improve the organization – please let me know. If you have constructive criticism, that is welcome as well. Again, I appreciate everyone's efforts, and thanks for all you do.

Teams and Judges Sought for Moot Court 2015

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Teams and judges are being recruited for August 2015. If you will be at the Judiciary College in August and would like to judge, or if you know of a moot court team contact Barbara Wagner, barbw@sportsinjurylaw.com.

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A Creative Approach to Workers' Comp

By Hon. J. Joseph Grady*

The second day of June 1915, almost 100 years ago, the Pennsylvania Workers' Compensation Act was born. Many milestones followed. Today the workers' compensation system protects both workers and employers, enabling them to thrive and prosper in Pennsylvania.

Now indeed is a good time to pause at that century mark and look at one of those milestones, namely, mediation. Its success in large part can be traced to *all* of the workers' compensation judges whose dedication and commitment to mediation embodies the definition of "creativity in the law."

Creativity can be defined as the ability to make new things or think of new ideas. In the early 1990s, I was fortunate to be among a handful of judges who realized that the time had come when a common need in workers' compensation compelled action. Conventional wisdom at the time suggested that as judges we hear and decide cases litigated in front of us. The common need was mediation. But workers' compensation had no system in place for mediation to meet the needs of the changing times.

So the call went out. An important first step included the cooperation of the workers' compensation bar and the Commonwealth's Bureau of Workers' Compensation and all of its judges. Early on several judges began mediating each other's cases. More and more judges followed. Soon we all realized that mediation was resonating with the parties and their counsel.

In 1996, when the Workers' Compensation Office of Adjudication was created, a place for voluntary mediation was found under the Workers' Compensation Act. Then, in 2006, mandatory mediation was created. No easy task. This requires mediation in *all cases* unless there is a finding that attempting mediation would be futile. A proper place for mediation was, however, assured.

Mediation has worked well because mediation is a creative process. There is no right or wrong way to do it. Much depends on your audience. Looking back, some judges never intended to be mediators. But here and there we all received instruction and, as good students, began to apply that new knowledge practically. And, as experienced adjudicators, we relied much on our own instincts, keeping it simple and approaching each mediation with a gentle touch. We helped people think differently. We listened hard. We proceeded with patience. Lots of patience.

Today we remain creative, recognizing that some days we need only remain bystanders. Allow the parties enough time to talk and many will resolve their own cases. Equal parts judges, mediators, philosophers, teachers, we allow ourselves to listen to and learn from those who appear in front of us as much as they listen to and learn from us.

And we will continue to stay creative by remaining positive, by never failing to show respect for the opinions and feelings of those before us. Mediation is a sacred place. The parties want to tell their stories. They have extraordinary decisions to make and we will continue to help them make those decisions. Mediation works. Each day new stories, new ideas and new resolutions.

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* Judge Grady is a Workers' Compensation Judge in the Scranton office of the Workers' Compensation Office of Adjudication, Commonwealth of Pennsylvania, where he decides cases from a five-county area of northeastern Pennsylvania.

Continued, Page 4.

New Officers and Board Take the Reins, from page 3.

He is a member of both the Pennsylvania and New Jersey Bar Associations and has served as a workers' compensation judge since 1992. Judge Grady is a graduate of the University of Scranton and Seton Hall University School of Law. Prior to becoming a workers' compensation judge in 1992, his law practice was limited to representing local and nationally known employers, insurance companies and third-party administrators in the area of workers' compensation in northeastern Pennsylvania. Throughout his professional career, Judge Grady has served as an officer and director of many charitable, civic and religious organizations. He currently serves as a member of the Board of Directors of the Lackawanna Bar Association and is the current chairman of its Mediation Committee. Judge Grady now serves as a member of the Board of Directors of both The Parents of Down Syndrome of Lackawanna County and Saint Joseph's Center in Scranton. He is also a member of the Exceptional Children's Committee of the Pennsylvania Bar Association. Over the past two decades, Judge Grady has served as president of a variety of community and legal organizations including, the Lackawanna Bar Association, Young Lawyers' Division of the Lackawanna Bar Association and Family Service of Lackawanna County. In addition, he served as board member of Lackawanna Pro Bono, Inc.

The Winter of our Discontent in Texas

By Hon. Jennifer Hopens*

Now is the winter of our discontent here in Texas – at least so far as college football goes. As I type this, the exclusion of Baylor and TCU from a berth in the NCAA college football championship playoffs continues to be a source of frustration, consternation, and downright befuddlement. Undoubtedly, athletics are a vital part of the life and spirit of this region – from the rites of pre-K T-Ball/Kickball games, Pop Warner football, Little League Baseball/Softball and the "Friday Night Lights" to the fandom associated with the collegiate and professional fields of play.

Unsurprisingly, against this backdrop, there are a number of professional sports franchises in Texas. Texas Labor Code Section 406.095 addresses workers' compensation coverage for "certain" professional athletes, particularly those employed by the following organizations – the National Football League, the National Basketball Association, the American League of Professional Baseball Clubs, the National League of Professional Baseball Clubs, the International Hockey League, the National Hockey League, or the Central Hockey League. *See* Texas Labor Code Section 406.095, subsection (c).

As it relates to injuries of professional athletes covered under Section 406.095, the Texas Labor Code provides as follows at subsection (a) of that statutory section –

> A professional athlete employed under a contract for hire or a collective bargaining agreement who is entitled to benefits for medical care and weekly benefits that are equal to or greater than the benefits provided under this subtitle may not receive benefits under this subtitle and the equivalent benefits under the contract or collective bargaining agreement. An athlete covered by such a contract or agreement who sustains an injury in the course and scope of the athlete's employment shall elect to receive either the benefits available under this subtitle or the benefits under the contract or agreement.

In my nearly eight years as a hearing officer for the Texas Department of Insurance, Division of Workers' Compensation, I have heard only a couple of cases involving injured professional athletes. I thought I would share one of those cases, which I found to be quite interesting. The athlete in this case had sustained a compensable injury, and this injury resulted in multiple surgeries. The franchise released the athlete from his contract not long after the injury event. The athlete did not play professional sports after the termination of his contract, but he had earnings from another business endeavor.

Continued, Page 5.

The Winter of our Discontent in Texas, from page 3.

The evidence reflected that the athlete's earnings from this enterprise were less than the equivalent of his pre-injury average weekly wage.

