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*WILG is the national non-profit membership organization dedicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of work-related injuries or occupational illnesses and who need expert legal assistance to obtain medical care and other relief under workers' compensation programs. WILG is a network of like-minded advocates for workers' rights, sharing information and knowledge, a sense of commitment and kinship, and networking to help each other and our clients.*

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# THE STATUS OF WORKERS' COMPENSATION IN THE UNITED STATES

## *Revisiting the Grand Bargain*

### *A Special Report*

### Workers' Injury Law & Advocacy Group

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# THE "GRAND BARGAIN"

In the early part of the twentieth century, the only legal remedy for a worker injured or killed as a result of a work-related accident was to bring a "common-law" action against his employer to recover economic and non-economic losses. The process caused much delay and employers were armed with common-law civil defenses such as "contributory negligence," "assumption of risk," and the "fellow-servant doctrine." Even if an employer ultimately won a suit, the employer's potential risk of liability and cost of defending a claim was great and the litigation delays for employees were devastating with legal assistance unaffordable. Furthermore, at the time there were few other remedies for help available for injured workers or their families, such as public social insurance assistance, or affordable health care for the working class.

"The Grand Bargain" was struck to create in each state a statutory system of "workers' compensation" to provide injured workers and their families compensation for economic losses and medical treatment associated with work-related injuries and deaths, without regard to fault of either the employer or employee. In exchange for this "no-fault" agreement and benefits (aka: the "Quid Pro Quo"), workers were prohibited from suing their employers, which afforded employers protection from large judgments for non-economic losses such as pain and suffering or punitive damages, as well as judicial awards for related future damages . This compromise gave birth to the legal notion that, in most cases, workers' compensation is an "exclusive remedy" providing immunity and exclusivity from tort suits against an employer.

Nearly a century ago, after the State of New York passed one of the first workers' compensation statutes, the U.S. Supreme Court considered the constitutionality of such legislative replacement of a common law tort remedy for work-related injuries, with an exclusive remedy no-fault system with so-called "scheduled" benefits for injured workers. The "Grand Bargain" was upheld by the Court in *New York Central Railroad v. White, 243 US 188, 37 S.Ct. 247, 61 L. Ed 667 (1917).*

The landmark case in *White*, holding that the use of workers' compensation laws in place of tort remedies **must provide "significant" benefits**, was quick to recognize that there was a limit to a state legislature's authority to provide such a statutory remedy that abolished an injured worker's longstanding right to sue his employer for an array of common law damages. Thus, in such an exchange of constitutional rights, any "consideration" for such a Grand Bargain must provide a **"reasonable amount, and according to a reasonable and definite scale, by way**

**of compensation for the loss of earning power incurred in the common enterprise…"**

In consort with the principle of exclusivity in exchange for reasonable considerations, the philosophical linchpins supporting the concept of a system of "workers' compensation" as national policy intended for such a new form of social insurance, rest on two fundamental principles:

1. **Private Sector Liability**

   *"The American workers' compensation system is distinguishable from public social insurance in its essentially private nature…and in its mechanism of unilateral employer liability.."(Larson, WC Law, sec 3)* In short, employers who benefit from the labor of their employees are in the best economic position to pay liability for injuries or death sustained in the course and scope of an employee's labor, and the employer can pass the cost of that liability along in the costs of their products and services.

2. **A moral commitment for a more humanitarian system**.

   In short, American common law remedies were inadequate to meet modern industrial conditions and conceptions of moral obligations, and should substitute therefore a system based on a higher conception of man's moral obligation to his fellow man.

For the past century, the Grand Bargain has generally been a good compromise for both the American worker and business; and, historically, as long as such a system provided for expedient medical care and "reasonable" indemnity (wage replacement) and so-called scheduled benefits, it was a win-win for all stakeholders and in the best interests of the states' and national economies.

