Consistency Among the States Is Needed

Is It Time for a Model Workers' Compensation Act?

By James M. Anderson

A federal takeover of the state workers' compensation systems is not the choice solution to the current impetus for change, but change will come. A model act might avoid this, to everyone's benefit.

Although the election of 2017 might have slowed some of the impetus for change in workers' compensation on a national level, most workers' compensation professionals believe that the discussion will continue and will reach a new focus level as the political pendulum swings. Nearly everyone believes that an efficient workers' compensation system that provides realistic benefits without destroying the economic reality of affordability should be the goal, and most would also agree that a competent and efficient workers' compensation system is a significant component of economic reality.

When dealing with the lives and well-being of the workforce and their families, as well as the significant financial effect that bad decisions have on the financial integrity of the workers' compensation community at large, it is easy to see how important workers' compensation is to our society as a whole. The concept is well illustrated in this quote:

> Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it.

Singletary v. Mangham Construction, 418 So.2d 1138, 1140 (Fla. Dist. Ct. App. 1982).

Some on the national scene are now arguing that the system should not be named "workers' compensation," which suggests only *paying* injured workers. Instead, they argue, the system should be named "workers' recovery," which focuses on getting injured workers back to work, earning their own money, and maintaining and improving the quality of their lives.

The past few years have seen many changes in some of the states' workers' compensation systems. Some of those changes have attacked the "grand bargain" that is workers' compensation, such as the "opt-out" movement. That, too, has had repercussions, including a look by the federal government at the workers' compensation systems. Many would agree that a federal takeover of the workers' compensation systems is not the solution of choice, but candidly, it is a possibility if there is not enough focus on improving the way that things work in the various systems.

It is not new for the federal government to look at workers' compensation. During the Nixon administration, in July 1972, "The Report of the National Com-

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mission on State Workmen's Compensation Laws" was submitted by the commission to the president and Congress. It concluded that every workers' compensation system should have four major objectives and one other objective that supports the others. The first four objectives follow:

1. broad coverage of employees and of work-related injuries and diseases;
2. substantial protection against interruption of income;
3. provision of sufficient medical care and rehabilitation services; and
4. encouragement of safety.

The report concluded that the achievement of the four basic objectives depends on a fifth objective: establishing an efficient system for delivering the benefits and services.

The details are included in the report, which can be found online at http://workerscompresources.com. Those basic premises were ultimately expanded into 19 essential recommendations. The effect of the report on real change has been minimal, but the significance is that there is precedent for the federal government to look at the various workers' compensation systems and potentially to try to create a national system. Nearly everyone would agree that if the Longshore and Harbor Workers' Compensation Act is the model, the affordability of a new federal workers' compensation law is a challenge that the average employer cannot bear.

An illustration of the impetus for change is captured in the joint stories by NPR and ProPublica over the past couple of years detailing an emerging trend of permitting employers to drop out of state-regulated workers' compensation programs, write their own worker-injury plans, and limit benefits on their own. That resulted in a letter, dated October 20, 2015, to U.S. Secretary of Labor Thomas Perez that indicated that 33 states have cut workers' compensation benefits, made it more difficult to qualify for benefits, or given employers more control over medical care decisions. It was signed by Senator Bernie Sanders, one of the Democratic presidential hopefuls in our last national election, as well as the ranking member of the Senate Labor Committee, the ranking member of the House Workforce Committee, and seven other senior Democrats on the House and Senate Budget, Finance, Employment, Workforce, Ways and Means, and Social Security Committees. Had the Democrats won the national election in 2016, the discussion would likely already be at a higher pitch.

One of the things that happened in 2016, on the heels of the October 2015 letter mentioned above, was the formation of a Workers' Compensation Summit. It was a loose coalition of interested groups in the workers' compensation arena—lawyers from both sides of the bar, administrators, judges, doctors, injured workers, and nurses, among others, which met three times in conjunction with national workers' compensation conferences during 2016 in Dallas, Orlando, and New Orleans. A draft report of those meetings has been prepared, the net result of which is a list of 29 issues worthy of further discussion, and they were broken down into three separate priority groups. This is the list that was compiled.