The Appeals Panel (AP) is the reviewing and decision-making body with jurisdiction over appeals of contested case hearing decisions and orders in workers' compensation indemnity disputes in Texas. The AP has held that, to establish disability, an injured employee need only prove that the compensable injury is a cause of the inability to earn the pre-injury wage, not the sole cause of that inability. Texas Workers' Compensation Commission Appeal No. 960054, decided February 21, 1996. While there was some conflicting evidence in my case indicating that the termination of the athlete's contract and his choice of post-injury career were causes of his inability to earn the equivalent of his pre-injury wage during the period in dispute, I found in the athlete's favor on the disability issue. I determined that the preponderance of the evidence presented established that the compensable injury, which effectively ended the athlete's professional sports career, was *a* cause of his disability during the time frame in dispute.

In closing, in the words of the ever-quotable Yankee legend Yogi Berra, "[i]t ain't over till it's over." My decision and order in the referenced case was affirmed by the AP and not appealed into district court. For purposes of Texas workers' compensation dispute resolution, it's over.

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*Jennifer Hopens (TX) is President-Elect of the NAWCJ. She received her undergraduate and law degrees from the University of Texas at Austin. She was licensed to practice law in Texas in 2002. In 2007, she joined the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) as a Hearing Officer. She has traveled extensively for the Division, holding contested case hearings in workers' compensation matters in the Austin, Beaumont, Bryan/College Station, Corpus Christi, Dallas, Fort Worth, Lufkin, Missouri City, Houston East, Houston West, San Antonio, Uvalde, Victoria, and El Paso Field Offices of TDI-DWC. She attended the Judicial College of the National Association of Workers' Compensation Judiciary (NAWCJ) in Orlando, Florida each year 2009-2014. In 2010, she was chosen to serve on the NAWCJ Board of Directors. She was previously a Hearing Officer for the Texas Workforce Commission. In her free time, Jennifer enjoys reading, traveling, genealogy, and photography

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(Revisiting the Original Scholarship of Workers' Compensation)

To Limit Litigation, Make the New Law Simple

By Hon. David Torrey*

Francis H. Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARVARD LAW REVIEW 328 (Feb. 1912) [Part I]; 25 HARVARD LAW REVIEW 401 (Mar. 1912) [Part II]; 25 HARVARD LAW REVIEW 517 (Apr. 1912) [Part III].

> *Penn Law Professor Francis Bohlen, as he initiated his service on the Pennsylvania Industrial Accidents Commission, published a major article, in three installments, in which he identified a "problem" in the drafting of workers' compensation laws. In this article, we read that he actually identifies three challenges: (1) whether to allow willful misconduct on the part of the worker to constitute a defense in a no-fault law (he recommends against it, though arguing for additional liability for* employers *who willfully allow unsafe work conditions that in turn cause accidents); (2) how to define the compensable event or casualty (he insists that the term "accident" be used so as to better define and limit what is compensable); and (3) how to define the parameters of coverage (he argues against using the British term "arising" out of the employment, as it had proven to be ambiguous and the source of chronic litigation under the British Act.)*
>
> *The thesis of the article, overall, is that for the system to be accepted, and for it to remedy the unsatisfactory litigious system of the day, every effort must, in the drafting, be made to keep the system as free of litigation as possible. This is the "problem," or challenge, that is referred to in the title. For this goal to be reached, simplicity was required. Simplicity is this context meant (1) precise wording in detailing under what circumstances an employee can be denied benefits because of willful misconduct; (2) restricting an award of compensation to injuries caused by an accident; and (3) making the work-related test as unambiguous as possible – not adopting, in this regard, the "arising" test as used in England.*

In these early articles, University of Pennsylvania law professor and reformer Francis Bohlen identified a number of perceived challenges in workers' compensation laws. The title (shared by all three installments), may at first seem misleading. Although the title speaks of "a problem" (implying just one), Bohlen identifies a number of challenges.

The first installment of the article is also remarkable as it begins with what was likely a speech – accompanied as it is by only four footnotes. It then gives way to a heavily footnoted and scholarly review of how the British courts, to which he pointed for guidance, had addressed the challenging issue of defining the compensable event, to wit, the "accident."

The thesis of the article, in any event, is that for the system to be accepted, and to remedy the unsatisfactory litigious system of the day, every effort must, in the drafting, be made to keep the system as free of litigation as possible. This is the "problem," or challenge, that is referred to in the title. For this goal to be reached, simplicity was required.

Larson, notably, writing in the 1960's, stated that these articles were "widely read as a guide to the drafting of compensation acts …."[1]

Continued, Page 7.

Make the New Law Simple, from Page 6.

I. Identifying the Impetus for Public Support

Bohlen was obviously in sympathy with enactment of workers' compensation laws, and he first sought to determine the impetus behind what he perceived as newfound public support. Here he ventured to find at least four causes.

The first, "dominating" force was "sentimental humanitarianism, that altogether admirable instinct which revolts from the contemplation of individual suffering and which regards as unjust any condition, social or legal, which throws a loss upon a class of individuals unable to bear it without actual suffering."

The second force was that of the "advanced collectivist." Such individuals believe that society as a whole should share the shock of industrial accidents rather than that it should be borne by the particular individual whose ill fortune it is to suffer it immediately, and so desires to place the burden primarily on the employer, who, in theory at least, can add the costs to the price of his product and so distribute the loss among that part of the community at least whose wants call his business into existence.

The third force was a "different species of humanitarianism which considers the improvement of the human race as a primary object of consideration rather than the relief of unfortunate individuals. To such a one it appears intolerable that workmen and their families as a class should be subject to the risk of fortuitous degradation in the social scale by an accidental injury to the head of the family, thereby throwing the entire family back into a submerged or pauper class … and so render nugatory the effort expended in raising them to the position from which their mere misfortune has cast them." (Here Bohlen, though not naming them, is likely referring to the social workers and other reformers like Crystal Eastman and her colleagues.)

Finally, Bohlen identified "a large class," by which he likely meant business and at least some lawyers, which had become dismayed by the tort system and "the waste and uncertainty of the present state of the law …."

II. The Major Challenge: Would the Proposed Reform of Workers' Compensation Become Litigious, Just like Tort?

Bohlen worried that ambiguity and other difficulties in interpretation of the law would divert the new proposed system from being a quick-remedy social insurance reform into a litigation-heavy morass – not unlike the tort regime out of which the reform was born. This eventuality, in his view, would be a monstrous result, one which "would satisfy no one." Injured workers would, in such a system, turn to lawyers, particularly "that highly unpopular species of the genus middleman, the accident lawyer," whose involvement would purportedly cause delay in the litigation and in any event reduce the worker's compensation check.

Insurers, meanwhile, having "no direct contact with labor," might be tempted to defend "every case in which there was the remote chance of success."

How to avoid these hazards? Workers' compensation laws, he asserted, should be so crafted that, where possible, the right to compensation should be plain and not the "subject of antagonistic litigation." In Bohlen's view, the success of the program, and its wide and enduring acceptance, turned in critical part on whether litigation costs could be kept down:

> To employers the result [that is, a litigious program] is at least as unfavorable. They would be subjected to new demands and added costs, not merely in the sums expended for compensation, but in those paid for the cost of litigation as well, without any corresponding saving. There is a point beyond which the cost of production cannot be increased without

Continued, Page 8.