## METHODICAL BREACH OF THE GRAND BARGAIN

The modern era of workers' compensation began during the term of President Richard Nixon in 1972 with the *Report of the National Commission on State Workmen's [sic] Compensation Laws*. The National Commission was authorized as part of the 1970 creation of OSHA , in part to focus federal and state initiatives to improve workplace safety and reduce workplace injuries and fatalities, and to recognize that a safer workplace resulted in fewer accidents, injuries and fatalities, in turn having a direct impact on the employer's cost of workers' compensation. The Commission was also charged with addressing the

inadequacies and disparities that had evolved in the initial 50 years development of state workers' compensation systems. The report promulgated ***19 essential recommendations*** for states to provide for **minimum and standard levels of benefits** to avoid possible federalism of the system. A few of the essential recommendations as standards for state programs included:

1. **Compulsory coverage, not elective by the states**.

2. **Elimination of all numerical and occupational exemptions to coverage**.

3. **Full coverage of work-related (occupational) diseases**.
4. **Full medical and physical rehabilitation services without arbitrary limits.**

5. **Elimination of arbitrary limits on duration or total sum of benefits for both medical and indemnity**.

6. **Employee initial choice of physician**.

7. **AMA Impairment Guides not used for evaluation of disability benefits**.

8. **State oversight of medical care and rehabilitation services**.

9. **Establishment of alternative benefits in cases of insolvent or uninsured employers.**

In addition to promulgating the standards for reasonable benefits, the Commission also revisited returning to a tort-based system of civil remedy, and concluded :

> "…We have considered implications of abolishing WC and reverting to negligence suits, a remedy abandoned some 50 years ago. This option is still inferior to WC: its deficiencies include uncertainties for both employer and worker and the substantial costs arising from litigation over the degree and source of impairment. Such litigation also has serious adverse effects on efforts at rehabilitation…"

In concluding their findings, the Commission also resolved:

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

Following the 1972 essential recommendations, throughout the 1970s and early 1980s, the states heeded the call by developing and increasing benefits to generally acceptable and reasonable levels. However, consistently and methodically throughout the country beginning in the mid-80's, state workers' compensation programs have seen dramatic departure from the '72 Commission recommendations, resulting in recent research and conclusions by OSHA in March 2015 that employers in America today are only contributing 21% of the cost of workers' injuries. *(See Report: "The Costs of Failing to Protect Workers on the Job", OSHA, March 2015, p.6)*. Furthermore, this dramatic shift of costs for medical care and wage replacement benefits during periods of related disability has recently been estimated to increase Federal Social Security disability by $12 billion each year. *(See Study: "Rising Disability Payments: Are Cuts to Workers' Compensation Part of the Story?", Center for Economic and Policy Research, Wash., DC, by Nick Buffie and Dean Baker, October 2015.)*

Despite safer work environments and decreasing frequency of claims throughout the nation, employers and insurance companies still clamor and argue for "reform" of workers' compensation systems, in part by comparing their state's benefits to others with lesser benefits, lesser costs, or more restrictive requirements. In fact, significant disparity of benefits between states has now resurfaced in the absence of compliance with any acknowledged minimums and reasonable standards of benefits. *(See Special Report: "The Demolition of Workers' Comp", by Michael Grabell, ProPublica and Howard Berkes, NPR, March 4, 2015).*

Coincidentally, while employers and insurers continue to argue for reform, according to the National Academy of Social Insurance (NASI), between 1992 and 2011, total employee workers' compensation benefits paid and employer costs have declined by approximately 40% , and *"despite an uptick in total benefits and costs in 2012, workers' compensation benefits and costs per $100 payroll have been lower in 2007 to 2012 than at any time over the last three decades" (NASI, August 2014).*

Furthermore, the so-called workers' compensation 'industry' (insurers, adjusters, third party administrators, health practitioners, vocational rehabilitation specialists, attorneys, etc. is estimated at $89 billion annually, with workers' compensation insurance being the second most profitable line of liability insurance following auto insurance, earning in 2012, according to NCCI, $6.20 profit for every $100.00 of net premiums paid.