The First Priority Group

1. Benefit adequacy
2. Regulatory complexity
3. Delays in treatment even if compensable
4. System failures
5. Incentive is different in workers' compensation and group health
6. Systems are persistently adversarial
7. Staffing and training of the workers' compensation professionals
8. Permanent, partial compensation
9. Opt-out movement
10. Injured workers' beliefs, not informed or uninformed assumption
11. Treatment protocols, a benefit or a burden

The Second Priority Group

12. Perceptions and education
13. Vocational rehabilitation
14. Ability versus disability
15. Methodology of claims handling
16. Medical ignorance
17. The critical point in a claim
18. People who are acting inappropriately
19. Misclassification
20. Unrealistic expectation of full recovery and youth
21. Federalization

The Third Priority Group

22. A new national commission?
23. Employee participation in the conversation
24. Occupational disease
25. Lawyers in the system
26. Competition among states
27. Roles and delineation
28. Single payer
29. Outliers

The workers' compensation community can plan on changes coming, and whether those changes are positive or not will, of course, depend on the individual's perspective. Arguably, taking a planned approach to devise a new model for workers' compensation in such a way that manages costs while still permitting a healthy benefit system makes sense. The goal would be that at the end of the day, the true intent of the "grand bargain" remains intact, adequate benefits are provided, illegitimate claims are not rewarded, and getting an injured worker back to work remains a viable probability.

Some might argue that this focus is meaningless—that workers' compensation systems have survived constitutionality attacks, and nothing new can be expected on that front, so there is no reason to search for new ways to envision an effective workers' compensation system. Those individuals who are of that opinion have not been keeping up. Courts in several states have struck down portions of existing workers' compensation laws based on a constitutional challenge with rising regularity. To illustrate, on June 20, 2017, Pennsylvania declared as unconstitutional the provision in its law requiring the use of "the most recent edition" of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* as an illegal delegation of lawmaking authority. *Protz v. WCAB (Derry Area Sch. Dist.)*, 124 A.3d 406 (Pa. 2017).

Also, the Circuit Court of Jefferson County, Alabama, Birmingham Division, handed down a decision on May 8, 2017, in a case styled *Clower v. CVS Caremark*, #01-CV-2013-904687, declaring that the provisions in the Alabama Workers' Compensation Law limiting permanent, partial disability benefits on most cases to a $220 weekly cap and limiting attorney fees to 15 percent of the recovery are unconstitutional.

On April 27, 2017, the Supreme Court of Kentucky declared that a provision in the Kentucky Workers' Compensation Law was unconstitutional as an equal protection violation. In *Marshall Parker v. Webster County Coal, LLC, et al.*, and *Webster*

County Coal, LLC v. Marshall Parker, et al., claim number 2014-SC-000536-WC, the court held that a provision terminating benefits as of the date that the employee qualifies for normal, old-age Social Security retirement benefits was unconstitutional.

In Louisiana, on March 2, 2017, in *Janice Hebert Barber, et al. v. Louisiana Workforce Commission et al.*, No. 621, 071 SEC. "26," in the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana, the court issued an injunction prohibiting the enforcement of the treatment guidelines developed by the Louisiana Workforce Commission for workers' compensation cases based on an alleged unconstitutional delegation of responsibility argument.

The differences among the states' maximums are simply now too great, and with the ongoing focus on constitutional issues across the nation, a challenge is likely to surface.

On June 9, 2016, in *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016), the Florida Supreme Court declared a provision of the Florida Workers' Compensation Law unconstitutional, which related to a 104-week limitation on temporary total disability, which was not worded as a presumption of maximum medical recovery, and the court reinstated a 260-week limitation that was included in an earlier version of the law.