Make the New Law Simple, from Page 7.

> destroying the profit of the producer and so directly driving him out of business or raising the cost of the commodity to a point where the demand is stifled, and so indirectly reaching the same result.
>
> [T]he ultimate success or failure of this form of legislation, one may venture to predict, will depend upon whether the modern humanitarian and collectivist sense of justice can be satisfied without unduly burdening business or the consumers whom it serves, and this can only be done by recouping the employer for the additional burden which will undoubtedly be put upon him by relieving him from the cost of litigation, by reducing to a minimum the cost of enforcing the claims, and so securing to workmen and their dependents the fullest possible share of the sums paid by the employers, and by making the compensation payable to them at the earliest possible moment, so that their current expenses can be immediately met.

Bohlen concluded, on this point, "To accomplish this it is essential that the act should be so drawn as to be as far as possible automatically applicable to any given state of fact, and, as far as may be, to prevent the right to compensation from becoming a subject of antagonistic litigation."

III. A Challenge: Workplace Safety, the Issue of Misconduct, and Avoiding Litigation on the Issue

Bohlen encouraged readers to avoid conceptualizing a compensation award as a "penalty" against an employer. Bohlen, in this regard, took to heart the proposed no-fault innovation: the purpose of a workers' compensation law is to "remedy the existing condition of affairs which offends modern ideas of social justice and to protect workmen and their dependents … from want …. [Fault, in this conceptualization] has no place … as a determining factor."

Still, one purpose of the law was its supposed natural tendency to leverage employers to act more responsibly and generate safe work practices. Given no-fault liability, "it becomes to the master's advantage to diminish accidents with the attendant liability to make compensation for the resulting loss, as so the spur of self-interest operates to impel the employer to take steps for the protection of his employees."

Every incentive, Bohlen asserted, to encourage employers in this effort should be undertaken. This led him to comment on a challenge both in policy and drafting.

In his view, a major incentive for an employer's deliberate failure to enforce safety rules, resulting in a worker injury, should be (1) an additional ("enhanced") award of compensation, or (2) preserving, in the worker, his tort suit against the employer.

Yet, he rejected the idea that *workers* who disregarded safety rules should be disqualified from benefits. He defended this proposed disparate treatment with three arguments.

First, Bohlen noted that when a worker is injured, it is not only he (the author did not mention female workers), that suffers: "the penalty [of work injury] is paid not by him only, but by those dependent on him as well. The public opinion which regards it as unjust that a man should profit by his own fault may yet shrink from visiting the sins of the father upon the children. Then, too, an enhanced compensation will not, save in very exceptional cases, seriously cripple a business, while to deprive a workman and his family of compensation will be their economic destruction."

Second, Bohlen dismissed the idea that the threat of compensation forfeiture would leverage injured workers to more personal responsibility for their own safety. After all, no evidence existed that the rigors of the common law had that effect. Sophisticated employers, he suggested, would be leveraged to safe practices by the threat of increased liability, but not so workers: "The interest of the servant … is not wholly financial; the servant by his reckless conduct risks his own person as well as his earning power. But since the fear of personal injury and of the loss of their earning power, which under our present system they must bear themselves, has not in the past proved sufficient to deter workmen from recklessly running unnecessary risks, it is hardly probable that they will be impelled to greater care through the fear of forfeiting the compensation to which they would be entitled under the act if injured without recklessness."

Continued, Page 9.

Make the New Law Simple, from Page 8.

Third, Bohlen posited that the issue of whether a worker's act or omission is deliberate, reckless, or "unnecessarily encountered" is a factual question that is "highly controvertible and litigable …." When one took into account the considerable *industry* of the American worker, which "carriers with it as an inseparable incident the necessity of taking chances," it made no sense to allow disqualification for such alleged acts or omissions. Only when the worker has undertaken a deliberate *self-infliction* should compensation be denied under the law.

Bohlen recommended that if the legislature, nevertheless, desired that injuries resulting from willful misconduct be excluded, an exception should be specifically detailed and included in the statute.

IV. A Drafting Challenge: How to Define the Compensable Event

Towards the goal of limiting litigation, Bohlen was hopeful that U.S. boards and courts would be attentive to the already considerable body of British law struggling with and defining the phrase, "arising out of and in the course of employment." Perhaps use of the British precedents could "avoid that vast amount of litigation generally required" for the typical interpretation of such language. He was later to revisit the issue at length in the second and third installments of his article.

Bohlen, however, first made recommendations about what we would today call the compensable event, or "casualty." He asserted that, given the British experience with legal interpretation, the phrase, "personal injury by accident" should be adopted as the casualty. Still, Bohlen reviewed the British precedents at length, and remarked worriedly that the courts of that country had interpreted the term "accident" very liberally to compensate many non-obvious injuries. The British courts often held that an injury had occurred even if no "violent alteration of the physical structure of the body" had occurred. They did so by simply conceptualizing "accidentally" as something unexpected.

Bohlen was opposed, in this regard, to a workers' compensation law that would compensate non-obvious maladies such as non-traumatically induced diseases and gradual onset injuries. He had the concern that the causation of many such diseases were hard to determine. Further, he worried that making the employer liable for what we would now call "repetitive motion" injuries would generate the arbitrary, and unfair, result of making the last employer liable and an effective "pensioner" of the worker.

Continued, Page 10.

NAWCJ Board of Directors

Make the New Law Simple, from Page 9.

If diseases were to be compensated at all, meanwhile, the legislature should, as had the British, promulgate a list of diseases with known tendencies to occur in the workplace – to wit, occupational diseases. As for *non*-occupational diseases, he would, as had Germany, have a different social insurance fund altogether created and run by the state, compensating such diseases independently of the occupational injury scheme.

"[T]he word 'injury'," Bohlen admonished, "should not be used without qualification …."

On these issues, the comments of Bohlen were relevant to what was to unfold in Pennsylvania. First, the Board and courts, perhaps under his influence, did indeed turn heavily to the British precedents in interpreting the early Pennsylvania Act. Second, diseases were not covered in the 1915 law, and when the Act finally covered occupational diseases in 1937, the disease list was much like that of the British law, matching occupation with diseases and then affording a presumption of causation in the event of illness.

Most importantly, the Pennsylvania Act did indeed include the phrase, "personal injury … by an accident." A further refinement, however, was added. The phrase, as if inspired by Bohlen's comments, was defined as "violence to the physical structure of the body."