Reflecting back on some of the essential recommendations of the '72 Commission, significant changes have occurred in the past two decades that exemplify the breach of the Grand Bargain. For example, *compulsory coverage* in some states has been relaxed to the point where some states have now elected to "opt-out" of exclusivity protection and a return to tort risk. Texas is the only state that currently allows all employers to choose "non-subscriber" status to be sued in tort. The result is that 38% (or 114,000) of Texas employers have unsubscribed, leaving an estimated 500,000 Texas employees with neither workers' compensation nor health insurance protection. The state of Wyoming also allows employers in their retail and agricultural industries to "opt-out" of compulsory coverage as well. In Oklahoma, a modified version of "Opt-Out" recently was enacted, allowing employers to elect to administer and reconcile disputes of their own workers' compensation benefit plans, while significantly reducing benefits and retaining exclusivity. So-called "Opt Out" initiatives are currently being discussed and debated in Tennessee, South Carolina, North Carolina, and Georgia, with possible introduction pending in Arkansas, Mississippi, and Alabama.

Contrary to the '72 Commission standards, many states have since exempted certain injuries and classes of workers from coverage, and have restricted coverage for certain occupational diseases. *(See Report: "Unequal Risk – Disease victims often shut out of workers' comp system", Center for Public Integrity, by Jamie Smith Hopkins, November 4, 2015).* Since the portion of medical benefits now paid in workers' compensation approximates 50% of the total costs of the system, most states have recently enacted so-called reform initiatives to mitigate costs of medical services and treatment, while making it more onerous for medical practitioners to treat their patients. For example, the states of Montana and Georgia recently enacted caps and restrictions on the number of weeks of eligibility for medical benefits at 260 and 400 weeks, respectively. Present in the first "Opt-Out" proposal in Tennessee was a provision limiting medical benefits to 154 weeks or $300,000, whichever comes first. In Illinois and other states, lawmakers have enacted changes that place strict caps on payments to doctors and other medical providers through medical fee schedules. Critics say such stringent caps cause many doctors to stop taking workers' compensation patients.

Little by little, the definition of "course and scope of employment" and what constitutes a compensable injury has been changed, chipping away at the Grand Bargain agreement that if an accidental injury or disease occurred in the course and scope of employment, the employer was obligated to provide reasonable benefits. In some states, even the definition of "injury" has changed. For example, in Oklahoma, new reforms require a compensable injury must be "foreseen," a complete departure from traditional definitions of an accident and the no-fault concept of the Grand Bargain.

The so-called "carve out" of traditional compensable injuries has continued. The concept of "major cause" has been introduced in many states. Where heretofore the aggravation of a pre-existing condition was universally accepted as a compensable, work-related injury, "major cause" now means that more than 50 % of the reason for medical care and resulting disability must be attributed to the work accident for it to be "work-related". "Major cause" has resulted in the denial of thousands of claims of workers whose latest work-related injury has cast them aside with no job and in need of medical care.

Restrictive drug formularies, medical treatment protocols (aka Evidence-Based Treatment Guidelines), and restrictive medical permanent impairment guidelines promulgated by the American Medical Association (which self-declare they are not to be used for evaluating disability indemnity benefits) have further limited the ability of workers' compensation judges and administrators to award reasonable indemnity and medical benefits. In addition, most states now leave the selection of treating physicians in complete control of the employer. Cuts in disability benefits in Oklahoma in 2013 approached 85% for workers suffering permanent partial disabilities, causing Oklahoma workers to follow the lead of Florida in challenging the constitutionality of the entire benefit scheme as no longer providing an adequate and reasonable remedy under those two states' constitutions.

