Lex and Verum

The National Association of Workers' Compensation Judiciary

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President's Page

By Hon. Michael Alvey

Happy Holidays to all. The NAWCJ has enjoyed a very successful year. It has been a pleasure, honor and privilege to serve as president of such a fine organization for the past year. Thanks to all of you who have participated in making it so successful.

During this year, members of or organization participated in numerous events across the country, including involvement with the IAIABC, SAWCA, the College of Workers' Compensation Lawyers, the Workers' Compensation Committee Midwinter Seminar and Conference, presented by the ABA Section of Labor and Employment Law, and the Tort, Trial and Insurance Practice Section, as well as various other training sessions and programs. Thanks to those who participated and served in numerous leadership roles in events sponsored by those organizations, and who have also continued to provide great leadership to the NAWCJ.

Also, as I previously mentioned, our annual college drew more participants than ever before. Likewise, we had participants from a larger number of jurisdictions than any previous college. This is directly attributable to the quality of the program, and to members of our association promoting this event on a national level.

Planning is well underway for the 2016 conference, which should be as good as, if not better than, our previous programs. If you would like to become more involved, please let me know. You may contact me at michael.alvey@ky.gov. Thanks for all you do, and Happy Holidays everyone.

Happy Holidays from the NAWCJ!

The Opt-Out of Workers' Compensation Legislation in the Southern States

By Hon. David B. Torrey*

I. Introduction

In late winter, 2015, the organization "ProPublica," in concert with National Public Radio, published a report that addressed the trend, long criticized in academic literature,[1] of legislatures enacting retractive amendments to many state workers' compensation laws.[2] The report featured dismaying accounts of several injured workers who had been ill-served by such restrictive laws.

Many in the workers' compensation community thought that the report was over-stated. A veteran observer, Terry Bogyo, responded that sixty U.S. and Canadian systems exist, and that it was unsatisfactory to paint with an overly broad brush.[3] This critique rang true in Pennsylvania, where we have had four rounds of reform over the last twenty years (1993, 1995, 1996, 2006), but where the system is generally viewed as fair.

However, as if to prove that retraction has been dangerously afoot, the *ultimate retraction* of benefits has recently been enacted in Oklahoma. This ultimate retraction has taken the form of so-called "opt-out" legislation, which permits an employer to remove itself from the workers' compensation system entirely if it substitutes an ERISA-governed employee benefit plan for work accidents.[4] When an Oklahoma employer does so, it retains, remarkably, its historic immunity from tort suit – that same immunity which formed the basis of the original workers' compensation compromise or "bargain." The overriding intent of the opt-out legislation is employer cost-cutting, particularly of the medical benefits which form so large a share of work injury costs.[5]

It is notable that the employee does not have the option to pick whether he or she is covered by an opt-out plan or retains the protections of the state workers' compensation law. The "opt-out" choice is under the strict control of the employer.

The opt-out proponents, and defenders of the scheme, portray the work accident plans as innovative cost-savers. They further argue that the ability to opt out should be welcomed by both employers and injured workers alike. It's a dynamic 21st century invention that leaves workers' compensation, its stale bureaucracy, and its incomprehensible "volumes of statutes,"[6] behind.

Opt-out is a dramatic change, and the opt-out proponents make "no pretense of altering the century-long bargain between employers and employees."[7] Indeed, the advocacy underlying opt-out rejects not only original intent but the reform calls of the 1972 National Commission on State Workmen's Compensation Laws. The Commission's over-arching recommendation was for "mandatory, universal coverage," with the specific admonition "that coverage by workmen's compensation laws be compulsory and that no waivers be permitted."[8]

As I write, however, this machination has become the subject of another journalistic investigation, with the same ProPublica writers dissecting the opt-out legislation in theory and practice.[9] The report verified a number of items that many have been observing for some time. Among these are:

- that the benefits available under such plans are impecunious, even though in Oklahoma they are supposed to be "of the same forms," as those found in the state's workers' compensation law. For example, one Oklahoma plan reportedly will not cover illness from mold exposure, bacterial infection, or asbestos exposure;

Continued, Page 3.

The Opt-Out, from Page 2.

- that technicalities can easily bar serious claims. For example, some Oklahoma plans require that the worker report his or her injury by the end of the shift, or the claim is barred;
- that the state of Oklahoma has failed to effectively regulate these new operations.[10] For example, when the journalists contacted the Oklahoma agency about plans that were obviously not complying with the law, they were told that the agency had no power over such things. An Oklahoma official stated that his job was to "confirm" an opt-out plan, not to "approve" one;[11] and
- that injured Oklahoma employees are required to engage in "mandatory" compromise settlements, despite the fact that state law requires workers' compensation agreements to be voluntary.[12]

Not all opt-out plans are the same. Plans in Oklahoma are (as noted above) supposed to have benefits "of the same forms" as those of the state workers' compensation law, but it is very clear that many do not – and, as noted above, the agency seems to have washed its hands of the matter. (Perhaps it must.)

Opt-out is being advanced in other states, and the Tennessee proposal, after objections were raised, has reportedly had a number of manifestations. A WCJ of that state, in August 2015, characterized the opt-out proposal in Tennessee as always changing and hard to comprehend.

Many of the ambitious claims about opt-out have their genesis in the Texas experience, where workers' compensation has never been mandatory. There, over the last couple decades, more employers have opted out, set up their own plans, and oblige workers to arbitrate disputes.[13] (Some employers do not, and expose themselves to tort liability.[14]) Employers in that state have met with success from a cost-savings point of view,[15] but whether injured workers are treated fairly is unclear to this writer.[16]

II. Foundations ("Drivers") of Opt-Out

"The three things that drive the success of an option bill," according to proponents, "are medical management control, employee accountability, and competition." This proposition is also found on the website of the opt-out advocacy group, Association for Responsible Alternatives to Workers' Compensation (ARAWC). Some have alleged that the opt-out legislation is radical, and some of its foundations, or "drivers," suggest that this is true.

Continued, Page 4.

The Opt-Out, from Page 3.

A. *Work injury recovery – not a right, but just another employee benefit which can be pared off at will.* The proponents of opt-out conceptualize a worker's recovery for injury as the subject of just another employee benefit plan,[17] and one where costs can be reduced via the employer's absolute, complete control over medical care. The principle that a worker's injury recovery possesses an element of justice, one that derives originally from the constitution, the common law, and from social justice concerns, is forgotten.

B. *Worker access, in case of dispute, to an independent fact-finder, abolished.* The complete control tenet of opt-out, meanwhile, is attended by a delivery system that is likewise in the employer's control. In case of dispute, the workers' compensation adjudication system is unavailable and disputes are handled in-house – in a manner said to be similar to those of group health or disability systems. That the employee might have access to such an adjudication system is incompatible with the opt-out premise that the "bureaucracy" of workers' compensation must be avoided. The principle, heretofore enshrined in Anglo-American concepts of due process, that a worker should be able to access some kind of hearing, is jettisoned. The involvement of lawyers (at least on the injured worker's side), and judges, is incompatible with cost cutting.

C. *Barring claims via arbitrary procedural rules.* The opt-out proponents assert that "employee accountability" will bring efficiency and cost savings. This theme is reflected by such demands that a worker provide notice of injury by the end of his shift, lest the claim be barred; and that a worker comply with the opt-out physician's medical treatment regimen, with alleged failure to do so a forfeiture of the claim. Of course, a rule that all injuries be reported by the end of the shift will leverage *knowledgeable* employees to make out reports, but the real motive is to cleverly bar the most difficult workplace injuries – those that do not result from acute, reportable traumas, but from ambiguous situations and insidious exposures. These types of injuries are not only real but are the type that often find their way to disputes in court.

D. *The "Free Market"Premise.* Another foundation of opt-out is the encouragement of competition. Freed of the obligation to comply with state workers' compensation laws, employers can demand that carriers compete with each other to provide the least-cost (and presumably least-benefit) work accident plan. In a defense of opt-out, Mr. Bill Minick details the theory:

> Texas workers' compensation [where opting out as always been allowed] is outperforming national averages because Texas employers have a choice. The [opt-out] option creates a greater sense of urgency among regulators and workers' compensation insurance carriers to manage claims better so they can reduce premium rates and compete with the alternative system. The option also makes implementation of workers' compensation reforms more manageable, because they happen across a smaller base of claims.[18]

It is this strategy that has led the opt-out proponents to wrap themselves in the flag of the "Free Market," as they did during the attempt to enact a Tennessee opt-out.

This semantic strategy is intended in part to generate the idea that defenders of the status quo are hopelessly trapped in the past. But in fact the sort of competition that opt-out proponents suggest will only aggravate the already existing "race to the bottom," as accident plan carriers and their employer clients vie with one another to offer the most impecunious plan. And experience suggests that such plans will likely be administered in the most austere fashion possible. In any event, the untrammeled free market is not consistent with the provision of this form of social insurance.

The Dean of American workers' compensation law and economics, John F. Burton, Jr., remarked this year that

> the current threat to the state workers' compensation system is a race to the bottom among states. Unfortunately, I do not think that any of the solutions to this threat I just discussed … [including] … Federal standards … will be enacted. Does this mean the entire state workers' compensation system will eventually collapse into a black hole? Or will the state system survive largely in its current constellation, with some states maintaining adequate benefits, broad coverage of workers, and expansive compensability rules, while other states plunge into the abyss?

Continued, Page 6.

THE NATIONAL ASSOCIATION

OF WORKERS' COMPENSATION JUDICIARY

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The Opt-Out, from Page 4.

> [O]ne problem is that states that try to maintain decent programs will increasingly find their workers' compensation costs under attack as other states pass them by on the way to the bottom…. In my view, the state workers' compensation system is in its most dire situation in at least the last half-century.[19]

Professor Michael Duff, another workers' compensation scholar, agrees: "[T]he greatest threat facing the workers' compensation system is a race to the bottom…. Presently, I think most people in most states would recognize a moral duty for a state to provide some means by which a victim of workplace injury could be compensated. However, now, as in the past, the more competitive pressures exist in an industry the more tempting it is for employers to avoid the responsibility of compensating for injuries sustained in productive activity…. [F]urthermore, it only takes one employer without scruples to initiate a fearsome race to the bottom of the kind reflected in the collapse of the [19th century] enterprise plans, 'to force the moral sentiment pervading any trade down to the level of that which characterizes the worst man who can maintain himself in it.'"[20]

III. Will Opt-out Legislation be Enacted in More Jurisdictions?

The opt-out legislation has its genesis in Texas. There, the majority of employers carry workers' compensation. However, carrying the same has never been mandatory. Many companies, like Wal-Mart, opt-out and in that state expose themselves to tort lawsuits. Does this mean the playing field is even? The answer is no. In this regard, many large companies – like Wal-Mart – set up in-house plans and condition employment on their employees' agreement to arbitrate any dispute. The Texas Supreme Court, meanwhile, has created common law that makes it difficult for workers to prevail in negligence cases.[21]

The Oklahoma scheme, in any event, is a bold extension. As discussed above, employers can opt out, set up an ERISA-governed plan, and be free from *any* tort liability.

Will other states authorize this remarkable extension and abandon mandatory workers' compensation? In a position paper in opposition to the Tennessee opt-out proposal, the American Insurance Association remarks, "One great irony of the interest in opt-out is that it comes during a time of stability in the nation's workers' compensation system." Indeed, in part because of the many retractive reforms discussed at the outset, the system is not viewed as one in a cost crisis, as in the late 1980's and 1990's.