V. A Drafting Challenge: "Course of Employment" and the Ill-Defined "Arising out of the Employment"

In the second part of his article, Bohlen undertakes a short treatise on the phraseology, "arising in the course of, and out of, employment." He did so by a thorough study of the cases of the British and Scottish courts. These tribunals had been construing the phrase in earnest since 1907.

Bohlen observed that little ambiguity existed in the concept of "course of employment." The British courts had been fairly consistent in defining this time and place requirement of an injury, such that compensability would or would not follow.

The "arising" test, on the other hand, which demands that a causal connection exist between the injury and work, had been found ambiguous. This misfortune had led to countless litigation battles over whether the idea of arising should be *narrowly* or, instead, *broadly* interpreted. The British courts, at least as of 1912, had settled on a narrow conceptualization. They held that what we, in the modern day, would call "peculiar" risk was required. In this regard, only if the hazard was the type *foreseeable* would it represent the type of risk that was conceptualized as causing the injury.

Exceptions, however, existed. Activities intimately incidental to the worker's work, for example, were held to have arisen out of the employment. Likewise, workers injured while acting impulsively to protect another worker, a supervisor, or the employer's property were held to have sustained injuries arising out of the employment. The upshot of this analysis was Bohlen's recommendation that legislatures in the U.S. should avoid at all costs use of the term "arising" out of the employment. He favored, seemingly, the simple phrase "course of employment," and if the legislature desired that certain activities were not to be covered – like injuries resulting from overt willful misconduct – that exception should be specifically detailed and not left for the courts to divine.

Once again, one sees Bohlen's influence in the 1915 Act. The parameters of coverage referred only to "course" of employment, and the term "arising" was notably absent. Arthur Larson, *The Heart Cases in Workmen's Compensation: An Analysis and Suggested Solution*, 65
MICHIGAN LAW REVIEW 441, 444-445 (1967).

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*Judge David Torrey is the Immediate Past-President of the National Association of Workers' Compensation Judiciary. He is a Workers' Compensation Judge in Pittsburgh, PA and an Adjunct Professor of Law, University of Pittsburgh School of Law.

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1. Arthur Larson, *The Heart Cases in Workmen's Compensation: An Analysis and Suggested Solution*, 65 MICHIGAN LAW REVIEW 441, 444-445 (1967).

Workers' Compensation System Slammed for Poor Quality Health Care and Failure to Innovate

By Thomas A. Robinson, J.D.*

An important, but overlooked element associated with the swelling group of Americans permanently removed from the workforce is the failure of Federal and state workers' compensation systems to provide effective health care to treat non-catastrophic injuries, says a group of researchers in a recently released commentary [See Franklin, G., et al., "Workers' Compensation: Poor Quality Health Care and the Growing Disability Problem in the United States," *American Journal of Industrial Medicine,* October 2014]. The authors of the commentary argue further that innovations in workers' compensation health care delivery and in the use of evidence-based coverage methods, such as prospective utilization review, if widely adopted, could substantially reduce avoidable disability and provide greater financial stability both for individuals and the country's social welfare programs.

Explosion in the Number of Disabled Americans

The commentators document the tremendous growth during the past decade and a half in the number of Americans drawing SSDI benefits: in 2012, 8.8 million people were collecting disabled worker (SSDI) benefits, totaling $200 billion annually—a 75 percent increase in the number of working-age people receiving such benefits compared to 2000. The commentators posit that while the problem has received lots of attention, almost completely overlooked in the discussions and analyses is the functioning of workers' compensation systems and the health care those systems provide and regulate.

Commentators' Hypothesis: Workers' Compensation Systems Are Failing to Provide Adequate Care

They point out that the mix of conditions causing permanent disabilities has significantly changed over the past several decades, but that strategies for their treatment have not. In the early 1980s, the number of disabilities associated with cardiovascular conditions was almost twice that of disabilities associated with musculoskeletal conditions. By 2012, the ratio had fallen to 25 percent.

The commentators lament that much of the policy discussion continues to be centered on "late stage analysis," after disability has become a fact of life. They argue that while primary prevention is undeniably important, secondary prevention, which focuses on the prevention of disability once a worker has been injured, deserves greater attention and resources.

"Risk" of SSDI Reliance Doubled From 1987 to 2010

The commentators point to an additional alarming point: While in 1987–1989, approximately 11% of all compensable workers' compensation claims accumulated one year of disability, by 2010, the percentage had risen to 19 percent. Concomitantly, the commentators indicate the "risk" of receiving SSDI benefits doubled during the period. They posit that the likelihood of "definite" transition from workers' compensation to SSDI benefits is perhaps three percent among compensable claims, but that the likelihood of "possible" transition among compensable claims may be as high as nine percent. It is with this six percent of "possible" transition claims that secondary prevention methods can be used to greatest advantage, say the commentators. According to the commentators, achieving effective secondary prevention of disability in workers' compensation will require a focus on two concerns:

1. Improved delivery of occupational best practices to workers at risk early on after injury, and
2. A reduction in ineffective or harmful health care services through evidence-based coverage policies.

Poor Quality Health Care, from Page 11.

Improving Health Care Delivery for Injured Workers to Achieve Secondary Prevention

The commentators point to a decade-long pilot test in Washington State that used both financial and non-financial incentives to deliver occupational health best practices to injured workers within the first few weeks following injury. With 25% of injured workers in the state participating, there was a reduction in long-term (one-year) disability by about 30 percent for low back injuries. Already expanded by 2011 legislation within the state, the Washington results could be repeated in other states.

Improved Secondary Prevention by Using Evidence-Based Coverage Policies to Improve Outcome and Prevent Harm

The commentators point to a "meta-analysis" of more than 200 studies comparing outcomes of the same surgical procedures in workers' compensation and non-workers' compensation health care. The studies suggest far worse recovery for injured workers in nearly every procedural category. The studies did not point out **why** an injured worker tended to be worse off than a patient with a similar physical issue treated outside the comp system. The commentators, however, suggest three specific examples of potentially inappropriate medical care prevalent within the workers' compensation system:

1. Chronic opioid therapy.
2. Lumbar fusion surgery.
3. Thoracic outlet surgery for disputed neurogenic thoracic outlet syndrome.

Preventing Disability in Workers' Compensation

The commentators conclude by suggesting that improving health care delivery with a goal of preventing persistent, long-term work disability will require meaningful quality improvement at a system level as well as changes in workers' compensation regulations. They argue that critical to the process is the introduction—at the early stage of treatment—of effective incentives and improving care coordination. Quality improvement is necessary, but the commentators say it likely will not be enough. The workers' compensation system itself needs improvement. More aggressive prospective utilization review with application of evidence-based guidelines, and regulatory changes, are likely needed to address the problem of poor care that places workers at risk of long-term disability.

Continued, Page 13.