In 2014, ProPublica, a group of independent, non-profit investigative journalists based in New York City, and National Public Radio (NPR) set out to investigate the extent of changes to state workers' compensation systems and the impact upon injured workers and the government. In their comprehensive March, 2015 report, the investigation revealed that 33 states have cut workers' compensation benefits in the past 20 years, created hurdles to get medical care, or made it harder to qualify for benefits. ProPublica/NPR said: *"The changes have resulted in devastating consequences for some of the hundreds of thousands of workers who suffer serious injuries at work each year."*

Finally, as employers methodically evade their workers' compensation liability by diminishing benefits, the number of other employers who fail to

procure coverage, and who intentionally misclassify their employees to evade paying their fair share in the workers' compensation risk pool, is ever increasing. Numerous studies have consistently concluded that approximately 35% of all employers are committing some form of employer payroll fraud, not only depriving their injured workers of compensable benefits, but depriving federal and state coffers of millions of dollars of lost tax revenues and unemployment insurance, not to mention gaining an unfair and competitive financial advantage over other employers who play by the rules.
*(See Report: "Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries", NELP (National Employment Law Project), July 2015.)*

*[Note: The most comprehensive national reporting on the dismantling of America's workers' compensation system is found at the following sources:*

***www.propublica.org:***
*How Much Is Your Arm Worth? Depends on Where You Work, March 5, 2015;*
*The Fallout of Workers' Comp "Reforms," March 24, 2015;*
*How to Investigate Workers' Comp in Your State, August 24, 2015;*
*Inside Corporate America's Campaign to Ditch Workers' Comp, October 14, 2015; and,*
*U.S. Lawmakers Call for More Oversight of Workers' Comp, October 21, 2015.*http://www.workerscompensation.com/

***Two other nationally-respected websites provide current and balanced information on trends and court challenges—www.workerscompensation.com and www.workcompcentral.com.]***

## SHIFTING THE COST
## and
## THE RACE TO THE BOTTOM

The significant cost-shifting away from the responsible employers and their carriers to injured workers, private health insurance plans, Social Security, Medicaid, and Medicare has now attracted attention via a recent Congressional inquiry to the US Dept. of Labor. *(See Letter: Congressional Inquiry to Sec.Thomas Perez, US DOL, October 20, 2015).* Furthermore, in their March 2015 Report (referenced above), OSHA Director David Michaels notes the important

link between workplace safety and employer workers' compensation liability, wherein he states:

> *"The failure of many employers to prevent millions of work injuries and illnesses each year, and the failure of the broken workers' compensation system to ensure that workers do not bear the costs of their injuries and illnesses, are truly adding inequality to injury"*
>
> *"If employers whose workers are being injured had to pay the true cost of these injuries, these employers would have real incentive to prevent the injuries from occurring. Instead, workers, their families and taxpayers are subsidizing these dangerous employers….It does appear that there is right now a race to the bottom. State workers' compensation systems are competing to lower benefits and make it tougher for workers to get the benefits to which they're entitled."*

OSHA's report also cites two recent studies in the *American Journal of Industrial Medicine* that noted that more than half of hospital patients with work-related amputations in Massachusetts and one-third of those patients in California did not receive workers' compensation benefits. The huge cost in those states, and in other states where the rules on compensability of work-related accidents and illnesses have been limited, are shifted to the worker, Medicaid and state-run medical assistance programs, and Medicare.

Severe cuts to workers' compensation benefits also affect the issue of income equality. The OSHA report found that even with workers' compensation benefits, studies show that injured workers' incomes are, on average, almost $31,000 lower over 10 years than if they had not been injured. OSHA strongly recommended that states eliminate roadblocks that prevent injured workers from

getting quick and adequate medical care and adequate wage-replacement payments.

## OPT OUT - THE FALSE PREMISE

There is an immediate and growing threat that American employers will replace traditional workers' compensation insurance coverage with stripped-down ERISA type "Opt Out" plans. This trend should be of great concern to both workers and employers. Opt Out plans enacted in Texas, Wyoming and Oklahoma, introduced in Tennessee, and being discussed in South Carolina and Georgia, would drastically reduce statutes of limitations, benefits, and constitutional rights of due process for workers, and also contain major pitfalls for employers.