The Supreme Court of Utah, in *Injured Workers' Ass'n of Utah v. Utah*, 374 P. 3d 14, (Utah 2016), found that the limiting of attorney fees to be paid to injured workers' attorneys was unconstitutional because the limits did not also apply to defense attorneys. Similarly, in Florida, in *Castellanos v. Next Door Co.*, 124 So. 3d 392 (Fla. 2016), the Florida Supreme Court found that the state's mandatory attorney fee schedule for workers' compensation cases was unconstitutional.

It should be immediately obvious that this article will not, should not, and could not address all of the issues listed in the compilation by the Workers' Compensation Summit. Inasmuch as the list was compiled through input from varied interests within the system from all around the nation, it is easy to argue that not all of these issues would apply in every jurisdiction. Indeed, there is likely significant disagreement about which of these issues are priorities.

The point, however, is that change is likely coming to workers' compensation systems nationwide. Do we wait for the federal government to do that for us? Some might be of the opinion that it would be acceptable if the law developed in that fashion, but a sound argument exists for attempting to change the way that we are implementing revisions to our workers' compensation laws. Rather than allowing Band-Aid revisions in each state, driven by the agendas of whichever political power has the most influence at the time, perhaps we should strive for consistency.

This article will now speak to only a couple of differences among the states in an effort to illustrate how far apart we are on some crucial issues. Arguably, a model act could smooth out some of the differences. I am sure that opinions will vary on the best way to achieve greater consistency and continuity, but let's look at a topic or two, keeping in mind what a model act might do for us. Let's look at benefit adequacy, return to work, and compensable injury.

Benefit Adequacy

It is not an accident that benefit adequacy was the first item on the top-tier priority list drafted by the 2016 Workers' Compensation Summit mentioned above. However, it is interesting to note that the summit participants could not even agree on what this really meant. From the perspective of some, it meant the weekly amount of benefits payable for temporary disability; for others, it was a reflection of the adequacy of permanent disability benefits; and it was felt by some to be an issue involving dollar maximums payable for indemnity benefits. For still others, it was all about the length of time for which benefits are payable, while yet other summit participants encouraged its listing as it relates to medical benefits. Nearly everyone agreed that it is an issue, however, in spite of the disagreements about how to approach the challenges represented by the concept.

Take a look at Table 1 for the current maximum weekly temporary disability rates across the nation, ranked from lowest to highest.

The purpose of including the chart here is not to embarrass any state. My home state of Mississippi is on the lowest end of the applicable compensation rates, a fact about which I am not proud. The point, of course, is that it should be easy to see a constitutional challenge forming, based on equal protection and due process arguments, due to the obvious inconsistencies. The differences among the states' maximums are simply now too great, and with the ongoing focus on constitutional issues across the nation, a challenge is likely to surface.

To illustrate the point, assume a worker is injured on the north Mississippi state line near its border with Tennessee. Ignoring jurisdictional challenges for the moment, his or her weekly maximum in Mississippi would be $477.82, yet if the injury had occurred 50 feet further north in Tennessee, his or her weekly maximum would be $992.20. It is hard to argue that the result is consistent with "equal protection" of the law.

The weekly rate maximums differ in the way they are calculated: some legislatures simply decide what it will be on an occasional basis; others are formulaic, based on a percentage of the state's average weekly wage, for instance. The wide differences, however, are a reflection of which percentage of a state's average weekly wage is used to set the applicable maximum. In Mississippi, for example, the maximum is set at 66 2/3 percent of the state's average weekly wage. Other states use 100 percent, 110 percent, or 125 percent, among others. Standardizing this simple formulaic approach could even out some of that inconsistency.