Inns of Court

The American Inns of Court exists "to foster excellence in professionalism, ethics, civility and legal skills." There are Inns across the continent, and they are "uniquely non-partisan association(s)" which "encourage meaningful mentoring relationships."

There are now six Inns dedicated to the practice of workers' compensation:

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Poor Quality Health Care, from Page 12

Stuart D. Colburn, Esq., Shareholder at Downs Stanford, P.C., Austin, TX, agrees with the commentators' points about utilization review and argues for a more robust workers' compensation utilization review in the areas of opioids and lumbar fusions:

> Researchers recently concluded that a more robust workers' compensation utilization review in the areas of opioids and lumbar fusions would reduce the number of SSDI applicants. Some commentators argue we are becoming a nation of disabled as evidenced by the drastic increase of those on permanent disability. A separate discussion can be had on the physiological causes of a disability mindset. Workers' compensation stakeholders can and should aggressively limit lumbar fusions (studies show fusions are ineffective treatment for degenerative disc disease) and opioid therapy. Overutilization of narcotics is a growing epidemic requiring workers' compensation carriers to forge new strategies to fight the business of prescribing opioids for chronic pain and the resulting addiction (and sometimes death). Easier said than done. Parties with monied interests form powerful lobbies against many reforms (think doctors, hospitals, ASCs, implant manufacturers, pharmaceuticals, pharmacies, to name a few). Stakeholders often play catch-up to the latest money-making scheme disguised as effective treatment (for example, physician dispensing and compound medications). Thomas A. Robinson is quite right: This study is an important part of an ongoing conversation; but hopefully, talk will lead to action.

Limitations in the Commentary Analysis

While the commentators identify a number of important factors to explain the tremendous growth in the number of persons receiving SSDI benefits, particularly with regard to those who also have suffered workplace injuries or illnesses, they provide no discussion of the host of macro-economic factors that no doubt are also at work. For example, according to Department of Labor data, as of July 2012, there were 811,000 more long-term unemployed than when the recession officially ended in June 2009. By the end of 2012, the pool of Americans who are not part of the labor force had increased by 7.5 million. An injured worker may not return to work because he or she has moved to the SSDI ranks, but it may be just as likely that a former worker has sought out SSDI because there is no job to which the worker can return. While it is fair to say the workers' compensation system can do a better job in returning injured workers to the employment world, that world is increasingly more competitive and jobs are often tenuous.

Improvements Are Possible

The workers' compensation system can be improved, say some prominent experts in the field. For example, Rebecca A. Shafer, JD, President of Amaxx Risk Solutions and author of *Your Ultimate Guide to Mastering Workers' Comp Costs*, said:

> After spending time interviewing and reviewing claims of multiple injured workers, I agree that we can do better. Failure to return to work is, unfortunately, often the result of employers' unwillingness to accommodate both transitional and permanent medical restrictions following an injury. Employers often do not have the knowledge to develop return to work programs; they may not even know that return to work during recovery is an option.

Continued, Page 14.

Poor Quality Health Care, from Page 13

> Better delivery of medical care must include the use of medical review to ensure injured workers get all the medical care needed, without delay. One way to do this is to use injury triage within the first 15 minutes of an injury to advise on the proper level of care needed. Far too often we see utilization review "cost containment" services used as a club to randomly and routinely deny medical care to injured workers. That practice starts a regrettable cycle: poor care followed by longer periods of time off-work, followed by more poor care.

Additional Studies Needed

The commentators urge additional investigation, randomized trials and comparative effectiveness studies, including population-based observational studies to add insights to this important problem in our nation. Indeed, the stakes are high as some experts say we have fewer than half dozen years before the SSDI cupboard is bare. This examination of the workers' compensation system, its apparent lack of quality in providing appropriate medical care and the growing problem our country faces with the disabled is an important part of the ongoing conversation among all groups of stakeholders.

Thomas A. Robinson, Durham, North Carolina, received his B.A., cum laude, for both Economics and History, in 1973 from Wake Forest University, his J.D. in 1976 from Wake Forest University School of Law, where he served as Managing Editor, *Wake Forest Law Review*, and his M.Div. in 1989 from Duke University Divinity School. From 1976 to 1986, Mr. Robinson was in private practice, where he focused on workers' compensation defense work. From 1987 to 1993, he was research and writing assistant to Professor Arthur Larson. Since 1993, Mr. Robinson has been the primary upkeep writer for *Larson's Workers' Compensation Law* (LexisNexis) and *Larson's Workers' Compensation, Desk Edition* (LexisNexis). He is the Assistant to the Editor-in-Chief for *Occupational Injuries and Illnesses* (LexisNexis), and a contributing writer for *California Compensation Cases* (LexisNexis), *Benefits Review Board Service–Longshore Reporter* (LexisNexis), *New York Workers' Compensation Handbook* (LexisNexis), *Dubreuil's Florida Workers' Compensation Handbook* (LexisNexis), and *Workers' Compensation: State-by-State Survey: Rankings, Benefits, Data* (LexisNexis). *The WorkComp Writer*, can be accessed at http://www.workcompwriter.com/.

From the Pages of workcompcentral

Carriers May Reduce Comp Exposure as Congress Allows TRIA to Expire

By: Greg Jones
December 18, 2014

Employers looking to renew workers' compensation policies after the start of the New Year could be forced into the residual market as private carriers attempt to dial back their potential exposure to losses resulting from acts of terror. That's because the 113th Congress adjourned on Tuesday without extending a 12-year-old program that covers 85% of carriers' losses in excess of $100 million for claims arising from terrorist attacks. Earlier in December, the House voted 417-7 to pass a bill that would extend the Terrorism Risk Insurance Act by six years. The House bill would have also modified the program so that it would pay 80% of carriers' losses exceeding $200 million.

Sen. Tom Coburn, R-Oklahoma, blocked the Senate from voting on the measure, saying taxpayers assume the risk of TRIA while the insurance industry assumes all the profits. Coburn also objected to an amendment to the bill that would have created a national registry of insurance agents. The Obama administration had already signaled its opposition to another provision in the TRIA bill that would have exempted manufacturers, energy and agricultural companies from the requirement in the Dodd-Frank Act to post collateral when trading derivatives.

The end result of the congressional action is that when the clock hits midnight on New Year's Eve, TRIA will expire. Starting Jan. 1, carriers will have to review every workers' compensation policy that comes up for renewal, said Robert Hartwig, president of the Insurance Information Institute. Carriers can exclude terrorism coverage from some policies, but they have to provide such coverage on work comp, he said. "The insurer decisions will be based not only on their workers' compensation exposure for the individual customer, but aggregate exposure nationally as well as property exposures to terrorism," Hartwig said. "This is an example where a decision as to whether or not to write workers' compensation is not independent of what happens on the property side of the equation."