In 2013, Oklahoma became the second state to pass a statewide Opt Out plan, officially the Oklahoma Employee Injury Benefit Act (OIBA), found in Oklahoma Statutes, Title 85A. The law allows an employer to become a "Qualified Employer," develop its own benefit plan, and make all decisions regarding compensability and medical care and appoint their own dispute resolution officers.

The Opt Out movement is well-funded, supported by some of the nation's largest retail, health care, and food companies. The focus of the effort emanates from the Association for Responsible Alternatives to Workers' Compensation (ARAWC), a coalition led by executives from Walmart, Nordstrom, Lowe's, Hobby Lobby, Costco, Best Buy, Sysco, Safeway, Dillard's, and others. ARAWC, based in Austin, Texas, is well-funded and has announced its intention to first take Opt Out to states in the South where pro-business legislators are receptive to the idea of mitigating employer workers' compensation costs, regardless of the consequences to injured workers, constitutional due process, or implications of the cost-shifting issue.

Bob Burke, an Oklahoma attorney, who has filed several lawsuits challenging the constitutionality of the Oklahoma Opt Out Law, has testified:

> "*Every one of the benefit plans of the first 60 companies to Opt Out of our traditional workers' compensation system provide substantially lower benefits, restrict what accidents are covered, and prevent any court or arbiter from considering any evidence other than from the employer-selected doctor….There are serious due process and equal protection of the law questions with Opt Out."*

According to Burke, as further example of how "opt-out" WC plans potentially destroy an injured worker's fundamental due process rights, the Oklahoma system allows employer opt-out plans to set absurd statute of limitations contrary to the rights of other non-opt out employers. Another employer opt-out plan does not pay for blood used in blood transfusions for critically injured workers. Another plan does not cover injuries suffered in tornados in Oklahoma (aka,"Tornado Alley"). Other plans, totally written by the employer, provide no requirements to report injuries or its actions to any state or federal agency, eliminate compensability for *"injuries suffered using a keyboard"* and injuries from *"altercations and fights."*

Further, the appeals rights under Opt Out plans are facially unconstitutional. Many plans prohibit "*de novo review"* and *"any arbiter or court"* from overturning the employer's decision on compensability and extent of benefits. The employer makes every decision every time and can even compel an injured worker to settle his case, using only the opinions of the employer-selected doctor and employer-selected actuary to determine the value of the case. If the worker does not accept the employer's proposal to settle, *"all further benefits under the plan are terminated."*

Other national commentators have recognized the mounting threat of Opt Out. In their most recent study and report, ProPublica/NPR obtained the benefit plans of more than 100 companies who have opted out (so-called non-subscribers) in Texas and in Oklahoma. The report concluded:

> *"The investigation found the plans almost universally have lower benefits, more restrictions, and virtually no independent oversight…Plans…allow for a hodgepodge of provisions that are far different from workers' comp… …..McDonald's doesn't cover carpal tunnel syndrome and Brookdale Senior Living, the nation's largest chain of assisted living facilities, doesn't cover most bacterial infections…Taco Bell can accompany injured workers to doctors' appointments and Sears can deny benefits if workers' don't report injuries by the end of their shifts…"*
>
> *…"The fine print of opt-out plans contains dozens of opportunities for companies to deny benefits. Employers can terminate workers' benefits for being late to doctors' appointments, failing to check in with the company, or even consulting their personal doctors."*
>
> *(See Study and Report: "Inside Corporate America's Campaign to Ditch Workers' Comp", Pro/Publica by Michael Grabell, and Howard Berkes, NPR, October 14, 2015.)*

A typical Opt Out plan is a thick document that is forbidding to most employees to read and understand. Not covered under such plans are exposure to asbestos, silica dust, or mold, or assaults unless the employee is defending the employer's property. ProPublica/NPR discovered that Costco's plan does not cover external hearing aids costing more than $600—although the cheapest external hearing aid you can buy at Costco retails for $900.