Regardless, ARAWC, the lobby group that writes the opt-out legislation, predicts that opt-out will be proposed throughout the country. The proposed Tennessee opt-out plan (or some other version of it), to date not enacted, is said soon to be "America's Plan" and "the U.S. Option."[22] Opt-out legislation will soon be proposed, ARAWC declares, in many states, including South Carolina,[23] Florida, Georgia, Alabama, and North Carolina.[24]

The opt-out movement has to date been one of the southern states. ARAWC has obviously identified business-friendly states where legislators can be found who are willing to propose the legislation.

In contrast, opt-out will not be an easy sell in jurisdictions where labor, trial lawyers, and moderates have a voice in the law-making process. At an August 2015 meeting for example, judges from Washington state and Maine rejected out of hand the idea that such legislation could gain a foothold in those states. In this writer's state (Pennsylvania), opt-out would receive a hearing, but the types of plans that have been promulgated in Oklahoma will never be allowed.

The insurance industry is said to be opposed to opt-out legislation, and the American Insurance Association's position paper in opposition to the Tennessee legislation (available from this writer), is a *tour de force*. Yet, Sedgwick was a founding member of ARAWC,[25] and an insurance executive in Pennsylvania with links to the Chamber of Business & Industry has remarked to this writer that he is confident that the industry could create profitable insurance products to underwrite an opt-out's risks. Thus, the insurance industry is not unanimous in its opposition to opt-out.

Continued, Page 7.

The Opt-Out, from Page 6.

Trial lawyers, meanwhile, are also opposed to opt-out, and Oklahoma attorney Bob Burke has filed a number of lawsuits against both employers and the state in an effort to stop opt-out plans, to challenge their inclusions and omissions, and to have the entire ability to opt-out be declared invalid under the state constitution. Trial lawyers and other defenders of workers' compensation among states will indeed challenge such laws on a variety of constitutional grounds.

Thus, while opt-out proponents have announced that it has "America's Plan" ready for roll-out in the fifty states, question exists with regard to whether such proposed legislation will succeed widely. The social and economic justifications of workers' compensation are justifiably well-entrenched, and employers that perceive a benefit from the current stable system are unlikely to embrace such new, destabilizing, procedures.

The socio-political reality is that in states where corporate interests that advocate opt-out have dominating political influence, such laws have the potential to succeed. In states where labor and the interests of the working class – and the working poor – are accommodated, such laws should fail.

IV. Nine Reasons to Oppose Opt-Out

The workers' compensation system is far from perfect, and its omissions, dysfunctions, and the perverse motivations it can generate have been talked and written about for almost as long as the system has existed.[26] Still, allowing opt-out is not the answer to these persistent problems.

It is submitted that opt-out legislation is an overreaching pro-business measure which, under the veil of innovative reform, will unconscionably shifts costs of work injuries and deaths from employers to injured workers and others. And a troubling part of this machination is the denial to injured workers of access to the workers' compensation adjudication system, or some true equivalent, so that in case of dispute due process can be afforded.

Opt-out has put-off this writer from the outset. The manner in which opt-out has been promoted resembles television advertising for extreme exercise regimes and miracle diets – the purported "happiness" of injured employees is inevitably stressed, and billions of dollars in saving are promised. The opt-out lobby group website even promises that those "volumes of statutes, regulations, and litigated decisions" will be a thing of the past. The blogger Bob Wilson has characterized all this as "Disneyesque."[27]

The creator of opt-out, meanwhile, now feels that he must respond to the "myths" surrounding opt-out – in a whopping *eight* installments.[28] The public, in this series of broadsides, is encouraged to reject the "lies" of opt-out opponents.

Opt-out is also said to be inspired by libertarian convictions, but no plan allows a worker the liberty to choose between workers' compensation protections and an opt-out plan. The hypocrisy is glaring.

Continued, Page 8.

Industrial Commission of Arizona has New Director

The Industrial Commission of Arizona (ICA) announced in November that James Ashley will serve as executive director. Ashley will be responsible for the overall administration of the Industrial Commission of Arizona programs, including the Department of Labor and the Arizona Division of Occupational Safety and Health with oversight of laws relating to workers' compensation, payment of wages, and child labor.

Ashley has worked as a political and public affairs consultant and most recently as deputy chief of staff and director of constituent operations for U.S. Congressman Ben Quayle and district director for U.S. Congressman John Shadegg.

He has an extensive background working in the public sector and as a federal executive. He received his Bachelor of Business Administration degree in marketing from New Mexico State University.

The Opt-Out, from Page 7.

This spectacle alone should raise eyebrows, but nine substantive reasons justify opposition to the opt-out machination.

1. ***Opt-out is legislation that unfairly affects the working class and the working poor.*** Workers' compensation lawyers and judges are experts at the real constituency of workers' compensation, particularly those workers who have developed issues with their benefit provision and are in need of dispute resolution.

Who makes up this constituency of the litigated workers' compensation cases – that is, those workers who are most likely to be affected by draconian system that limits injuries covered, imposes procedural impediments, and denies access to justice?

The answer is easy: it's the poorly-educated members of the working class and the working poor. In Pennsylvania, a state with a high average weekly wage ($951.00 for 2015), the vast majority of workers' compensation claimants possess only a high school education, many have only a GED or no degree, and their average wages are frequently less than one-half the average.[29] Many such injured workers testify that they have no savings and that they were living paycheck-to-paycheck prior to their disabling injuries. Further, despite the expansion of general healthcare coverage under the Affordable Care Act, many workers still testify that they have no insurance to support medical treatment when the workers' compensation claim has been denied, or when some element of treatment in an accepted case has been contested.

Many of these types of workers, notably, labor for the type of national retailers and nursing homes chains that are said to desire opt-out.

Opt-out, given its disparate impact, is hence a form of unfair class legislation and would hurt these injured workers the most. An Oklahoma-style plan would outright deny many claims and prevent access to an impartial fact-finder in the event of dispute.

Opt-out would also create the unsatisfactory effect of having similarly situated injured workers being treated differently. A "separate but unequal" regime[30] should not be allowed.

2. ***Opt-out discounts the encouragement-of-safety purpose of workers' compensation***. The 19th century reformers who advocated the *pre*-workers' compensation, tort-based "employer liability" laws (which weakened employer defenses), were convinced that enhancing financial burdens on employers would spur them to implement workplace safety precautions. Of course, this approach failed, tort remedies and liabilities were ultimately abolished, and mandatory workers' compensation was substituted in their place.

This development carried forward this "financial incentive" theory. The idea is this: if employers know they will be liable on a no-fault basis for workplace injuries, they will do everything possible to encourage safety.

The godfather of the Pennsylvania Act, Francis H. Bohlen, declared, "The object of all compensation acts may be stated to be [among other things,] the prevention of accidents, by supplying the spur of self-interest to secure adequate safety conditions of work."[31]

Continued, Page 9.

The Opt-Out, from Page 8.

The first book-length retrospective on the American system, published in 1936, succinctly summarizes this advocacy: "The various state commissions which made investigations and which proposed the enactment of compensation laws in this country regarded accident prevention as one of the most important purposes of such laws."[32]

The financial incentive idea has been refined by "experience rating," under which an employer's premium rate is adjusted to reflect the costs of its employees' claims. Employers generating "higher-than-normal claim levels" are penalized with increased premiums, while those reporting few claims receive some sort of premium discount.

This financial incentive, though acknowledged to be imperfect, endures to this day. The National Commission on State Workmen's Compensation Laws emphasized that safety, via experience rating, was a critical purpose of a properly functioning Act.[33] When one visits the Pennsylvania Rating Bureau for instruction on experience rating, he or she will hear the admonition, "Safety is what it's all about."

Opt-out discounts the safety purpose of mandatory, experienced-rated workers' compensation. While its proponents argue, without evidence, that opt-out will leverage employers to safety measures,[34] neither the historical record nor common sense make such an outcome plausible. For accident insurance to leverage employers to safety, benefit levels and associated premium costs must be such as to promote employer investment in safety.

This is a fundamental that has been recognized in Pennsylvania from the earliest years of the program. The first actuary of the Pennsylvania system remarked that "compensation laws had everywhere given a notable impetus to the safety movements," but he took for granted that "the higher the benefits, the greater, of course, will be the incentive to prevention."[35] Most observers, I believe, have agreed that the higher benefits of the system, post-National Commission, have been a material factor in engendering the workplace safety culture that evolved in the 1980's and 1990's.[36]

This writer, in any event, has never read or heard of the idea that aggressive *downward* pressure on benefit levels and premiums promotes safety.

A sophisticated analysis of the safety issue is found in the American Insurance Association critique of the proposed Tennessee opt-out:

> [O]pt-out jeopardizes sound disability management by allowing unsafe employers to "wash" bad experience by abandoning the workers' compensation system.
>
> [T]he workers' compensation system's experience rating plan requires employers with poorer safety records to bear a higher cost and protects safer employers from subsidizing the losses of less safe ones. The higher relative cost imposed on less safe employers also is an incentive for them to improve the safety of their workplaces, while safe employers enjoy lower insurance costs. Opting out allows unsafe employers to "wash away" their experience, abandoning a system geared to promoting work place safety. It may also dilute the actuarial credibility of the experience rating plan for employers who remain in the workers' compensation system.
>
> [I]s this sound public policy?[37]

3. ***Employers should oppose loss of the exclusive remedy***. Under Texas law, and under some opt-out plans (like at least one in Tennessee and South Carolina), employers who opt-out expose themselves to civil liability in tort. They lose the protection of the exclusive remedy. A typical strategy, as discussed above, is to offer a plan and oblige workers to arbitrate in event of dispute.

Still, employers should balk at losing such immunity in the name of the possibility of resort to a cheap opt-out plan. Opt out proponents on occasion defend abandonment of the workers' compensation system by pointing out that justice can still be achieved by the worker through direct tort lawsuits. Of course, the irony of such a rhetorical position is that we would thereby regress a century to what proved to be a failed and unworkable system.

Continued, Page 10.

The Opt-Out, from Page 9.

The AIA position paper on the Tennessee proposal captures this irony perfectly: is "suing one's employer … a mark of an enlightened social insurance system?"[38]

Employers that do opt out would be free of litigation in the workers' compensation adjudication system. However, litigation and potential liability under ERISA presents new problems of its own.[39]

As for this writer's state: In Pennsylvania, freedom from tort liability is of untold benefit, as the exclusive remedy is enforced with an iron fist. Even allegations of intentional harm are insufficient to breach immunity. No "intentional tort" exception to immunity exists as found so commonly in other states,[40] and even if an employer intentionally *assaults* his worker over a work-related matter, the civil courts will dismiss the tort suit.[41] Pennsylvania trial lawyers know of these rules, and they don't file lawsuits against employers based on intentional tort allegations.

4. ***Opt-out legislation is inconsistent with constitutional guarantees of rights of access to courts, availability of remedies, and due process.*** As one can discern from the Oklahoma experience, "altering the century-long bargain between employers and employees" will generate constitutional challenges – and rightly so.

A. The first challenge is to the opt-out scheme of restricting an employee to a private plan for work accident recovery, yet at once affording the employer immunity from tort under the exclusive remedy. The constitutions of many states feature an "open courts" proviso that guarantees access to courts. The Pennsylvania Constitution has such a proviso, said to have its genesis in the Magna Carta,[42] as does Oklahoma,[43] and several other states. An opt-out feature which abolishes workers' compensation yet forecloses a tort suit, rounds afoul of such provisions.

This was the Oregon experience in a different context. There, the workers' compensation statute was amended to abolish recovery for injuries where work causation was not the predominate causal factor. Employers argued that when such workers' compensation claims were dismissed by ALJ's as non-cognizable, they still possessed the protection of the exclusive remedy. The Oregon Supreme Court, however, rejected this position. It interpreted the state's open courts proviso so that an employee was to have a right and remedy in one court or another.[44]

This writer has always believed that the Pennsylvania Supreme Court would rule in the same manner.[45] The Pennsylvania Supreme Court, faced with an Oklahoma-style opt-out, and provision of Oklahoma-style benefits, would reject the same as a cognizable remedy and would allow civil suits against Pennsylvania employers.