Return to Work

Lip service is often given to the idea that the workers' compensation law is designed to return people to work in various jurisdictions. For instance, Mississippi provides that the law is to prevent injuries, and in the event of injury or occupational disease

Table 1

STATE	EFFECTIVE DATE	WEEKLY MAXIMUM TEMPORARY DISABILITY
Mississippi	1/1/2017	$477.82
Georgia	7/1/2016	$575.00
Kansas	7/1/2017	$630.00
Louisiana	9/1/2017	$653.00
Idaho	1/1/2017	$655.20
Arkansas	1/1/2017	$661.00
Delaware	7/1/2017	$686.99
Arizona	1/1/2017	$695.68
Montana	7/1/2017	$768.00
Indiana	7/1/2016	$780.00
South Dakota	7/1/2017	$781.00
West Virginia	7/1/2017	$783.59
New Mexico	1/1/2017	$796.77
Maine	7/1/2017	$804.40
South Carolina	1/1/2017	$806.92
Nebraska	1/1/2017	$817.00
Kentucky	1/1/2017	$835.04
Oklahoma	11/1/2015	$841.90
Alabama	7/1/2017	$843.00
Hawaii	1/1/2017	$846.00
Utah	7/1/2017	$855.00
Michigan	1/1/2017	$870.00
New York	7/1/2017	$870.61
Nevada	7/1/2017	$874.37
Florida	1/1/2017	$886.00
Wyoming	7/1/2017	$894.00
New Jersey	1/1/2017	$896.00
Ohio	1/1/2017	$902.00
Texas	10/1/2016	$912.69
Missouri	7/1/2017	$923.01
Colorado	7/1/2017	$948.15
Wisconsin	1/1/2017	$961.00
North Carolina	1/1/2017	$978.00
Tennessee	7/1/2017	$992.20
Pennsylvania	1/1/2017	$995.00
Virginia	7/1/2017	$1,043.00
Minnesota	10/1/2016	$1,046.52
Maryland	1/1/2017	$1,052.00
Rhode Island	10/1/2016	$1,154.00
North Dakota	7/1/2017	$1,168.00
California	1/1/2017	$1,172.57
Alaska	1/1/2017	$1,239.00
Oregon	7/1/2017	$1,280.80
Vermont	7/1/2017	$1,281.00
Massachusetts	10/1/2016	$1,291.74
Connecticut	10/1/2016	$1,292.00
Washington	7/1/2017	$1,375.66
Illinois	7/15/2017	$1,440.60
District of Columbia	1/1/2017	$1,467.46
New Hampshire	7/1/2017	$1,537.50
Iowa	7/1/2017	$1,720.00

Source: Social Security Administration, https://secure.ssa.gov/poms.nsf/lnx/0452150045.

to workers, to assist workers' with "their rehabilitation or restoration to health and vocational opportunity." Miss. Code Ann. §71-3-1(1) (1972) (as amended). The last sentence of paragraph 3 of that code section, in defining the primary purposes of the law, after listing payment of benefits, states, "and to encourage the return to work of the worker." However, it is sad to note that that part is completely overlooked in the implementation of the law.

That is a theme often repeated in workers' compensation systems across the nation. On the other hand, and to illustrate the other end of the spectrum, the state of Texas does not permit settlements, and the focus is instead on an effort to return the injured worker back to gainful employment. To illustrate, Texas law provides as follows in the section "Goals; Legislative Intent; General Workers' Compensation Mission of Department":

> (a) The basic goals of the workers' compensation system of this state are as follows:
>
> …
>
> (4) each injured employee shall receive services to facilitate the employee's return to employment as soon as it is considered safe and appropriate by the employee's health care provider.
>
> (b) It is the intent of the legislature that, in implementing the goals described by Subsection (a), the workers' compensation system of this state must:
>
> …
>
> (2) encourage the safe and timely return of injured employees to productive roles in the workplace.
>
> …
>
> (d) *As provided by this subtitle, the division shall work to promote and help ensure the safe and timely return of injured employees to productive roles in the workforce.*

Tex. Lab. Code Ann. §402.021.

Texas law further provides for the implementation of these details in additional code sections.