Depending on how carriers respond – and whether the 114th Congress acts quickly on a TRIA measure next year – Hartwig said employers could run into difficulty obtaining workers' compensation coverage and could be forced into the residual market. The threshold for the risk that carriers are going to be able to assume will be reduced when TRIA expires, according to Hartwig. That will likely result in insurers backing away from writing workers' compensation policies as well as property risks in an effort to control their overall exposure to terrorism-related losses. Hartwig said small businesses will see the greatest impact. "Many large companies already self-insure or take enormous retentions or operate through captives. For smaller businesses, this is not an option."

Hartwig said he is optimistic that the new class of lawmakers will take up TRIA in short order after members return to Washington, D.C., on Jan. 6. House Speaker John Boehner, R-Ohio, released a statement Wednesday saying he expected the new Congress to "act very quickly" to reauthorize TRIA. The sooner Congress acts to renew TRIA, the better, Hartwig said. The more time that passes, the more likely it is lawmakers will end up focusing on other issues.

Continued, Page 16.

TRIA, from Page 15.

Meanwhile, he said if state funds end up with a higher concentration of terrorism risk in their pools they might want to investigate purchasing reinsurance. He also said that regulators should consider engaging with self-insured employers and self-insured employer groups that purchase catastrophic excess coverage to make sure they are adequately prepared for carrying more risk.

The International Association of Industrial Accident Boards and Commissions is working with members to try to figure out what the expiration of TRIA will mean and how regulators should handle it, according to spokeswoman Heather Lore. "It puts insurers at a huge risk not having that backstop," she said. "At this point, we're just trying to provide information and resources and a forum for discussion figuring out how, from a comp regulatory perspective at the state level, how they can respond and what they need to do." Lore said she thinks a lot of people are "shocked" by the inaction on TRIA and that most people were expecting at least a short-term measure to keep the act in place until lawmakers can work out a long-term solution. For the time being, she agreed with Hartwig that carriers who are required to offer terrorism coverage with comp policies might just stop writing workers' comp until a new backstop is put in place.

The Property Casualty Insurers Association of America said in a statement that it was "unconscionable" for the Senate to adjourn without reauthorizing TRIA. Eileen Giligan, senior director of federal and international public affairs for PCI, said the organization was still mulling over the possible ramifications of the congressional inaction. The American Insurance Association said in a statement that Congress needs to quickly reauthorize TRIA next year to protect the economy from terrorism. Congress passed the Terrorism Risk Insurance Act in 2002 after carriers who suffered billions in losses from the 9/11 attacks pulled out of the terrorism insurance market. It was renewed in 2005 and again in 2007.

Some media reports suggest that without terrorism coverage, the National Football League might have to cancel the Super Bowl. Hartwig with the Insurance Information Institute said that's unlikely because the NFL "can afford coverage and can't afford not to let it go on." He also said he has some concerns that elected officials will see the college bowl games being played on New Year's Day and will see that Disney was still open after TRIA expired and conclude there are no problems. But he also pointed to an ironic situation that developed on Wednesday with Sony Pictures Entertainment deciding not to release a movie in which a journalist is enlisted by the Central Intelligence Agency to assassinate the supreme leader of North Korea, Kim Jong-Un. The studio decided not to release the movie, called The Interview, based on anonymous threats to blow up theaters showing the film. "It's truly remarkable," Hartwig said. "The first day they allow this to lapse, the spectacle of threats by North Korea causes a major movie studio to cancel the release of a major film. Congress sure knows how to pick 'em."

ACOEM Finds Evidence Supporting Use of Opiods Doubtful

By Ben Miller
December 18, 2014

The American College of Occupational and Environmental Medicine has downgraded its rating of evidence for the effectiveness of opioids in treating pain in its latest guideline update, making it more difficult for physicians who use the guidelines to justify use of the drugs as a treatment option.

ACOEM, which develops guidelines for medical treatment on which many states base regulations and guides for the care of injured workers, reviewed 263 articles and published an updated version of its opioid prescription recommendations in the December issue of the Journal of Occupational and Environmental Medicine. Largely, what ACOEM found was that research on opioid use was industry-funded, short-term and inadequate to prove that doctors should seriously consider use of the drug class in most cases relative to workers' compensation.

Continued, Page 17.

ACOEM, from Page 16.

"Quality evidence currently fails to demonstrate superiority of opioids to other medications and treatments," the researchers wrote in the JOEM article.

The researchers found that "although there are a few trials of patients with acute pain treated with opioids compared with placebo, the overall magnitude of benefit is small while the adverse effects profile is sufficiently high that this resulted in the recommendation being downgraded." ACOEM reduced its rating for evidence supporting the use of opioids for acute pain from an "A," meaning that there were at least two high-quality studies, to a "C," meaning that there was at least one study of moderate quality. Acute pain lasts for less than a month.

For sub acute and chronic non-cancer pain, the authors wrote that "no quality trials suggest superiority of opioids to other medications or treatments." Sub acute pain lasts one to three months, while chronic pain lasts more than three months. For post-operation pain, the guidelines state that "thoughtful use of short-acting opioids for postoperative pain management is recommended for limited use as adjunctive therapy to more effective treatments." ACOEM recommended a morphine equivalence dose no higher than 50 mg per day for acute or chronic pain. The dosage should exceed that limit when the drugs are producing a documented increase in function, according to the guidelines.

Steven Feinberg, a Palo Alto-based pain specialist and past president of the American Academy of Pain Medicine, said ACOEM tends to be stricter than other organizations and state regulators when it comes to establishing guidelines. "ACOEM has the strictest, most thorough scientific criteria, which is very upsetting to these various specialty societies that look at these studies and feel that they're (of) a higher quality," he said.

For instance, the California Division of Workers' Compensation proposed guidelines in April calling for increased vigilance when the morphine equivalence dose reached 80 mg per day or higher. The division's review of other state systems found that some jurisdictions put that threshold at 80 or 120 mg per day. The American Academy of Neurology published an article in September advising physicians to keep the daily morphine equivalence dose below 80 mg to 120 mg.

The ACOEM updates criticized many studies because of their funding sources and because of researchers' conflicts of interest in "the vast majority of studies." The authors particularly stressed that they could find no placebo trials lasting more than four months studying the effects of opioids on chronic pain. They also found no "high-quality" evidence that opioids prescribed for chronic pain led to increases in patients' function – a concern in workers' compensation since studies have shown that claims cost less when employees get back to work sooner.