It is here, in any event, that the opt-out concept of work accident injury recovery as just another employee benefit, to be manipulated and/or pared off at will, collides with constitutional precepts of access to justice.

B. The second challenge, at least in Pennsylvania, is whether a private Oklahoma-style plan that pays minimal benefits reflects "reasonable compensation."

Continued, Page 11.

WCRI Announces Leadership Transition

The Workers' Compensation Research Institute has announced the next phase in its planned leadership transition. On November 23, 2015, WCRI simultaneously announced the retirement of Dr. Richard Victor and the Board's appointment of Dr. John Ruser as President-elect.

Dr. Victor has been a WCRI fixture, serving as its leader since its inception in 1983. His retirement is effective January 4, 2015.

WCRI is a provider information and analysis on workers' compensation. Its research has addressed topics such as the impact of changing health insurance, medication formularies, treatment guides, physician choice, fee schedules, and more.

The Opt-Out, from Page 10.

In this regard, the Pennsylvania Constitution was amended in 1915 to allow the legislature to enact laws that limit "damages," to the extent a workers' compensation law might be enacted that provided for "reasonable compensation." This proviso, Article III, Section 18,[46] was tested in the late 1930's, in a case where the Supreme Court declared unconstitutional, as unreasonable, the liberal amendments to the law that dramatically raised benefit levels and seemed to foreshadow a significant corresponding increase in premiums.[47] The restrictive Oklahoma and Texas opt-out plan benefits, were they authorized in Pennsylvania, would seemingly run afoul of this constitutional proviso.[48]

C. The third challenge surrounds due process. Critics of opt-out legislation have correctly identified that lack of impartiality is apparent in the manner in which opt-out plans handle disputes. Such plans typically feature disputes being addressed by panels which the employer or plan have themselves established, and the Oklahoma system never allows the worker to speak and be heard – any appeal is in writing. An appeal may eventually be taken to the Commission or its ALJ, and in that forum, "The Commission shall rely on the record established by the internal appeal process and use an objective standard of review that is not arbitrary or capricious. Any award by the administrative law judge or Commission shall be limited to benefits payable under the terms of the benefit plan …."[49]

A major question exists with regard to whether this process constitutes a "hearing" under precepts of state and federal law. Whatever else is true, the abolition of the injured worker's access to dispute resolution in an administrative law court, heretofore thought to be required in the event of dispute resolution, is a marked departure from familiar principles of due process and an individual's access to justice.

The denial of the right to be heard in the face of denial of a property right will be challenged in any state where opt-out is enacted which features such a marked departure. This writer predicts that in Pennsylvania, the denial of an opt-out-governed employee to access the Workers' Compensation Office of Adjudication for an impartial hearing will be declared unconstitutional by Pennsylvania courts. This writer also predicts that no proviso *mandating* that a worker accept a settlement, lest he lose all benefits, will ever be permitted in Pennsylvania.

Advocacy for opt-out is inevitably paired with advice that there will be less litigation.[50] But it is here, too, that the opt-out concept of work accident injury recovery as just another employee benefit collides with constitutional precepts of access to justice.

The opt-out proponents have in fact *moved beyond* the idea of "rights" and "due process." In an astonishing act of reductionism, the activity of lawyers in the work accident realm, and the proceedings of workers' compensation adjudication, are conceptualized as mere "bureaucracy." A statement on the ARAWC website is telling. Opt-out plans "eliminate the need for volumes of statutes, regulations, and litigated decisions that often focus too little on employee protections and accountability, and too much on the protections of lawyers and a minority of self-interested providers."

5. ***Opt out removes agency regulation of system performance.*** A properly functioning workers' compensation agency has oversight responsibilities with regard to system performance. Agencies monitor employers and carriers, for example, to determine whether claims are accepted or denied on a timely basis, whether they are providing correct information to workers, and whether payments are being made timely. Further, modern workers' compensation agencies monitor employer insurance status and undertake enforcement to ensure that employers are in fact insured and that workers are not misclassified. Many agencies, like that of Pennsylvania, have safety divisions which proactively encourage workplace safety.

An opt-out bill, by design, will remove employers which opt out from this valuable oversight. Opt-out proponents may reject such efforts as mere bureaucracy, but it reflects governmental pro-activity that has been found to be of value for decades. Its rejection is radical.

6. ***Opt-out will increase cost-shifting.*** The advent of the Medicare Set Aside reflects the federal government's reasonable concern that the costs of work injuries are too often shifted away from workers' compensation and onto Medicare.

Continued, Page 12.

The Opt-Out, from Page 11.

A recent study has also suggested that workers' compensation laws that restrict the concept of injury cause a transfer of work injury disability costs onto the Social Security Disability (SSD) system.[51]

This cost-shifting is discernible on a daily basis in litigated workers' compensation cases. A scenario this writer regularly observes is the lawyers scrambling to compromise-settle in an accepted case where, because of the work injury, the worker has become entitled to SSD but is not yet Medicare eligible. Under this device, the full costs of the work injury disability are shifted, after two or three years, to SSD; and the parties escape the obligation to set aside, in the interests of Medicare, a portion of the lump sum for medical treatment expenses.

Other cost shifting exists as well. Many of the working poor whose claims are denied end up having their medical bills paid by Medicaid. When no coverage at all can be found, many physicians and hospitals saddled with unpaid bills, and hence the costs of work injuries are transferred to providers and society at large.

Opt-out will *exacerbate* this unsatisfactory situation. The draconian Oklahoma-type plan that erects technical defenses in order to deny meritorious claims, and which penalizes workers with forfeiture for alleged non-compliance with treatment programs, will throw many workers off the private plan rolls and presumably onto Medicare, SSD, Medicaid, providers, and the taxpayers. Texas-style plans are even worse, as they can and do limit which injuries and diseases are covered. Cost-shifting in such cases follow as if by design.

7. ***Opt-out may threaten state regulation of workers' compensation.*** Workers' compensation has famously remained a system, like many insurance programs, that is regulated by the states. Though a lobby has always existed for federalization or federal standards,[52] the better view is that the states are best equipped and positioned to run workers' compensation. Confident of this view, most states responded in varying disagrees to the 1972 National Commission demands that programs be updated, as to benefits and procedures, so as to bring benefit levels up from poverty levels. In critical part because of this response, the federalization movement was thwarted.

Continued, Page 13.

Opt-out, however, is the ultimate *backslide*, and its enactment evidence that a state is not best equipped and positioned to run workers' compensation. To the contrary, the legislature of an opt-out state has intentionally lost its grip on the program, and it has exhibited to Congress proof positive of its lack of fitness to deliver social insurance benefits. It is difficult to imagine a more open invitation for renewed interest in federal control.[53]

By coincidence, as this paper is being prepared, several members of Congress approached the U.S. Labor Department with their concerns about both retractive workers' compensation programs and its ultimate retraction – the opt-out legislation. These legislators, in an October 20, 2015 letter,[54] called for increased federal oversight of state programs.

8. ***Opt-out disregards vocational rehabilitation***. The National Commission viewed vocational rehabilitation of the permanently injured worker to be an employer responsibility under state workers' compensation laws.[55] As far as this writer can tell, provision of this benefit is not within the contemplation of an opt-out plan. To be sure, vocational rehabilitation is a benefit on the wane among states, but opt-out fails even to give this worthy benefit lip-service.

9. ***Opt-out is inconsistent with First World Standards***. England, France, and Germany all adopted workers' compensation in the decades before the United States. They did so for the same reasons as did U.S. states, and most laws were in fact modeled on that of England.[56] Japan, meanwhile, has always had a workers' compensation system, and a robust one since World War II.[57]

Of course, European countries have broadened their social welfare programs over the decades, but workers' compensation is still mandatory, still based on no-fault, still viewed as a matter of social justice, and still thought to promote safety. Workers' compensation is, in short, a benefit of the First World. To this writer's knowledge, no developed country allows employers to opt out, generate their own plans, and be free of tort liability. A jurisdiction which allows opt out exhibits it unwillingness to abide by First World values.

V. Conclusion

One journalist, in a column about Maine workers' compensation, complained bitterly that "inertia" and "vested interests" will slow the purported innovation of opt-out legislation.[58] "Inertia," however, implies that some *positive* goal is being thwarted. Opt-out, however, is retractive and a step backwards. And opt-out isn't innovative in any sense. It no doubt saves money for employers who have the ability to opt out, but it robs workers of benefits, access to the courts, and justice on several levels.

As for vested interests, it's true that workers' compensation lobbies have long thwarted positive reform[59] – but in this instance those interests happen to be right in their opposition to opt-out.

So is this writer defending the status quo? Yes. In the present context, it is submitted that the corrective to a workers' compensation system that is believed to be unfair, unreasonably costly, or excessively bureaucratic is not to allow some employers to escape it, but to improve the system for the benefit of all.

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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.

All comments are strictly of the author and not those of NAWCJ, the Commonwealth of Pennsylvania, or any of its agencies. This paper was originally acquired and published by MCLE New England in *Collected Papers, Massachusetts Workers' Compensation Law: 16th Annual Conference* (Boston, MA, Nov. 20, 2015).

Endnotes on pages 32-35.

Judiciary College 2015

Marriott World Center, Orlando, Florida

Dr. Sanford Silverman is a well-known pain management physician in Pompano, Florida. He presented at the 2015 College regarding pain medication and other modalities.

Dr. James Talmadge brought the subject of impairments and workability alive at Judiciary College 2015.

Judge Melodie Belcher moderated the Regulator Roundtable, presented by the Southern Association of Workers' Compensation Administrators during WCI 2015. Judges from the NAWCJ College program also participated.

ProPublica and Peter Rousmaniere Give Workers' Comp Opt-Out a Very Bad Day

By: Robert Wilson*

ProPublica, the news organization that last spring electrified the workers' compensation industry with a series of scathing reports, has turned its sights on the world of Opt Out, and is reporting that, for employees subject to that system, things are not as Disneyesque as promoters would have us believe. The highly detailed report[1] was published simultaneously on NPR. Looking at the article and the details the authors provide, it would seem that Opt Out is not the happiest place on earth after all.

ProPublica reporter Michael Grabell tells me they "obtained and read all the plans that have been approved in Oklahoma as well as about 60 in Texas." They also created an interactive database that is definitely worth looking at, as you can explore and compare the plans, proposed bills and state laws related to Opt Out. They conducted extensive interviews with Opt Out advocates, including Bill Minick, president of Partner Source, as well as program opponents like venerable Oklahoma attorney Bob Burke. In addition, they "tracked down a number of injured workers whose employers had [Opt Out] plans to hear their experiences."

Overall, it is likely the most extensive review ever conducted regarding this closed and opaque system – at least one not produced by the people who tout its benefits and profit from its growth.

I encourage you to fully read the article. It clearly shows that all things are NOT created equal, and despite the hype, there are some tragic stories occurring behind the Opt Out veil of secrecy. With this system being seriously considered in other states, people need to know what its implementation may really mean for their state and its workers.

One of the biggest surprises for people will be the revelation of something that has been well known in private circles, but never before mentioned in the media. Many people are unaware that the medical director "charged with picking doctors and ultimately reviewing whether injuries are work-related" for many Opt Out firms is Dr. Melissa Tonn, an occupational medicine specialist who often serves as an expert for employers and insurance companies. Why is that potentially significant? Quite simply, Dr. Tonn is the wife of PartnerSource president Bill Minick, the guy who drove the effort to take Opt Out to Oklahoma, helped craft the laws, and then wrote the plans most OK Opt Out employers use.