Finally, in reviewing various opt-out plans, ProPublica/NPR noted the no-fault premise for workers' compensation has been reversed in Opt Out plans written by Home Depot, Pilot Travel Centers, and McDonald's. Those plans exclude injuries caused by safety violations or the failure of a worker to ask for help with a particular task that might injure him. Such a trend to reintroduce employee fault into workers' compensation was recently noted in a legislative proposal by Governor Walker in Wisconsin that would reduce an employee's benefits proportionate to their fault in not following an employer's safety rules and procedures.

A major promoter of Opt Out justifies his marketing efforts on the basis he has saved his clients more than billion dollars in Texas in just the last decade. That sounds great, but the opposite side of that coin is that Texas injured workers lost that billion dollars in benefits that would have been provided under the statutory Texas workers' compensation system. Workers, Medicare, Medicaid, and Social Security primarily bore that billion dollar loss.

The American Insurance Association (AIA) has strongly opposed any proposed effort to take Opt Out to Tennessee. In 2015 , AIA stated:

> *"SB 721 creates a system of separate but very unequal protections for injured workers that will put Tennessee employees – and businesses -- at risk. It creates incentives for employers to offer benefits that may be weak at best and illusory at worst, while leaving the employer vulnerable to unlimited liability in tort. Compounding the problem, the state of Tennessee may have no legal mechanism to assure that benefits to an injured worker are delivered timely and correctly; because of ERISA's preemption of "state laws relating to an employee benefit plan," should ERISA's preemption be held to apply, all the state can do is revoke the employer's right to opt-out for future claims. "*

Michael Clingman, a former director of workers' compensation systems in two states, noted his concern about the lack of safeguards under Opt Out systems, when he stated :

> *"An injured employee whose employer has "opted-out" has none of the safeguards and protections provided by state comp statutes. Whatever plan*

*the employer concocts and files and whatever protections or rights they choose to give or withhold from workers, these decisions are totally up to the employer. Interpreting how to apply benefits, the duration of benefits, what injuries are covered under the plan, the amount and duration of medical benefits, and many other aspects of the injury are totally under the employer's control, as long as they follow their own adopted plan."*

## A SLIPPERY SLOPE

Opt Out is bad for Employers.

(1) *Loss of exclusive remedy.* Even though legislative intentions may be to retain the exclusive remedy doctrine for employers, the obvious intent is to allow employers to Opt Out of the state workers' compensation system and ultimately cost-shift their liability to others, including taxpayers and the injured workers themselves, and to increase the financial burden on other social insurance systems. If an employer Opts Out of a statutory workers' compensation scheme, any argument for protection of the exclusive remedy fails on constitutional grounds, no matter what an Opt Out law states.

(2) *Opt Out would greatly increase defense costs.* Across the nation, the average defense cost of a workers' compensation claim within a statutory state system is about $3,000. However, under Opt Out, if an employer had to defend each workers' compensation claim under an ERISA type arrangement in federal court, the defense cost could easily exceed $40,000 per case. Federal court litigation is very expensive. Furthermore, where opt-out plans do not attempt to retain the exclusive remedy, the lessons of tort risk and liability learned a century ago and revisited by the '72 Commission, will be lost.

(3*) Opt Out simply shifts costs and does not save an employer money.* If an employer adopts an Opt Out plan, and successfully eliminates most workers' compensation claims, there is no cost savings. Workers will still be injured and will continue to need reasonable and necessary medical care. The cost of such claims will most likely be borne by the employer's health insurance plan, which is propped up by most employers in higher premiums. Further, loss of the investment of a trained and skilled workforce will have adverse effects on the employer's production and profitability.