The researchers downgraded ACOEM's rating of evidence for which patients can be prescribed opioids without risking escalation of dose or other adverse outcomes from a "C" to an "I," meaning that they found insufficient or irreconcilable evidence in the literature. Nevertheless, opioids are a major component of medical treatment in the workers' compensation industry. In its 2013 report on drug trends in workers' compensation, Express Scripts reported that 10 of the top 25 most expensive medications in the industry are opioids. OxyContin, an extended-release pill, took the top spot and accounted for 8.5% of the total medical spend that year.

In a survey of 25 workers' compensation payers released Dec. 8, the pharmacy benefit management consortium CompPharma found that opioids were a chief concern of the respondents.

Continued, Page 18.

ACOEM, from Page 17.

CompPharma asked the participants to rate how big a problem opioids are on a scale of one to five, and the average of the responses was 4.6. The ACOEM guidelines found many ways in which prescribing opioids to a patient can do them harm. The side effects include a greater sensitivity to pain, lack of coordination, sexual dysfunction, motor vehicle crashes and a lower rate of return to work.

Then there's the risk of addiction, abuse, diversion and death. Many states have implemented prescription drug-monitoring programs and other tools to try to curb those side effects of opioids, but the Centers for Disease Control and Prevention has declared use of the drugs in the U.S. a "growing epidemic." According to the CDC, drug overdose was the leading cause of injury death in the U.S. in 2012, and 38.6% or 16,007 of those overdoses involved opioids. The centers estimated the cost of opioid abuse at $55.7 billion in 2007.

Feinberg said the ACOEM guideline updates, as well as new recommendations from other medical groups and state regulators, illustrates a disconnect between science and the actual medical treatment of injured workers. "We're seeing more and more evidence that a lot of the stuff we do doesn't work, at least it doesn't pass scrutiny when it comes to the scientific evidence," he said.

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The NAWCJ Congratulates Our Four Members Inducted into the College of Workers' Compensation Lawyer's Class of 2015!

By Hon. LuAnn Haley.*

The CWCL recently announced the names of the fellows to be included in the 2015 Class and the NAWCJ is proud that the class included the following four members: Karl Aumann (MD), Wesley Marshall (VA), Maureen (Miki) McGovern (IA), and A. James Sarkisian (IN). The induction of these fellows into the College will take place on March 21, 2015 in Naples, Florida.

As many of you know, the College of Workers' Compensation Lawyers has been established to honor those workers' compensation professionals who have distinguished themselves in the field of workers' compensation. Members are nominated for the outstanding traits they exhibit in their practice of twenty years or longer, representing plaintiffs, defendants, or serving as judges. These workers' compensation professionals have convinced their peers, the bar, and the bench that they possess the highest professional qualifications, ethical standards, character, integrity, and leadership.

Hon. R. Karl Aumann

The CWCL Class of 2015 will include the following NAWCJ members:

R. Karl Aumann was appointed Commissioner of the Workers' Compensation Commission in Maryland in February 2005 and named Chairman in October 2005. Chairman Aumann earned a B.A. from Loyola University in 1982 and his J.D. in 1985 from the University of Baltimore. Thereafter, he was admitted to the Maryland Bar in 1986. In 1991, President George H.W. Bush appointed him counsel and Senior Policy Advisor to the Appalachian Regional Commission and from 1994 through 2003 Chairman Aumann served as District Director for Congressman Robert Ehrlich. He served as president of the Southern Association of Workers' Compensation Administrators and on the Adjudication Committee of the IAIABC. He has served since 2010 as a Board member of the NAWCJ as well as a board member of the Maryland Workers' Compensation Educational Association.

Hon. Wesley Marshall

Wesley Marshall was appointed to the Virginia Workers' Compensation Commission in May 2012 and previously was in private practice for 23 years in Fredericksburg, VA. Judge Marshall earned his B.A. and J.D. from the University of Virginia. He is a member of the Southern Association of Workers' Compensation Administrators, the National Association of Workers' Compensation Judiciary, and the Virginia Workers' Compensation American Inns of Court. He promotes high levels of civility and professionalism among practicing attorneys and seeks to instill positive values and to promote value-driven delivery of services within Virginia's workers' compensation system. In his free time, he volunteers with the Boy Scouts of America and the Rappahannock Regional Soap Box Derby. He also enjoys sailing, backpacking, fly fishing and cooking.

Hon. Michelle McGovern

Maureen (Miki) McGovern was named Acting Workers' Compensation Commissioner in Iowa on September 8, 2014.

Continued, Page 20.

College of Workers' Compensation Lawyers, from Page 19.

Prior thereto, Commissioner McGovern was Deputy Commissioner in Iowa for 26 years. She earned her law degree from Drake University and is a member of the Bar in Iowa. Commissioner McGovern began working for the Iowa Division of Labor in 1982 and is a member of the National Association of Workers' Compensation Judiciary.

James Sarkisian is a Judge for the Indiana Workers' Compensation Board. He graduated from Valparaiso University in 1980 and from DePaul University in 1983. Shortly after graduation, Judge Sarkisian embarked on his litigation-oriented career and worked as a Prosecutor for the State of Indiana. Prior to becoming and Adjudicator, he was in private practice and representing plaintiffs in personal injury and workers' compensation cases. In his free time, he has served as the Valparaiso Community School Board President as well as a youth sports coach. He is a member of the National Association of Workers' Compensation Judiciary.

Hon. James Sarkisian

Judge LuAnn Haley is an ALJ for the Industrial Commission of Arizona and has worked in that position since moving to Arizona in 1998. Before moving to AZ, she worked as a defense lawyer in Pittsburgh, Pennsylvania after graduating from Dickinson School of Law in 1981. She is licensed in Arizona and Pennsylvania and has worked exclusively in the field of Workers' Compensation Law since 1981.

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Workers' Compensation: Capitalist Plot?

By Hon. David Torrey*

Roy Lubove, *Workmen's Compensation and the Prerogatives of Voluntarism*, 8 LABOR HISTORY 254 (1967).

I.

This article, authored in 1967 by prolific University of Pittsburgh academic Roy Lubove, is the classic, pre-National Commission indictment of workers' compensation as well-intentioned social reform hijacked, at the outset, by employer and insurance company interests.

The title of the article foreshadows the late author's overall thesis. "Voluntarism" in this context refers to the reliance on voluntary action (here of employers), to carry out a policy (compensation of worker injuries), free of what is perceived of as government coercion (a mandatory insurance and regulatory system). "Prerogatives," meanwhile, in this context, has its plain meaning – that is, rights and privileges. However, in the author's use surely an element of "primacy" is intended as well.

Lubove's "prerogatives of voluntarism," in any event, refers to the prevailing view of the second decade of the last century that workers' compensation, to be legitimate, must (1) preserve the right to elect out of the system; and (2) be underwritten not by a socialist-style state fund but by the same type of casualty insurance that had been underwriting the existing employer liability system.