Critics say that Tonn "has a vested interest in PartnerSource making more money." Minnick defends his wife's qualifications, saying she stands "on her own credentials as the former director of two hospitals' occupational health programs and as past president of both the Texas College of Occupational and Environmental Medicine and a national organization of physicians who evaluate disabilities." He also indicated PartnerSource discloses the relationship in contracts, and client companies "can visit with whatever vendor they want to." They do not have to use Tonn.

Fair enough. Employers who are saving a ton of money are fully informed and aware. I wonder if that relationship is clear to the injured workers whose lives are suddenly dependent on this arrangement?

Doesn't matter. Employees in that system really have no control over their situation regardless.

To compound the issue for the Opters, columnist Peter Rousmaniere, who is not an opponent of Opt Out, issued a damaging letter of his own this morning in response to the ProPublica report. In it he details how injured workers' covered under Opt Out could see a reduction in benefits of up to 25% over traditional workers' compensation systems.[2]

Continued, Page 16.

Propublica, from Page 15.

Rousmaniere wrote it after reading the ProPublica report early Wednesday morning and circulated it as an email. He considers it an examination of one aspect of the Opt Out/workers' comp trade-offs that industry insiders would appreciate; though it is "probably hard for lay people to fully understand." He told me via email that his paper "could not have been done" without ProPublica finding the ERISA plans, which, in his words, "Opt Out advocates have much to their detriment not made public over time." He also says it is part of his efforts to stimulate an informed debate.

And no matter what you make of Rousmaniere's numbers, he really hit at the Achilles heel of Opt Out; the secrecy and lack of transparency that all participants seem to insist upon. This is not new information, and in fact has been the single biggest point that cause many of us to oppose Opt Out to begin with. We suspect the emperor has no clothes, but we just are unable to see the emperor. If Opt Out employers recognize that, and develop real and verifiable reporting mechanisms, many of the critics of the system could be silenced. As long as, that is, the emperor really is clothed.

And finally, a public relations company hired by ARAWC, the Association for Responsible Alternatives to Workers' Compensation, sent me an email containing a statement that they asked be included should I run a story on the topic. Since I am nothing if not fair and reasonable, I will comply. In fact, I'll do better than that. I'll not only publish the statement, I will publish the requesting email, and will provide commentary on both.

No need to thank me. It is what I do.

First, the email, from Courtney Blossey of Jones Public Relations:

> *Good morning,*
> *As you may be aware, ProPublica's Michael Grabell has published an article regarding The Option and opting out of state workers' compensation. Should you choose to run the story, please also run our statement from the Association for Alternatives to Workers' Compensation (ARAWC) Spokeswoman Brenda Barwick.*
>
> *We can offer you an interview with an ARAWC representative if you're interested.*
> *Best Regards,*
>
> *Courtney Blossey*

My comment on this email:

Ms. Blossey, the last time I checked ARAWC stood for "Association for ***Responsible*** Alternatives to Workers' Compensation." However, I note in your missive that you call them the "Association for Alternatives to Workers' Compensation," omitting the word "Responsible." Personally I find that a refreshing change, and applaud you for a dramatically honest approach in public relations.

Now, the ARAWC (excuse me, the AAWC) statement:

> *First and foremost in the ProPublica article that came out today, ARAWC cares about employees and their recovery. References to employees in this story not receiving care are truly tragic, and our innovative system can be a solution in every circumstance. ARAWC will continue to actively advocate for The Option to be implemented in a transparent manner in other states so employees across the nation are able to participate in a program that fosters better care and ensures a faster recovery process. It is important to note there have been independent studies conducted on The Option and as an association we will openly distribute and share the positive medical outcomes achieved through our system.*

My comments:

It is interesting to note that the statement claims that "our innovative system can be a solution in every circumstance." It is interesting because in the article, Mr. Minick was quoted as saying that "There's no occupational injury system that we've found yet that will provide perfect results in a 100 percent of cases."

Continued, Page 17.

Propublica, from Page 16.

It could just be a typo in the statement, but for an organization that prides itself on transparency and conciseness, I doubt it.

Thank you for clarifying that point.

Furthermore, the statement reads "ARAWC will continue to actively advocate for The Option to be implemented in a transparent manner." Is that the same transparency intended when members of your organization supported the successful effort to "make confidential" all the information submitted in the application process in Oklahoma? No one may now review any documents or information submitted to the Commission for Opt Out approval (unless a court demands it). Was that the "transparency" to which you allude? Or do you mean the "transparency" where no claim data is available or will be discussed? Possibly both?

I'm just curious.

Also, can you clarify who funded the independent studies that you allude to?

And finally, I appreciate that you will "openly distribute and share the positive medical outcomes achieved through our system." Unfortunately, that is not the only thing we are interested in. What the world really wants to know is the claim denial rate of your membership, particularly in comparison to what it was prior to opting out. Can you add that information as well?

We all would appreciate it.

So, it seems that Opt Out might be having a rough day on the public relations front. They might as well get used to it. ProPublica isn't done. That, and the continued insistence on privacy and silence will continue to dog Opt Out employers; this will only become more prominent as the system expands to other jurisdictions. In its current structure and form, a secretive Opt Out could become a victim of its own success, ultimately collapsing under its own public relations weight as its reach expands across the nation.

To paraphrase an old adage – you can fool some of the people some of the time, but you can't fool all of the people in an ever increasing number of states. Ironically, in the end, Opt Out will probably be as bad for the employers who have embraced it as it is for the workers they employ.

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* Bob Wilson cofounded WorkersCompensation.com in 1999, and serves as President and CEO. He has almost 20 years' experience in the technology arena, including Internet business solutions and website architecture and development. Bob's experience includes turn around and area management, as well as human resources management and technical recruiting. Bob has presented at seminars and conferences on a variety of topics related to both technology within the workers' compensation industry, and bettering the workers' comp system through improved employee/employer relations and claims management techniques. He is the author of "From Bob's Cluttered Desk," a blog repeatedly selected as a top workers' compensation blog by LexisNexis.

Endnotes on page 35.

Interesting Workers' Compensation Blogs

DePaolo's Work Comp World
http://daviddepaolo.blogspot.com/

Workers' Compensation Institute
http://www.wci360.com/

Managed Care Matters
http://www.joepaduda.com/

Tennessee Court of Compensation Claims
http://tennesseecourtofwcclaims.blogspot.com/

Workers' Compensation
http://workers-compensation.blogspot.com/

From Bob's Cluttered Desk
http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/

Workers' Comp Insider
http://www.workerscompinsider.com/

Maryland Workers' Compensation Blog
http://www.coseklaw.com/blog/

From the Pages of workcompcentral

Study Identifies Blood Pressure Changes as Chronic Pain Measure

By Elaine Goodman
November 9, 2015

A problem with chronic pain is that it's subjective, often leading to disputes over whether a workers' compensation claimant's reported pain is real and deserving of treatment or just a ploy to obtain benefits.

But a California researcher thinks he's found an objective test for establishing the presence of chronic pain, based on how a person's blood pressure responds when standing up from a prostrate position.

"What chronic pain does is whack the blood pressure response system," said Dr. Solomon Perlo, a psychiatrist and volunteer clinical faculty member in the Department of Psychiatry and Biobehavioral Sciences at the University of California, Los Angeles medical school.

Perlo and researcher Dmitry Davydov of the Russian Academy of Medical Sciences published their findings recently in the peer-reviewed journal, Physiology & Behavior. Perlo has also asked to present his findings at the American Academy of Pain Medicine conference in February.

Perlo, who's a qualified medical evaluator in California, based his research on results from 50 workers' compensation claimants who came to him for examinations in disputed claims. He acknowledges that his research needs follow up and validation from additional studies, but he said the findings are significant because they introduce "a novel and objective metric of patient credibility in chronic pain that bypasses self-reporting and examiner bias because it is entirely physiologic."

And the tests don't require elaborate equipment or administration by a physician, Perlo said. An automatic blood pressure device and a trained technician are all that's needed. In one analysis in Perlo's study, the 50 claimants were divided into two groups based on their score from the self-reported RDIP (Determining Impairment Associated with Pain) published by the American Medical Association. Claimants with a score of less than 9 on the 20-point scale were considered low-pain; while those scoring 9 or higher were considered to have severe pain.

The claimants were instructed to lie down in a darkened room for 10 minutes, while their blood pressure was recorded several times. Then the lights were turned on and they were asked to stand. Blood pressure was recorded at intervals for the next 10 minutes. After a short delay, systolic blood pressure in the low-pain group spiked after the subject stood up, and then began decreasing. The blood pressure increase upon standing is a typical response thought to be a mechanism to maintain blood flow to the brain.

The blood pressure also increased in severe pain subjects after they stood up, but the response was flattened compared to the low-pain group. Perlo described the blood pressure response as a "fingerprint" associated with a particular level of chronic pain. The blood pressure test was conducted on the subjects twice during their visits. In the second test, which was performed in the afternoon following personality tests and interviews, the blood pressure response of the low-pain subjects was flattened out like that of the severe pain group. Perlo said the stress of the many exams performed throughout the day might be responsible.

Continued, Page 19.

Blood Pressure from Page 18.

Similar results — with the two groups displaying different blood pressure response profiles when going from lying down to standing — were seen when claimants' pain was classified using different scales or when other blood pressure measurements were used. The data from claimant exams were analyzed retrospectively with the approval of UCLA's Institutional Research Board.

Having a way to validate chronic pain could be a game-changer for workers' compensation, said Julius Young, an applicants' attorney with Boxer & Gerson in Oakland, California. The technique could streamline the case review process and simplify decisions on authorizing surgery or medications. "Pain is the heart of the workers' compensation system," Young said.

However, Young said he wants to wait and see how the scientific community responds to the findings. Many variables, such as quality of sleep, medications and overall health, factor into pain perception and should be considered by the research, he said.

The pain assessment technique could turn out to be a fad, Young said, similar to thermography measurements used in the 1980s to try to validate pain by measuring the temperature of different areas of the body. "Is this sort of a flavor-of-the-month thing or is this a scientific breakthrough?" he asked.

Dr. Steven Feinberg, a pain medicine specialist and owner of the Feinberg Medical Group in Palo Alto, California, called Perlo's results "very interesting" but said more research and verification of the findings is needed. "We know that people in chronic pain usually have a physiologic response," Feinberg said. "It would be very useful if that could be measured."

Bundled Payments in WC Just a Matter of Time?

By Elaine Goodman
November 3, 2015

Bundled payments — in which a provider receives a flat fee for treating a worker's injury rather than filing claims for individual treatments — might still be in the distant future for workers' compensation.

But in an article for the American Association of Orthopedic Surgeons, two doctors are making a case that workers' compensation is well suited for bundled payments, particularly when the provider is an orthopedic surgeon. "Orthopedic surgeons or groups are uniquely positioned to develop and implement bundled payments in the WC system. Not only do they know the entire continuum of care, they also understand the concepts of high- versus low-value services for patient healing and return to work," said the article's authors, Dr. Alexandra Page and Dr. Nicholas Colyvas. The article is in the November edition of AAOS Now.

Both authors are orthopedic surgeons based in California. Page chairs the AAOS Health Care Systems Committee and Colyvas is a member of the AAOS Practice Management Committee.

Continued, Page 20.

Blood Pressure from Page 19

With bundled payments gaining a foothold in Medicare systems, it may be just a matter of time before the payment model reaches workers' compensation, Page said in a telephone interview.

The question is how far providers and carriers should go in bundling workers' compensation services.