(4) *Opt Out will raise workers' compensation insurance rates for small and medium-sized business.* Only larger employers could risk giving up exclusive remedy and develop their own benefit plans. The overwhelming majority of small and medium sized employers could not afford the cost of Opt Out. Buying a traditional workers' compensation policy is cheaper. Furthermore, if large

employers are removed from the workers' compensation insurance pool, rates would rise for employers left behind.

Opt Out is Bad for Workers:

(1) *Benefits for workers would be drastically reduced or eliminated.*

Employer-Employee opt-out Benefit plans generally allow benefits owed by the employer to be reduced by any Social Security payment. Therefore, if a worker is killed, the employer never pays death benefits because of automatic Social Security benefits payable to minor children. If a worker is found to be permanently and totally disabled, Social Security payments can generally be reduced from the employer's payment dollar for dollar. If a worker is already drawing Social Security retirement at the time of the compensable injury, his retirement benefit is deducted from any amount owed by the employer.

Opt-out benefit plans uniformly cap medical benefits. For example, some plans cap nursing home costs at 60 days. For a severely injured worker, that leaves a great gap of reasonable and necessary medical care. This often expensive treatment would be dumped onto Medicaid and Medicare, or onto private insurance if the injured worker has a plan. Most plans have from 40 to 50 significant reductions in benefits when compared to state law.

Opt Out is Bad for Taxpayers:

(1) *Cost-shifting would burden Medicare, Medicaid, and state medical care programs.* If a low paid injured worker of an Opt Out employer is refused medical treatment, the cost of care will fall upon Medicaid or other government or charitable funds. If a paraplegic worker is confined to a nursing home or rehabilitation facility longer that what the plan allows, the cost is borne by the taxpayers. If a serious injury is denied under an Opt Out plan, other state benefits, including Food Stamps, would be adversely affected. Denial of permanent total disability benefits will fall squarely upon the shoulders of Social Security, not the employer.

(2) *Loss of premium tax would impact the General Fund of most states.* Most states use taxes or assessments from insurance carriers to raise revenue to operate their statutory workers' compensation system. If large employers are no longer self-insured or covered by workers' compensation insurance, premium taxes and other assessments are reduced, and the cost of administering the state agency and surviving workers' compensation system must be supplemented from general appropriations.

(3) *Second and Subsequent Injury Funds where available would be depleted.*

Many states still administer so-called "Second" or "Subsequent" injury funds, which provide benefit payments for workers who sustain permanent or

permanent partial disability as a result of second or subsequent work accidents. These funds were also created to encourage employers to employ workers who have pre-existing permanent impairments, and such funds are generally supported by assessments paid by employers. Obviously, larger employers opting-out of traditional workers compensation systems will deplete and diminish the effectiveness of such funds, which benefit both employers and disabled workers.

## SUMMARY

This is a critical time for the future of medical care and compensation for the nation's workers who suffer injury or illness related to their employment. Intervention by the federal government is immediately needed to assess the impact of the breach of the Grand Bargain, the impact of Opt-Out trends, and the potential demise of the fundamental principles of America's workers' compensation system as a reasonable and responsible form of social insurance. Protecting the American worker and their families and balancing the interests of the American taxpayer is necessary to preserve a fair and reasonable balance of interests between business and labor in America.

This critical time in the history of America's workers' compensation system, was noted recently in remarks by Professor John F. Burton, Jr., former chairman of the '72 President's Commission, who stated: *"...In my view, the state workers' compensation system is in its more dire situation in at least the last half-century…".*

*(Remarks in Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation program, June 1, 2015, Philadelphia, PA.)*

While America is experiencing a methodical and steady deterioration of state workers' compensation systems, the financial burden on America's injured workforce and American taxpayers is escalating. Action is necessary now to curtail the demise of state workers' compensation or the American taxpayer will be compelled to accept both the financial liability and moral responsibility to protect and serve the needs of our nation's injured workers.