The article, oddly, seems to be written in sonata form. The author sets forth his thesis at the outset, develops it, makes his conclusion, but then does it all over again with further elaboration and recapitulation.

No matter, his thesis is well-stated and supported (though some would complain that he is short on quantitative analysis), and a pleasure to read again and again. It's just not arranged in the linear treatment we lawyers are used to.

II.

Lubove (who died at age 60 in 1980), ultimately concludes that the system, however well-intentioned, was marred at the outset by these prerogatives. Was workers' compensation actually something of a clever swindle? Were unions hoodwinked into giving up employees' common law rights in favor of an impecunious system that never compensated workers appropriately?

Lubove begins his analysis by asking why workers' compensation was so widely adopted during the second decade of the last century, when other social insurance programs were promoted, but became stalled for at least another twenty years. (And, of course, the U.S in 2014 still has no true national health program.) The answer, to Lubove, was plain. Despite its genesis in a social reform movement, success unfolded because employers and insurance carriers, the "voluntary interests," favored workers' compensation, believed they would enjoy a net benefit from it, and had the juice to make it happen. By the end of his article we have his more nuanced explanation:

- Employers were beginning to get hit by substantial verdicts in tort cases.
- Insuring for employers' liability was expensive and only a fraction of the money ever made it to injured workers.
- The workforce had become unhappy and this discontent, in turn, led to labor management strife.

Continued, Page 23.

- A no-fault system might increase some costs, but the completely wasteful outflow of money for litigation and lawyers could be reduced or eliminated.
- Insuring for the costs of workers' compensation (a system designed in the U.S., unlike in England,[1] to be the employer's exclusive liability), could be better budgeted for by employers and counted as a cost of production.
- Workers' compensation was attended by a focus on accident prevention (given the leveraging effect of no-fault liability and merit-rating), and this fact coincided with a movement among many industrial leaders to focus on safety.
- Costs could also be kept low, as employers, already safe from hard-to-predict tort damages, could use the political system to keep workers' compensation benefits depressed, in turn keeping premiums modest.
- In most states, the laws were technically elective, so employers could, similarly, always use the threat of electing out to keep benefits at depressed levels.
- The insurance industry favored the system, as it could continue to profit from selling casualty insurance (though workers' compensation and not employers' liability), and it would presumably no longer be the object of vilification as it had been under the tort system.

"The social reformer," Lubove concluded from all this, "may have justified workmen's compensation in terms of equity and social expediency, but the decisive consideration was that a major voluntary interest anticipated concrete, material advantages through the substitution of compensation for liability." The system, he insists, "must be understood as a program designed to meet the needs of private business groups as much as those of injured workers." And finally, in a pointed critique, Lubove charged that "[w]orkmen's compensation never overcame its original structural deficiencies, rooted as it was in benefits schedules adapted to business imperatives more than to the objective needs of injured workers."

III.

The Lubove article is surely a must-read for those interested in the history of workers' compensation. In this regard, the author, before reaching his perhaps cynical conclusions, supplies the reader with a background of the entire crisis, uncovering and explaining the origins of the reform movement.

After a review of the problematic tort law and partial reform of employers' liability laws, he discusses the turn-of-the century efforts of U.S. Steel in encouraging safety, the support for workers' compensation of the National Association of Manufacturers (N.A.M.), and he summarizes *Crystal Eastman's Work Accidents and the Law*, the classic study addressing work fatalities and the paucity of recovery in Pittsburgh. (As to this book, he credits Eastman with accomplishing a brilliant synthesis of the values of "equity, expediency, and prevention" in arguing for the introduction of workers' compensation.)

Continued, Page 24.

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After a review of the problematic tort law and partial reform of employers' liability laws, he discusses the turn-of-the century efforts of U.S. Steel in encouraging safety, the support for workers' compensation of the National Association of Manufacturers (N.A.M.), and he summarizes *Crystal Eastman's Work Accidents and the Law*, the classic study addressing work fatalities and the paucity of recovery in Pittsburgh. (As to this book, he credits Eastman with accomplishing a brilliant synthesis of the values of "equity, expediency, and prevention" in arguing for the introduction of workers' compensation.)

Lubove also notes that, on the national stage, Theodore Roosevelt helped to identify the plight of injured workers and the need for a no-fault reform to assist in recovery.

IV.

Appendix: Lubove and the Pennsylvania Connection

Lubove remarks frequently on the Pennsylvania experience as he establishes the history of reform and its various causes. Indeed, he emphasizes the importance of Crystal Eastman and her renowned Pittsburgh study in bringing about change. He quotes a social scientist writing in 1934 to the effect that *Work Accidents and the Law* was "perhaps the strongest single force in attracting public opinion and arousing public conscience concerning this one aspect of wage workers' rights in this country."[2]

Lubove also notes (p. 269, n.40) that the Pennsylvania Industrial Accidents Commission, in its final 1915 Report, was resigned to recommending a law with only modest benefits. The Commission was concerned that employers would never agree to no-fault liability unless they were assured that their newfound liabilities would not be materially in excess of existing ones.

To bolster his argument about inadequate benefits, Lubove quotes at length (p.272) from the highly critical Kulp Committee Report (1934). That report, particularly the portion prepared by researcher John Perry Horlacher, depicted the Pennsylvania Act as providing low wage-loss replacement, medical benefits capped at thirty days, and "defective administrative arrangements" that caused delay in benefit delivery.

Finally, Lubove comments (p. 270), on the difficult roll-out of the New Jersey law, one that must have been closely observed by the proponents of compensation in our state. Among other things, Lubove notes that New Jersey at first opted for court administration of the law and for entertaining of the resolution of disputes. That approach (which was followed in England), was identified even by 1915 as having produced lengthy and harmful delays in case resolution and benefit delivery. (Id.) Perhaps it was because of this example that the Pennsylvania legislature, seemingly at the eleventh hour, opted for administration of the law by an administrative agency.

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*Judge David Torrey is the Immediate Past-President of the National Association of Workers' Compensation Judiciary. He is a Workers' Compensation Judge in Pittsburgh, PA and an Adjunct Professor of Law, University of Pittsburgh School of Law.

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1 Lubove states that the 1897 and 1906 British Workers' Compensation laws did not create, with the right to compensation, the workers' exclusive remedy. He states that a worker could try to sue his employer in tort and, if unsuccessful, could then seek workers' compensation insurance benefits. In other words, no binding election applied. Lubove states that Parliament changed the law in 1925, obliging a worker to elect between workers' compensation and a civil action. American industry, Lubove states, knew about the original British law, and was insistent that the introduction of workers' compensation be attended by the exclusive remedy.

2. Lubove, p. 255 (quoting ISAAC RUBINOW, THE QUEST FOR SECURITY, p.71 (1934)).

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