One option would be a bundled payment for a particular surgical procedure, such as a knee replacement, along with imaging, operating room services and an anesthesiologist. At the other end of the spectrum, a provider could receive a flat fee for managing the entire scope of recovery from an injury.

"Surgeons willing to take on risk in this model must have considerable expertise in managing both the medical and the disability aspects of injuries," the article states.

The authors said the benefits of a bundled system include a physician's ability to treat patients without a claims adjuster as intermediary. As one example, they said, rather than a rigid prescription for 24 sessions of physical therapy, providers could help a patient start a home treatment program with support from a therapist when needed. Home treatment can be just as effective at a lower cost, Page said.

When surgeons see that surgery is inevitable for their patients, they'll be able to bypass the insurance carrier's requirement to try physical therapy first, Page said.

The next step is for providers to team with interested carriers to try out one or two bundles for particular surgeries, Page said. Such a trial could be carried out within existing workers' compensation systems, she said.

Spreemo Chief Executive Officer Ron Vianu said bundled payments have potential for workers' compensation, but bundling needs to be done in "small, digestible chunks." Spreemo is a workers' compensation cost-containment company.

"Any solution is going to be baby steps," said Vianu, who also pointed to outpatient surgeries, or relatively simple inpatient procedures, as a good place to start. Some providers might already be offering such procedures as bundled services, he said.

From there, Vianu said, providers can move on to more complex, higher risk bundles.

Although the bundled payment for a surgery might result in cost savings, Vianu cautioned that the quality of the treatment should not be overlooked.

And Vianu doesn't envision workers' compensation claims adjusters being replaced anytime soon because of the need to manage the disability portion of claims in addition to medical management.

Even those providers who might not find the added risk of bundled payments appealing should be ready for their arrival, Page said.

"It's far better to be prepared," she said.

The articles on pages 18-20, *Study Identifies Blood Pressure Changes as Chronic Pain Measure* and *Bundled Payments in WC Just a Matter of Time?* were originally published on WorkCompCentral.com and are reprinted here with permission. The NAWCJ gratefully acknowledges the contributions of WorkCompCentral to the success of this publication and the NAWCJ.

Hon. Luann Haley

You be the Judge – Best Holiday Songs

By Hon Luann Haley and Hon. Jennifer Hopens

Hon. Jennifer Hopens

Judges have many interests and pursuits outside of the law and jurisprudence. One that comes to mind is music, famously termed "the universal language of mankind" by legendary American poet Henry Wadsworth Longfellow (1807-1882).

The holidays are now upon us, and the music of the season abounds. In that spirit, to paraphrase another fine bard of the past – friends, Romans, fellow members of the NAWCJ – lend me your ears, or at least your iPods.

While outside of our usual subject-matter jurisdiction, what follows is an extrajudicial exploration of some favorite holiday music by various members of the NAWCJ board of directors. In addition to learning more about the personalities of the board members, we hope to bring a smile to your face when you read this article. The list of songs are broken down into four genres – Classical, Pop, Rock, Jazz, and "Other."

Disclaimer: the opinions expressed in this article are neither *lex* (law) nor *verum* (true), but only the personal and highly subjective observations and musings of the individual contributors.

Classical:

Jennifer Hopens (NAWCJ President-Elect, Texas Department of Insurance, Division of Workers' Compensation): "The Nutcracker." The score of this two-act ballet by Russian composer Pyotr Ilyich Tchaikovsky (1840-1893) is an essential and elegant soundtrack for the holidays. The "Nutcracker Suite" is pure magic, in my opinion.

Jane Rice Williams (NAWCJ Board member, Kentucky Department of Workers' Claims): My all-time favorite is "O Holy Night." While there are various stories surrounding this timeless piece, the short version is of the poem written in 1847 in France at the request of a parish priest. The poem was set to music soon after. Following attempts to silence the song for being too secular, it made its way to America in the hands of John Sullivan Dwight, a Unitarian minister and ardent abolitionist, who translated it to English. He was most moved by the verse: "Truly he taught us to love one another, his law is love and his gospel is peace. Chains shall he break for the slave is our brother and in his name all oppression shall cease." The music and the lyrics range from very simple to magnificent and are truly timeless. World peace seems nothing more than a dream. But it is no more complex than the verse that moved John Sullivan Dwight and never fails to move me.

Deneise Lott (NAWCJ Board member, Mississippi Workers' Compensation Commission): For me, it's hard to separate the song from the memory of the performance. Few songs evoke the sacredness of the season like "Silent Night, Holy Night" when sung by a congregation by candlelight at midnight on Christmas Eve.

Frank R. McKay (NAWCJ Board member, Georgia State Board of Workers' Compensation): Handel's "The Messiah" is my all-time Christmas favorite. We always sing it at our church's Living Christmas Tree performance. However, I love all Christmas songs and am one of those people who just leaves my car radio set on the non-stop Christmas song station throughout the season.

Ellen Lorenzen (NAWCJ Past-President, Florida Office of Judges of Compensation Claims): "Glory to God in the Highest" from Heinrich Schultz' Christmas Oratorio.

LuAnn Haley (NAWCJ Board member, Industrial Commission of Arizona): The "Hallelujah Chorus" in Handel's Messiah, by George Frideric Handel, always sets the proper mood for the approaching holidays.

Continued, Page 22.

You be the Judge, from Page 21.

David Torrey (NAWCJ Immediate Past-President, Pennsylvania Department of Labor and Industry): As for classical, I must admit that I am partial to the musical drama, "Night of the Miracle." This operetta, composed by Colonel Samuel Loboda of The U.S. Army Band ("Pershing's Own"), in the 1960's, tells the story of the birth of Jesus from the standpoint of the shepherds, and it's full of both familiar carols and original music. As a new member of the band in the 1970's, I turned my nose up at this work, which we played every year along with the U.S. Army Chorus. As I've grown older, however, I have revised my thinking. This change came about when a CD recording was made available in 2013, and I started listening with a more mature ear. The production values of the recording are superb, and the singing is amazing. The recording, in this regard, was made during the Vietnam War, at a time when the Army Chorus was in its glory days. This was so because many of its members had been drafted out of leading university choral programs. I've engifted several NAWCJ members with this album, and you can get a copy from Altissimo Recordings! (www.military music.com).

Pop:

Jennifer Hopens (NAWCJ President-Elect, Texas Department of Insurance, Division of Workers' Compensation): "Peace on Earth/Little Drummer Boy." It's arguable what category this collaborative cross-genre gem even falls under, but I've always enjoyed this duet performed by Bing Crosby (1903-1977) and David Bowie (1947-) on Crosby's 1977 Christmas special. The pairing of the quintessential voice of the "Great American Songbook" with the king of iconoclastic glam rock would seem to make for strange musical bedfellows, but the result is perfect harmony, in my opinion. It's also a bit haunting, since Crosby passed away from a heart attack soon after taping the special, which aired posthumously.

LuAnn Haley (NAWCJ Board member, Industrial Commission of Arizona): "I want a Hippopotamus for Christmas," the version recorded by a child singer, Gayla Peevey, in 1953, as just like the rhinoceros, the Jonas Brothers' version "just won't do." The 1953 version reached the top of Billboard's Pop Chart in 1953. I love this song as well as it was also recorded in the 1960's from several of my childhood favorites: Captain Kangaroo and the Three Stooges.

Frank R. McKay (NAWCJ Board member, Georgia State Board of Workers' Compensation): Amy Grant's "Breath of Heaven" is so beautiful and calming as is Carrie Underwood's "Do You Hear What I Hear."

David Torrey (NAWCJ Immediate Past-President, Pennsylvania Department of Labor and Industry): How about Bing Crosby's "Christmas Dinner Country Style" (1963)? Yes, it's a little corny, with lyrics like: "Mother, mother, everybody's starvin' – Mother, mother, let's eat! – Hold your horses, got a million courses, And I'm fixin' …a treat!" Still, it's a classic Christmas feel-good song. And don't take my word for it – check out the video!: https://www.youtube.com/watch?v=K42ioKM5lE8.

Country:

David Torrey (NAWCJ Immediate Past-President, Pennsylvania Department of Labor and Industry): My favorite is Vince Gill's rendition of "Let There be Peace on Earth," sung along with his daughter Jenny. It can be found on the CD of the same name which is still widely available. This is rightfully so, as each cut is in fact a winner. I first came to know this number, written in 1955 by Sy Miller and his wife Jill Jackson-Miller, during basic training at Ft. Dix, New Jersey. It was belted out during mass by the base priest every Sunday of those eight weeks.

Continued, Page 23.

You be the Judge, from Page 22.

My assumption at the time was that he thought that it was simple enough that even us knuckleheaded teen-aged losers could sing along – and even *understand* its beneficent message. While this tune has become popular during the holidays, I note that basic training was for me during a very hot and humid summer, 1976, so in fact it is a great number for all seasons!

Rock:

Jennifer Hopens (NAWCJ President-Elect, Texas Department of Insurance, Division of Workers' Compensation): "Jingle Bell Rock." There have been many recordings of "Jingle Bell Rock" since its initial release in 1957, from artists spanning the musical spectrum from Brenda Lee to Billy Idol. To my mind, the original – recorded by singer Bobby Helms (1933-1997) – is the best. I really like the guitar melody at the beginning, and I thought Helms's vocals fit the lyrics wonderfully.

Frank R. McKay (NAWCJ Board member, Georgia State Board of Workers' Compensation): Burl Ives' "Rudolph the Red Nose Reindeer" is my favorite fun Christmas song. However, I also like "Santa Claus is Coming to Town" as sung by Bon Jovi.

LuAnn Haley (NAWCJ Board member, Industrial Commission of Arizona): "Santa Claus is Coming to Town" recorded by Bruce Springsteen in 1975. I love this version as it brings back a fond law school memory when I heard it performed live in Philadelphia in 1981 as a 3rd year law student. The concert was the night before the final exam in my Property course, which of course may be a reason I practice workers' compensation rather than real estate law.

Jazz:

Jennifer Hopens (NAWCJ President-Elect, Texas Department of Insurance, Division of Workers' Compensation): Anything by jazz pianist Vince Guaraldi (1928-1976), who provided compositions for the Charles Schulz (1922-2000) "Peanuts" TV holiday specials in the 1960s and 1970s.

Do I have to narrow it down to just one? Good grief!

If you twist my arm, I'll go with "Christmas Time is Here" from "A Charlie Brown Christmas" (1965). A great melody sure to inspire nostalgia.

Deneise Lott (NAWCJ Board member, Mississippi Workers' Compensation Commission): "Have Yourself a Merry Little Christmas" became my favorite when I heard Marvin Hamlisch play a wistful performance of this classic at the Kennedy Center. No vocals or orchestra, just a single spotlight on the maestro and his Steinway.

Frank R. McKay (NAWCJ Board member, Georgia State Board of Workers' Compensation): "Jingle Bells" by Duke Ellington.

"Other":

Jennifer Hopens (NAWCJ President-Elect, Texas Department of Insurance, Division of Workers' Compensation): "Greensleeves." Particularly, I love the soothing melody of "Fantasia on Greensleeves" (1934) by English composer Ralph Vaughan Williams (1872-1958). The folk song "Greensleeves" is believed to date back to the 16th century, though its authorship is unknown and widely debated. Rumor has long persisted that English monarch Henry VIII wrote it as a love song to his future queen, Anne Boleyn (things didn't really work out for them after that, but I don't think it had anything to do with this song).

Since "Greensleeves" or "Fantasia on Greensleeves" might fall on the "penumbra" between folk and classical (and since I already used up my "Classical" choice), I am putting this piece under the "Other" category.

