PRESIDENT'S MESSAGE

Rebalancing the Grand Bargain

Today's workers' compensation professional is living through an immense shift at odds with the purpose of workers' compensation. Politically, workers' compensation is less about protecting workers and more about protecting businesses. For many of us, we have never practiced law when workers' compensation benefits were not declining nationally. As such, tracking and following the trends around the country makes this organization an essential tool for all workers' attorneys.

Researchers evaluating the demise of workers' compensation's grand bargain provide a key year – 1990. This was the point at which workers' compensation cash benefits largely stopped increasing. (Burton & Guo 2015). The delicate balance of the grand bargain, with each party bearing part of the burden, has been upset by these decreases. The partial burden to bear the cost of lost work is falling more and more on workers, who have no control over their work environment. The cost of medical care for the work injury is falling to worker-paid personal insurance or community-paid social insurance programs. The cost of non-related medical care is no longer being born by employer-provided health insurance. Instead, workers are taxed for not being able to afford personal insurance. All these decreases mean the workers have even fewer resources to handle non-economic losses. The grand bargain has become a contract of adhesion.

The decrease in benefits since 1990 was accomplished through a series of laws aimed directly at decreasing benefits to workers to assist business. These laws created more stringent administrative rules and practices. Eligibility for aid tightened, cutting the number of workers who can access benefits. Reducing permanent partial disability benefits gave the same functional losses even less compensation. (Spieler 2017). The 2018 legislative session continued to see these same restrictions pop up around the country, all aimed at reducing costs for employers and their insurance carriers.

This shift violates a key component of the grand bargain: an industry creating an injury should bear the cost of that injury. According to OSHA's 2015 report, "Adding Inequality to Injury: The Cost of Failing to Protect Workers on the Job," workers bear 50% of the cost of workplace injuries, with the government paying another 16% and private health insurance paying another 13% of the cost. Workers' compensation only pays 21%. By shifting 79% of injury costs to others, the employers are not holding up their part of the bargain.

This shift away from the grand bargain is a key piece of evidence in stopping the reduction in benefits to workers. However, the insurance industry is now trying to combat these cost-shift arguments by producing research that concludes no such shift exists. The National Council on Compensation Insurance (NCCI) published a limited study. This study concludes state legislatures are not shifting costs from workers' compensation to Social Security disability insurance, but it does so by relying on conclusory declarations, faulty samples and false assumptions. For instance, the study only looks at the interaction between workers' compensation and Social Security money benefits. It does not consider the shifting of medical costs. It does not even address where the cost is shifted to the worker or state programs. It looks at total disability benefits when those are relatively infrequent. With this type of statistical analysis, it is no wonder the conclusion is insupportable.

Where industries think the legislature is primed, workers are also seeing the advent of the workers' compensation version of 'separate but equal' (despite that the Supreme Court already decided separate is never equal). While opt-out measures, like those passed and declared unconstitutional in Oklahoma, have taken a temporary back seat to other legislation, employers continue to look at ways to control costs without being beholden to state workers' compensation systems. Increasingly this is happening by declaring traditional workforces as independent contractors. This may even be preferable to the opt-out movement, as these workers are being outright excluded from coverage. By removing workers from the payroll, employers establish the ultimate cost-shift and eliminate any protections established in the grand bargain.

These are heavy ideas for attorneys dedicated to helping workers resume their lives after work place injuries. The reality of shifting the costs of workplace injuries from the industry that created them has designed an atmosphere in which workers cannot win. Injured workers are castigated for using the meager benefits allowed in the current and declining systems, they are criticized for using state and federal funds in place of workers' compensation benefits and they are not given tools to regain a productive life after a serious workplace injury. WILG's attorney members have an uphill battle. But, together, we have the means to win this fight.

WILG is helping attorneys to join forces in preparing a new civil rights movement. We are sharing ideas on how to challenge the constitutionality of reforms that limit workers' rights. We are working toward using the appellate courts to reassert the rights of workers whose voices are being lost in the drone of big business lobbyists in the legislatures. Our daring attorneys are focusing on repairing the bargain that has been so eroded in a time when the public is suspicious of increasing any social insurance program. And, we are starting to see changes for the better. This week, a solicitor for the U.S. Department of Labor issued an opinion urging allowing workers be able to choose where they get medical devices. This was a direct result of the amicus brief

submitted by WILG. We need to continue standing up for the rights of workers, and, together, we can make this system a “grand” bargain once again.

As always, thank you for all your hard work standing up for injured workers. You are the heart and blood of this great organization.

AMIE C. PETERS
BLUE WATER LEGAL PLLC
PO BOX 83
EDMONDS, WA 98020
425-361-2054