> (a) An insurance carrier shall, with the agreement of a participating employer, provide the employer with return-to-work coordination services on an ongoing basis as necessary

to facilitate an employee's return to employment, including on receipt of a notice that an injured employee is eligible to receive temporary income benefits. The insurance carrier shall notify the employer of the availability of the return-to-work reimbursement program under Section 413.022. The insurance carrier shall evaluate a compensable injury in which the injured employee sustains an injury that could potentially result in lost time from employment as early as practicable to determine if skilled case management is necessary for the injured employee's case. As necessary, case managers who are appropriately certified shall be used to perform these evaluations. A claims adjuster may not be used as a case manager. These services may be offered by insurance carriers in conjunction with the accident prevention services provided under Section 411.061. Nothing in this section supersedes the provisions of a collective bargaining agreement between an employer and the employer's employees, and nothing in this section authorizes or requires an employer to engage in conduct that would otherwise be a violation of the employer's obligations under the National Labor Relations Act (29 U.S.C. Section 151 *et seq*.).

(b) Return-to-work coordination services under this section may include:
   (1) job analysis to identify the physical demands of a job;
   (2) job modification and restructuring assessments as necessary to matchjob requirements with the functional capacity of an employee; and
   (3) medical or vocational case management to coordinate the efforts of the employer, the treating doctor, and the injured employee to achieve timely return to work.

Tex. Lab. Code Ann. §413.021.

The differences in the approaches are in the details, of course. But again, the point is that those differences in the statutory language are significant. Giving lip service to return to work is simply not the same thing as implementing a legitimate and functioning return-to-work program. Comparing those simple points is illustrative of the inconsistent outcomes achieved across the nation and another reason that a uniform approach might be beneficial.

What Constitutes a Compensable "Injury" When Dealing with a Preexisting Condition?

Another difference to ponder concerns the current law delineating what constitutes a compensable injury when dealing with the aggravation of a preexisting condition. Mississippi law provides the following definition: "'Injury' means accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a *significant manner*…." Miss. Code Ann. §71-3-3(b) (emphasis added).

Cases have held, however, that compensability is established in Mississippi if the work "*aggravates, accelerates, exacerbates, contributes to, or lightens up*" a preexisting condition. The broad interpretation can, in the hands of a skilled workers' compensation attorney, yield a result in which nearly any claim involving a health condition can be found compensable. And yes, all of that consumes considerable litigation expense due to competing experts and time delays in reaching a resolution.

On the other hand, many states use qualifying language for compensability that is tied to the concept that the "work must be the *major contributing cause* of disability." A case that recites language that should be the test for what the workers' compensation system should pay for is *Martin v. CNH America, LLC,* 195 P.3d 771 (Kan. Ct. App. 2007). In the case, the court noted,

> [I]t would breed inefficiency to allow workers with preexisting conditions… to place the burden of their personal health care expenses on employers.… *Workers compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen at work*.

Id. at 776 (emphasis added).

The language in South Dakota law could be used to fix the overreaching effect of the law. It provides as follows:

(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
(b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.

S.D. Codified Laws §62-1-1.

Conclusion

Injured workers deserve the best system for appropriate benefits delivery that can be designed. The system must necessarily provide appropriate benefits, focus on remaining affordable to the business community, and not impose further on the taxpayers unduly, as noted by Judge Mills in *Singletary v. Manghan Construction*, who was quoted to begin this discussion. 418 So.2d at 1140.

Workers' compensation systems that perpetuate the mindset that the treatment should create as much disability as possible to enhance recovery in a settlement should become a relic of the past. A paradigm shift toward workers' recovery and return to work should be the goal.

I believe that the time has come to start fixing the problems across the nation in its workers' compensation systems by developing a model workers' compensation act that will provide balance in the competing interests and maintain a strong focus on appropriate benefits and the return to work of an injured worker. Consistency among the states is needed, and I believe that the workers' compensation professionals around the nation are better positioned to create that model than the federal government. Doing nothing will result in federal bureaucrats and Congress imposing a national law, the net result of which will likely be a disappointment. FD