Deneise Lott (NAWCJ Board member, Mississippi Workers' Compensation Commission): I have fond memories of "Rudolph the Red-nosed Reindeer." At a sing-off among a group of International students one hot summer day, my fellow patriots and I chose it as the quintessential American Song. Coincidentally the sing-off followed an afternoon of cooking classes which included the consumption of a great deal of wine.

Continued, Page 24.

You be the Judge, from Page 23.

Ellen Lorenzen (NAWCJ Past-President, Florida Office of Judges of Compensation Claims): "I'm spending Hanukkah in Santa Monica" by Tom Lehrer, which will be known mostly by Jewish people of a certain generation and may have no appeal to anybody else.

Robert S. Cohen (NAWCJ Treasurer, Florida Division of Administrative Hearings): For those of us who are members of the Jewish faith, we don't have the beautiful songs like "Silent Night, Gloria, or White Christmas." We have been stuck for generations with "I Had a Little Dreidl," "Hanukkah O Hanukkah," and the Hebrew version of "Rock of Ages" ("Maot Tzur" in Hebrew). Then along came comic Adam Sandler, some 21 years ago, with his now famous "Hanukkah Song" and Jews around the world (or at least in the United States) were vindicated. Now we have a popular song performed on Saturday Night Live and on Comedy Central. So, my favorite holiday song is Adam Sandler's "Hanukkah Song" which has been updated since, in 1999 and 2002, and now again this year to include new celebrities such as David Beckham, Adam Levine, Jake Gyllenhaal and Scarlet Johansson. So, "put on your yarmulke, it's time for Hanukkah…..and have a happy, happy Hanukkah!"

David Torrey (NAWCJ Immediate Past-President, Pennsylvania Department of Labor and Industry): I'm one of those Broadway show tunes-type guys, so I have to invoke "We Need a Little Christmas," from Jerry Herman's *Mame* (1966). And who of judge-age can't relate just a little bit to these immortal lyrics?: "For I've grown a little leaner … grown a little colder … Grown a little sadder … grown a little older. And I need a little angel … sitting on my shoulder! Need a little Christmas now!"

Michael Alvey (NAWCJ President, Kentucky Workers' Compensation Board): How about "Grandma Got Run Over by a Reindeer," by Elmo and Patsy, and "Please Daddy Don't Get Drunk this Christmas," by John Denver? Because it's a tort, a criminal battery and a DUI.

David Langham (NAWCJ Board member *emeritus*, Florida Office of Judges of Compensation Claims): "Twelve Days of Christmas," by Bob and Doug McKenzie, because it reminds me of bacon. Mmmmm bacon. "Christmas Don't be Late," by Alvin and the Chipmunks, because you can't help but laugh; which of course led to Chipmunks Roasting on an Open Fire, by Bob Rivers, because who can resist "hot sauce dripping from their toes?"

Impossible to select:

Melodie Belcher (NAWCJ Board member, Georgia State Board of Workers' Compensation): It is impossible to select a favorite Christmas song. Christmas songs are memories, traditions, and reminders. They lift our spirits and soothe our souls. I remember my Mother playing the piano when we lived overseas and young U.S. Marines on their way to and from Vietnam would come to our house and sing Christmas carols. There is nothing quite like a piano sing-along with family and friends gathered around the Christmas tree.

When we came back to the states from Japan, we moved to Connecticut, and "The Christmas Song" became reality. Jack Frost was nipping at our noses and we were dressed up like Eskimos. Listening to my parents' albums – Andy Williams, Perry Como, Johnny Mathis, Julie Andrews and Nat King Cole – while enjoying cookies and hot chocolate after an afternoon of ice skating on the pond behind our house, was sure to put us in the Christmas spirit. Christmas trees were hard to find in Japan back then, and they tended to be a bit scrawny, but it didn't matter at all when the Marines belted out the chorus of "Oh Come All Ye Faithful."

Years later, when I had children of my own, I appreciated a different kind of Christmas song. All of a sudden, "Santa Claus is Coming to Town," took on new meaning as I chided my little ones to behave and to have a positive attitude.

Continued, Page 25.

You be the Judge, from Page 25.

My children are grown now and we've experienced personal grief – losing my mother and other family members and friends. We've also shared national grief with fellow Americans over 9-11 and other disasters – whether man-made or natural. Amy Grant's rendition of "My Grown-up Christmas List," is especially poignant.

Still, as I put the last ornaments on the big tree and sit down to admire its beauty and to smell that wonderful Christmas tree smell, with carols playing in the background and my dear husband (worn out from fighting with the lights) sitting beside me, drink in hand, I snuggle a bit closer when "Baby It's Cold Outside," starts to play. Maybe we'll sit too close just a little bit longer and listen to all of my favorite Christmas songs!

Kenneth Switzer, (NAWCJ Board member, Tennessee Court of Workers' Compensation Claims): I cannot recall an opera, rely on some basic training story, or refer to songs from different genres. All I can recall is the face of my grandfather peering in my front window on a rare snowy Christmas eve in the early 60s, arms full of presents, while my father's "hi-fi" was playing Bing Crosby singing "White Christmas." There is no other Christmas song.

John Lazzara (NAWCJ Founding President, Florida Office of Judges of Compensation Claims): my memory of the best Christmas song goes way back. I was in kindergarten in the early '50s and each child was told to memorize a Christmas song to be sung individually at an upcoming Christmas program -- I was assigned "Jingle Bells." I memorized the short song and sang it at my first ever public performance, and people *(other than my parents)* clapped. Wow!

In addition to this early adulation, the reason the song is significant to me is because up until the 8th grade "Jingle Bells" was the only non-religious song I had every memorized. All through elementary school, whenever asked to sing a song, I always sang "Jingle Bells" regardless of the season we were in. That was because that was the only song I knew all the words to. I can still sing it today *(while alone in the car)* and it puts a smile on my face when I recall the clapping I heard those many years ago.

(Ed.) What are the best holiday songs? The jury (and judges) may still be out, but hopefully we have given you some musical food for thought to enjoy throughout this season and beyond. Whatever your musical persuasion, the NAWCJ Board wishes you a safe and relaxing holiday season surrounded by friends, family (and music) that you enjoy.

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* Luann Haley is an administrative law judge at the Industrial Commission of Arizona. She is an NAWCJ Board member and is editor of the Lex and Verum.

* Jennifer Hopens is a hearing officer with the Texas Department of Insurance, Division of Workers' Compensation. She is the President-elect of the NAWCJ.

A Report on a New England Workers' Compensation Conference

By Deborah G. Kohl

Introduction

On October 23, 2015, attorneys and judges from Massachusetts, Rhode Island and New Hampshire gathered at Gillette Stadium to discuss a variety of workers' compensation issues that affect all three states. This is the second year that this conference has been held and the first year where New Hampshire has joined the discussion. Not only was this a perfect bright, crisp fall day in New England, but the venue allowed the participants to spend time at the home of the World Champion New England Patriots.

Massachusetts Secretary of Labor, Ronald L. Walker, II provided introductory remarks emphasizing the importance of workers' compensation in the regional economy. The day then centered on the judges and attorneys from three states spending time with each other recognizing the importance of learning about the similarities and differences in practice, procedure and substantive law in the New England region.

In our constantly moving society where more and more employees work electronically, commute from state to state and where employers have a multi-state presence, it is essential that practitioners and judges have a basic understanding of the workers' compensation laws in other states. Many of us represent employees or employers whose work covers several states or where employment contracts occur in one state but accidents occur in another. The speakers discussed topics common to the three states with an emphasis on comparing and contrasting the systems. The speakers described the litigation processes, how average weekly wage and comp rate are calculated, the payment of seasonal employees, compensability of occupational injuries and medical reimbursement rates along with the complex issues involved in joint/dual jurisdiction claims.

New Programs to Deal with Opioids and Addiction

One of the most important topics of the day revolved around the opioid medication epidemic. The Seminar participants were introduced to two newly established programs in Massachusetts designed to change the way in which opioids and addiction are handled. The Mass. Bar Association WC Section in conjunction with the Department of Industrial Accidents through Senior Judge Hernandez have recently created a pilot program which will "divert" post settlement claims involving opioid medication from the traditional litigation path to a mediation track designed to work with the parties to break the emphasis on opioid medication. In the traditional track, a judge ultimately decides whether an employee remains on opioid medication. Under the mediation plan, a mediating judge will work with the parties and a nurse case manager to create a program designed to break the emphasis on opioids. Ultimately, an agreement would be entered into between the parties. If the mediation fails, the parties can return to the litigation track.

The Workplace Safety Task Force of the MBA has worked with doctors and other practitioners to establish a network of medical providers with the goal of a team approach to reducing addiction. This medical team is available to injured workers and insurers as a means of reducing litigation and emphasizing a medical means of ending the addiction path.

Dr. Robert Feliz, a pain management practitioner, described the problems with opioid addiction and the need for the medical community to de-emphasize the prescribing of these addictive medications. The judges and attorneys on the panel all discussed potential alternatives to the use of opioid medications including "scrambler" therapy, physical therapy, alternative medicine and prescription of non-narcotic medication.

Continued, Page 27.

New England Conference, from Page 26.

The serious issue facing insurers, medical providers and attorneys is the extensive number of injured workers addicted to these expensive and dangerous medications. New ideas are important and should be considered in cases involving addiction.

Electronic Filing Systems

There was an interesting discussion of the good, the bad and the ugly of the very different electronic filing systems implemented by Massachusetts and Rhode Island. Clearly, each system has good and bad aspects. In Massachusetts, the entire file is viewable on line by anyone who is a party. However, not all forms are available to be filed in electronic format. In Rhode Island, everything must be filed electronically but not all forms and the history of the case can be viewed off the system. In time, hopefully both systems will evolve to the point where every document is filed electronically, is viewable on line and the parties can decrease emphasis on the use of paper documents.

Employer Premium Fraud

Attorney Michael Lynch from Beacon Mutual Insurance along with Martin Jenkins from the New Hampshire Dept. of Labor joined Paul Meagher of WCRIB and Anthony DiPaolo of the Insurance Fraud Bureau in discussing employer premium fraud and its effect on the system and ultimately on the premiums paid by employers for workers' compensation insurance. All agreed that continuing criminal prosecution was the key to putting the brakes on these illegal practices.

Opt Outs

The day concluded with a discussion of topics on both the national as well as the state levels which may be the next issues facing practitioners. Pending and potential legislation in Rhode Island and Massachusetts was described along with the national issues including opt-out. The Secretary of Labor as well as the practitioners and judges felt that opt-out is not an appropriate mechanism for providing workers' compensation benefits to injured workers. Moreover, there was substantial discussion of the inequities in differential benefits for employees based on the place of employ. It did not appear that there was any support in the room for opt-out.

The day concluded with an agreement that this seminar was a valuable tool for judges and attorneys alike and should be continued into the future hopefully with the addition of the other New England states.

The foregoing was originally published on LexisNexis Legal Newsroom, Workers' Compensation Law on October 12, 2015, titled *A New Mediation Track to Combat Opioid Use by Injured Workers,* and is reprinted here with the permission of the author.

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* Since 1980, personal injury attorney Deborah G. Kohl has focused her professional expertise and acumen on helping injured folks struggling with Workers Compensation and Social Security Disability law issues. She has been an active lecturer and author in both areas of law, and has held several prestigious leadership positions, including serving as president of the Workers Injury and Law Advocacy Group. Ms. Kohl is perennially listed in the publication Best Lawyers in America.

NAWCJ
National Association of Workers' Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

The All Committee Conference of the Southern Association of Workers' Compensation Administrators

By: Charlie Miranda

The Southern Association of Workers' Compensation Administrators (SAWCA) met for its All Committee Conference (ACC) in November at the Greenbrier Resort in White Sulphur Springs, West Virginia. In a quiet and quaint corner of the Allegheny Mountains sits a majestic structure, some of it dating to 1778. The area is replete with various springs, and people used to travel great distances to "take the waters" of the region. With the advent of the railroad, the destination became a resort on a grand scale. The twentieth century brought greater purpose, shrouded in secrecy. more on that later.

SAWCA is a group of 20 jurisdictions from New Mexico in the west, across the southern United States, and north up the eastern seaboard to Maine. Yes, Maine is the newest member of SAWCA. Asked about this seeming incongruity at the ACC last week, Chair Paul Sighinolfi reportedly replied "southern is a state of mind." Twenty jurisdictions with the goal of bringing together workers' compensation regulators and administrators for education, information and synergetic efforts aimed at better management of workers' compensation systems.

The program began on Wednesday, November 18 and concluded Friday, November 20, 2015. It was a whirlwind of activity, its onslaught of information and perspective punctuated periodically with humor and quiet conversations.

The ACC opened with How Long Does the Honeymoon Last. This frank discussion focused on the challenges of undertaking the role of leading state agencies. Commissioner Beth Aldridge of Mississippi, Chair Paul Sighinolfi of Maine, Safety National Vice President Tom Hebson, and Chair Frank McKay of Georgia discussed the manner in which agency leadership is recruited and appointed in various states. The discussion centered on bringing the value of past experiences to the role of agency leader, and the importance of setting interim and long-term goals.

The discussion of goals was continued in the second session, a compelling panel discussion titled *The Technological Re-Tooling of State Workers' Compensation Systems*. There is an incredible variety among states regarding data management. Most states have become comfortable with Electronic Data Interchange (EDI) and have expanded the impact of technology into electronic filing systems. Some jurisdictions are just deploying electronic filing for litigation, and others are in the process of deploying their next generation processes.

This panel included Delece Brooks of Georgia, Fran Davis of Kentucky, Roger Williams of Virginia, and two industry experts whose experience includes both the deployment and re-tooling of processes: Matt Bryant of WorkCompStrategies and Christine Dicken of SLI Global Solutions. Main take-aways of this program included the need to set and define goals and objectives. Repeatedly, the panelists stressed that agencies must have a point person primarily responsible for the project. There was significant discussion of the crucial period of planning, during which all of the agencies stakeholders must be involved in discussions of work flow and business process. There were several "if I had known then what I know now" stories, and every attendee came away with a new appreciation for the challenges of deploying technology.

On Wednesday afternoon the Self-Insurance and Insurance Committee met for two hours. Challenges with securing the payment of benefits from self-insured employers was a main topic. Specific focus was brought to the challenge of monitoring financial status and documentation from public entity employers.

Continued, Page 29.

Concurrently, there was a joint meeting of the Adjudication Committee and the Administration & Procedure Committee. Connie Chandler of United Parcel Service and Brandi Garrity of Summit Holdings joined regulators Roger Williams of Virginia and Elizabeth Gobeil of Georgia to discuss various perspectives. Developing from the morning's discussions of technology, the discussion began with ideas regarding electronic interaction, data security concerns and more. Wade McGuffey, Esq. moderated the discussion.

Wednesday evening, SAWCA took over "the Bunker." In the 1950s, President Eisenhower led the nation through the early days of the Cold War. One challenge was planning for the continuation of American governance in the event of a nuclear attack, and an answer to this challenge was the construction of a large fallout shelter under the Greenbrier resort. For thirty years, until the Washington Post exposed its existence in 1991, the Bunker was "hidden in plain sight" as a conference facility. The attendees enjoyed tours of the bunker, complete with discussion of its construction. One key thought was the secrecy surrounding construction, and whether such a feat would be possible today with regulations on workers' compensation and occupational safety and health.

Thursday morning, the Claims Administration Committee presented three speakers in a general session. Steve Heinen, of Risk Management Incorporated and administrator of the Georgia State Board Claim Management Training Program, led with a discussion of workers' compensation cases. He stressed that most workers' compensation claims are not litigated, but instead involve injuries, treatment, benefits, and a return to work. He lamented that the majority of state effort seems focused on the small minority of claims that are litigated. In a hierarchy pyramid, he placed those litigated cases at the apex, supported by medical-only claims, first aid claims, near-miss events (no accident, but close), and overall safety concern in the workplace. He argued that more effort on the foundation of safety would reduce the occurrence rate of all the other levels, to the benefit of all employees.

Bob Wilson of WorkersCompensation.com took the stage next to speak about claims. He stressed the value of communication and contact. The employer that makes contact with an injured worker, expresses concern and interest, and maintains a focus on regaining a valued employee will have successful claims handling according to Mr. Wilson.

Wade McGuffey, Esq. then spoke on the mathematical and legal challenges of statutes that attempt to apportion liability for benefits between work and non-work conditions. This evolved into a discussion of the similar challenges of claims for contribution between multiple employers when a recent injury is impacted or affected by some prior work accident either in terms of the medical care required, or the overall disability that results.

The convention lunch Thursday featured Mitch Barnhart of the University of Kentucky. He made several points about the challenges of college athletics. There are interrelations with professional sports that present challenges, such as the short college tenure of many basketball players. He stressed the team approach to management, noting that student athletes are in fact students and that a commitment to their education is integral in a successful athletic program.

Thursday afternoon began with a panel discussion of the recent Pennsylvania Commonwealth Court decision in *Protz v. Workers' Compensation Appeal Board (Derry Area School District).* In this decision, the Court addressed statutory language directing that impairment be assessed with the "latest" edition of the American Medical Association Guides to Permanent Impairment (AMA Guides).

Continued, Page 30.

The panel included an attorney who has challenged this reference to the Guides, Vince Quatrini, a representative of the Pennsylvania Rating Bureau, William Taylor, a producer of published standards, Ken Eichler, and a state agency Chair, Karl Aumann (MD).

The decision in *Protz* was under the Pennsylvania constitution, and a prohibition on delegation of legislative authority. It may therefore be argued that similar challenges to delegation could be decided differently in other states. However, the case has broad potential implications for workers' compensation in the delegation of authority to treatment guides, pharmacy formularies, and even fee schedules. In the era of court challenges on various aspects of workers' compensation, there was consensus that similar challenges will continue in Pennsylvania and perhaps elsewhere.

The Medical Rehabilitation Committee then presented American Medical Association Board Member Albert J. Osbahr, III, MD in a general session. His presentation was premised on the great promises of the medical insurance reforms that have headlined the news for the last six years. The AMA is a strong advocate for mandatory health insurance, and perceives benefits from legislative mandates. Dr. Osbahr's focus is on occupational medicine. He stressed the AMA position that reforms and advances should be focused on patient care and progress. The acid test, he said, should always be simply "does this contribute to patient progress."

Following this general session, the Medical Rehabilitation Committee continued into the evening with two speakers on the challenges of finding willing medical providers. Pat Merrill of Health Management Resources and Rosalie Faris of OMCA led a discussion on how to recruit physicians to treat injured workers. The lack of qualified and willing providers is a problem with which most jurisdictions struggle.

On Friday morning, Judge Robert Swisher, Chief Judge of Kentucky, presented on *stare decisis* and some recent decisions of the Kentucky Supreme Court. His presentation was illuminating on the subjects of predictability and transparency for appellate courts. He described the legislative and judicial imposition of statutes of limitations and of repose, providing the audience a concise understanding of each. The operation of repose statutes was a key point in explaining the evolution of recent Kentucky Supreme Court cases, which some feel leaves doubt as to whether there is a statute of limitations on workers' compensation cases in Kentucky.

The Program concluded Friday with a panel moderated by Bob Wilson of WorkersCompensation.com. This was a no-holds-barred open dialogue between Mr. Wilson and an outstanding panel. Mr. Wilson interviewed Frank McKay of Georgia, Dwight Lovan of Kentucky, Rachel Bayless of New Mexico, and Tom Glasson from American International Group Insurance. The subjects were varied and interesting. New Mexico has been a leader in the regulation of Marijuana. A claim for reimbursement of medical Marijuana has been granted there by a trial judge and affirmed on appeal. The state is therefore thrust into the fore of setting regulation for such reimbursement and use.

Mr. Wilson led the discussion into the subject of how agencies and regulators interact with other state agencies, the public generally, and various interest groups. There was also a discussion about the concept of workers' compensation opt-out, and whether it is likely to become a trend gathering momentum in states other than Oklahoma.

In a soothing mountain setting, the All Committee Conference had something for everyone. There was an amazing volume of information and education, with various opportunities for conversation, contrasts and comparisons. These opportunities provide a great opportunity to find out with what jurisdictions are contending and what may be on the horizon. SAWCA will next meet in Sandestin, Florida. This Annual Convention will be July 25-29, 2016.

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Endnotes from the Opt-Out of Workers' Compensation. Pages 2-13.

[1] *See* Martha McCluskey, *The Illusion of Efficiency in Workers' Compensation Reform*, 50 RUTGERS LAW REVIEW 657 (1998).

[2] Michael Grabell & Howard Berkes, *The Demolition of Workers' Compensation* (Mar. 4, 2015), available at https://www.propublica.org/article/the-demolition-of-workers-compensation (last visited October 24, 2015).

[3] Terry Bogyo, *What can we Take from the ProPublica/NPR Investigative Reports on Workers' Compensation?*, blog posting, Apr. 20, 2015, available at http://workerscompperspectives.blogspot.com/ (last visited October 25, 2015).

[4] 85A OKLAHOMA STATUTES §§ 200-213. The law is called the Oklahoma Employee Injury Benefit Act, and it was effective February 1, 2014.

[5] *See* Nancy Grover, *The Future of Workers' Compensation: Is Opt-Out the Answer?*, WORKERS' COMPENSATION 2013 ISSUES REPORT (2013).

Opt-out is different from what have been known colloquially as "carve-outs." Carve-outs, permitted but not utilized in Pennsylvania, are agreements between employers and unions which are reached as part of collective bargaining agreements. Opt-out is imposed on employees without their say. For an explanation, and a comparison of carve-outs among states, *see* David B. Torrey, *Workers' Compensation "Carve-Outs": Law, Background, Criticism, and a Twelve-State Table* (2014), available at www.NAWCJ.org.

[6] The website of the opt-out lobby group states that opt-out "eliminates the need for volumes of statutes, regulations, and litigated decisions …." *See* http://www.arawc.org/ (last visited October 24, 2015).

[7] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[8] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, p.45 (1972), available at http://workerscompresources.com/?page_id=28 (last visited October 25, 2015).

[9] Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Compensation* (Oct. 14, 2015), available at https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp (last visited October 24, 2015).

[10] In Oklahoma, the "benefit plan shall provide for payment of the same forms of benefits" as available under the state workers' compensation act, but in practice many plans are more restrictive, giving rise to lawsuits against both employers and the regulators. For the statute, see 85A OKLAHOMA STATUTES § 203b. Mr. Bob Burke, in his compendium of materials on the Oklahoma opt-out, has published a side-by-side comparison of benefits, based on actual plans of a national department store and of a nursing home enterprise. They are not equivalent by any measure.

[11] Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Compensation* (Oct. 14, 2015), available at https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp (last visited October 24, 2015).

[12] *Id.*

[13] Nathan E. Ross, *How Level is the Playing Field? Should Employers be Able to Circumvent State Workers' Compensation Schemes by Creating Their Own Employee Compensation Plans?*, 2000 JOURNAL OF DISPUTE RESOLUTION 439 (2000); Jason Ohana, *Texas Elective Workers' Compensation: A Model of Innovation?*, 2 WILLIAM & MARY BUSINESS LAW REVIEW 323 (2011), available at http://scholarship.law.wm.edu/wmblr/vol2/iss2/5/. *See also* Becca Aaronson, *As Large Companies Opt Out, Concerns Grow for Workers' Compensation System*, NEW YORK TIMES (April 7, 2012).

[14] At an ABA meeting, a Texas defense attorney, Jane Stone, remarked that many smaller employers opt-out, proceed to employ undocumented immigrant labor, and then hope that when such workers are injured, "they'll just go back to Mexico."

[15] Alison Morantz, *Opting Out of Workers' Compensation in Texas: A Survey of Large, Multi-state Nonsubscribers*, in Regulation and Litigation: National Bureau of Economic Research (forthcoming 2010).
available on-line at: http://ideas.repec.org/h/nbr/nberch/11965.html. The seemingly final version of this study is summarized at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2629498, under the title, *Rethinking the Great Compromise: What Happens When Large Companies Opt Out of Workers' Compensation?* (Oct. 15, 2015).

[16] *See, e.g.*, Jim Malewitz, *In Texas, Injured Workers Struggle to be Counted*, THE TEXAS TRIBUNE (Oct. 2, 2015), available at https://www.texastribune.org/2015/10/02/texas-injured-workers-struggle-be-counted/ (last visited Oct. 25, 2015).

Continued, Page 33.

[17] *See* Nancy Grover, *The Future of Workers' Compensation: Is Opt-Out the Answer?*, WORKERS' COMPENSATION 2013 ISSUES REPORT (2013). The author quotes a consultant as saying that employers in Texas that have opted out like the program because "workers comp becomes much more like all the other benefit programs that the employer has."

[18] Bill Minick, *Debunking Opt-out Myths (Part 4)*, Aug.10, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-4/ (last visited Oct. 25, 2015).

[19] John F. Burton, Jr., *Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation Program*, Hershey, PA (June 1, 2015), available at http://workerscompresources.com/ (last visited Oct. 25, 2015).

[20] Michael C. Duff, *A Hundred Years of Excellence: But is the Past Prologue? The Fall Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation Act* , p.11 (Oct. 7, 2015). The quote here is from Henry Carter Adams, *Relation of the State to Industrial Action* in RELATION OF THE STATE TO INDUSTRIAL ACCIDENT AND ECONOMICS OF JURISPRUDENCE: TWO ESSAYS BY HENRY CARTER ADAMS 57, 89 (Joseph Dorfman ed. 1954).

[21] *See, e.g*., *Austin v. Kroger Texas, LP*, 465 S.W.3d 193 (Texas 2015) (employee, who fell while mopping slick restroom floor, could not recover against employer, which had opted out – employee could not recover caused by the "premises defect" of which employee was fully aware but that his job duties required him to remedy, as "the employer's duty to maintain a reasonably safe workplace did not obligate the employer to eliminate or warn of dangerous conditions that were open and obvious or otherwise known to the employee.").

[22] *See* Molly Redden, *Walmart, Lowe's, Safeway, and Nordstrom are Bankrolling a Nationwide Campaign to Gut Workers' Comp*, MOTHER JONES (Mar. 26, 2015), available at http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation (last visited Oct. 25, 2015). The author quotes an opt-out lobbyist stating, "I anticipate [that] if we pass this, the Tennessee option will become the U.S. option."

[23] The ARAWC website, under its "Blog" link, details the nature and progress of the South Carolina legislation. *See* www.arawc.org/ (last visited Oct. 24, 2015).

[24] *See* Molly Redden, *Walmart, Lowe's, Safeway, and Nordstrom are Bankrolling a Nationwide Campaign to Gut Workers' Comp*, MOTHER JONES (Mar. 26, 2015), available at http://www.motherjones.com/politics/2015/03/arawc-walmart-campaign-against-workers-compensation (last visited Oct. 25, 2015).

[25] *See* https://www.sedgwick.com/news/Pages/Sedgwicknews.aspx (last visited Oct. 25, 2015).

[26] *See, e.g*., Karen C. Yotis & Robin E. Kobayashi, *The Adversaries and Frenemies of Workers' Compensation* LexisNexis Legal Newsroom, Workers Compensation Law (Sept. 21, 2015), available at http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2015/09/21/the-adversaries-and-frenemies-of-workers-compensation.aspx (last visited Oct. 25, 2015).

[27] Robert Wilson, *ProPublica and Peter Rousmaniere Give Workers' Comp Opt Out A Very Bad Day* (blog posting), Oct. 14, 2015, available at http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/22540-propublica-and-peter-rousmaniere-give-workers%C3%A2%E2%82%AC%E2%84%A2-comp-opt-out-a-very-bad-day.html (last visited Oct. 25, 2015).

[28] *See, e.g.*, Bill Minick, *Debunking Opt-out Myths (Part 4)*, Aug.10, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-4/ (last visited Oct. 25, 2015).

[29] For a profile of workers who typically appear in disputed cases in Pittsburgh, PA, see David B. Torrey, *What do Workers' Compensation Judges do All Day? Full Quarter Case Characteristics of a Pennsylvania WCJ*, PBA WC LAW SECTION NEWSLETTER, Vol. VII, No. 113, p.44 et seq. (December 2012).

[30] *See* Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System (Mar. 9, 2015).

[31] FRANCIS H. BOHLEN, *Workmen's Compensation: An Address before the Law Association of Philadelphia*, p.5 (Nov. 12, 1912).

[32] WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p.697 (The Commonwealth Fund 1936).

[33] REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, pp.94-95 (1972), available at http://workerscompresources.com/?page_id=28 (last visited October 25, 2015).

[34] *See* Kyle W. Morrison, *The Workers' Comp Option: Will More States Start Adopting Workers' Compensation Opt-out Plans?*," SAFETY & HEALTH (Sep. 27, 2015). Here the journalist quotes Mr. Bill Minick stating, "What we found is that employers that pursue options to workers' compensation are more focused on providing a safe work environment …."

[35] *See* E.H. DOWNEY, WORKMEN'S COMPENSATION (MacMillan 1924)

[36] *See generally* RICHARD A. VICTOR & LINDA A. CARRUBBA, EDS., WORKERS' COMPENSATION: WHERE HAVE WE COME FROM? WHERE ARE WE GOING? (WCRI 2010).

[37] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

Continued, Page 34.

[38] *Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[39] Bob Burke has asserted that an employer's cost of defending a workers' compensation claim would be dwarfed by the costs of defending an ERISA claim in federal court. Bob Burke, Esq., *Analysis of H.4187, Employee Injury Benefit Plan Alternative, South Carolina General Assembly* (Oct. 5, 2015).

[40] *Barber v. Pittsburgh Corning Corp.*, 555 A.2d 766 (Pa. 1989); *Poyser v. Newman & Co.*, 522 A.2d 548 (Pa. 1987).

[41] *Vosburg v. Connolly*, 591 A.2d 1128 (Pa. Super. 1991) (held: employee was covered by the Act when, after having completed his work day, he was physically attacked by his employer (owner of small company) because of an allegation that he had shared a business confidence with a customer; thus, case against employer qua employer (and hence its insurance company) was dismissed summarily, though claim against co-employee boss could proceed).

[42] Thomas E. Martin. Jr., Esq., *Citing Magna Carta – The Validity of the Great Charter in Pennsylvania Today*, 86 PENNSYLVANIA BAR ASSOCIATION QUARTERLY 105 (July 2015). The Pennsylvania Constitution, at Article I, Section 11, states, "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay…."

[43] The Oklahoma Constitution provides: "The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice."

[44] *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Oregon 2001).

[45] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 10:17 (Thomson Reuters/West 3rd ed. 2008).

[46] This proviso of the Pennsylvania Constitution states: "The General Assembly may enact laws requiring the payment of the employers, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertaining of such compensation and the maximum and the minimum limits thereof, and providing special or general remedies for the collection thereof …."

[47] This case was *Rich Hill Coal Co. v. Bashore*, 7 A.2d 302 (Pa. 1939). *See* DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 1:41 (Thomson Reuters/West 3rd ed. 2008).

[48] As constitutional precepts have changed over the decades, however, it is unclear how the Pennsylvania Supreme Court would treat this proviso in the face of a restrictive opt-out. While the Pennsylvania Constitution was amended to allow for a mandatory law, more recent cases have simply said that the legislature has the power to enact a workers' compensation law under the police powers of the state – a much more broad authority.

[49] 85A OKLAHOMA STATUTES § 211(b)(6). The phraseology, "an objective standard of review that is not arbitrary or capricious," is non-standard.

[50] Bill Minick, *Debunking Opt-out Myths (Part 5)*, Oct. 5, 2015, available at http://insurancethoughtleadership.com/debunking-opt-out-myths-part-5/ (last visited Oct. 25, 2015).

Continued, Page 35.

Endnotes from Opt-Out of Workers' Compensation. Pages 2-13.

[51] This study is discussed in Lidia DePillis, *We've tried to smooth disabled peoples' path back to work. Why isn't it helping?: An essential safety net program is still a barrier, not a gateway, to employment*, WASHINGTON POST (Oct. 23, 2015), available at http://www.washingtonpost.com/news/wonkblog/wp/2015/10/23/after-years-of-trying-to-make-it-easier-for-disabled-people-to-go-back-to-work-its-as-hard-as-ever/(last visited Oct. 25, 2015).

[52] *See* David B. Torrey, *Attempts at Federalization and Federal Standards for Workers' Compensation: A Short History* (ABA 2013), available at www.davetorrey.info.

[53] *See Statement of the American Insurance Association: Legislation Permitting Employer Opt-Out of the Tennessee Workers' Compensation System* (Mar. 9, 2015).

[54] *See* http://www.help.senate.gov/imo/media/doc/Letter%20to%20DOL%20re%20workers%20comp%2010-20-15.pdf (last visited Oct. 26, 2015).

[55] *See* David B. Torrey, *The Common Law of Partial Disability and Vocational Rehabilitation Under the Pennsylvania Workmen's Compensation Act: Kachinski and the Availability of Work Doctrine*, 30 DUQUESNE LAW REVIEW 515, 521-22 (1992). *See generally* Gregory T. Presmanes, *Workers' Compensation, Return to Work, and Use of Light Duty Work Offers: An Overview of Programs Throughout the United States*, 50 TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 781 (2015).

[56] KEN OLIPHANT & GERHARD WAGNER, EDS., EMPLOYERS' LIABILITY AND WORKERS' COMPENSATION (De Gruyter/European Centre of Tort and Insurance Law 2012). *See* https://books.google.com/books?id=vaGJ-N7pyEUC&printsec=frontcover#v=onepage&q&f=false (last visited Oct. 25, 2015).

[57] David B. Torrey, [*Workers' Compensation in*] Japan, PBA WORKERS' COMPENSATION LAW SECTION NEWSLETTER, Vol. VII, No. 123, pp.27-31 (Oct. 2015).

[58] Peter Rousmaniere, *PFR Maine: Simplest Chance for Major System Redesign?* (Sep. 28, 2015), available at https://www.workcompcentral.com/columns/show/id/91a2c996d0af6f0327fb93ee465e7fbf879461de (last visited Oct. 25, 2015) ("initiatives to radically change the 100-year-old workers' compensation system are growing, despite the daunting state legislative barriers of status quo defenders and inertia.")

[59] *See, e.g.*, Christopher Howard, *The Welfare State Nobody Knows: Debunking Myths About U.S. Social Policy* (Princeton University Press 2007).

Endnotes from ProPublica, Page 15.

[1] https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp https://www.propublica.org/article%20/inside-corporate-americas-plan-to-ditch-workers-comp%20

[2] http://www.workerscompensation.com/compnewsnetwork/files/Peter_Rousmaniere_Opt_Out_103472040.pdf

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National Association of Workers' Compensation Judiciary

P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222