"SAVE THE TICK"

NOTES FROM A SEMINAR:
TEXAS BAR ASSOCIATION ANNUAL CLE
Austin, TX, August 23-24, 2018

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On August 23-24, 2018, I attended the Texas Bar Association Workers' Compensation CLE. This is the Texas version of the Pennsylvania Bar Association Workers' Compensation Fall Section Meeting. I was a speaker and, as requested, gave a presentation on significant national developments in the law over the last 12 months. The venue was Austin, TX, and about 250 lawyers attended.

Texas, as also discussed below, is the only state in which employers are not obliged to take part in the workers' compensation system. In 2018, 28% of Texas employers did not carry workers' compensation insurance and 1.8 million workers, or 18% of the workforce, labored for these "nonsubscribers."* Yet, a robust workers' compensation program exists in the state, the contours of which are easily recognized by the Pennsylvania practitioner. I offer here a brief background of the Texas system and select notes that should be of interest to the Pennsylvania lawyer.

I. Key Aspects of the Texas System

Texas experienced dramatic change to the law in 1989 (effective 1991). Even some 25 years later, a frequent linguistic turn of the lawyers was talking about the "old law" (pre-1989) and the "new law." It is notable that other significant amendments, particularly in 2005, have unfolded since that time. Leading Texas cases commenting on the reforms that received national publicity are *Texas Mut. Ins. Co. v. Ruttinger*, 381 S.W.3d 430 (Texas 2012) (workers' compensation insurers are not subject to statutory "bad faith" claims for unfair claims settlement practices under the Texas Insurance Code); and *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Texas 1995) (various aspects of 1989 reform law were not violative of the constitution, including the Texas "open courts" proviso). These cases were mentioned a number of times in the course of the two-day program.

The reforms have been well known around the country for their efforts to disincentivize lawyers from participating in the system. This item was memorably discussed in a 2011 *ABA Journal* article. *See* Terry Carter, *Insult to Injury: Texas Workers' Comp System Denies, Delays Medical Help*, ABA JOURNAL (October 2011), http://www.abajournal.com/magazine/article/insult_to_injury_texas_workers_comp_system_denies_delays_medical_help/ (remarking that the legislature, in 2005, "enacted a severely restricted fee structure that made it nearly impossible for claimants-side lawyers to make a living wage. And it worked. Where previously hundreds of Texas lawyers had significant workers' comp practices, there now are about 30."). (Some have criticized that article for being biased.)

* Louis Esola, *Opt-out Texas Sees Dip in Employers Offering Comp Coverage*, BUSINESS INSURANCE (Dec. 4, 2018).

It is hazardous in the extreme for an outsider to assess another state's workers' compensation system. Still, the received wisdom about the professional scene in Texas seemed borne out by one lawyer, who commented from the podium that he was one of "the 40 of us left who do this work." Many injured workers, meanwhile, are *pro se*, and others are represented by attorneys of the state's Office of Injured Employees Counsel. (It is notable that the OIEC has an excellent website, with videos of both the Benefit Review Conference (BRC, a form of mandatory mediation), and the Contested Case Hearing (CCH, the full-blown hearing before the ALJ). This website is worth a browse for anyone interested in comp adjudication systems: https://www.oiec.texas.gov/).

One obstacle to lawyer involvement: fees cannot be assessed in cases involving denied and/or unpaid medical. This is a major issue for both injured workers and lawyers as well. In this regard, compromise settlements are prohibited and, as payments of TTD and PPD ultimately run out (in most cases), the worker will still be entitled to medical treatment. Disputes, naturally, will arise over time relative to that entitlement. Workers apparently consult lawyers with regard to such disputes, but no fee can be secured. The result can be lack of representation (or, perhaps, workers forgo treatment or turn to other more willing payers).

Texas, like Pennsylvania, is a big state. And, as in our state, different regions of Texas have their own litigation culture. Everyone seemed to agree that in South Texas, the ALJs at contested case hearings are more liberal than those in the rest of the state. One speaker also voiced two points of common wisdom heard from Pennsylvania veterans: (1) a need exists "for getting along" in the workers' compensation bar – after all, it is a "small family"; and (2) it is not a good idea to over-do public displays of familiarity with the judges, as such behavior breeds distrust among the parties.

Depending upon one's point of view, Texas is either ahead of or behind Pennsylvania on certain issues. Or, of course, maybe it's just different – or in its own category. In Texas, for example, the system maintains a drug formulary that largely excludes opioids; a rule exists for requiring pre-authorization relative to prescription of compound medications; and guidelines are in the works in Texas to facilitate telemedicine for work injuries. Meanwhile, Texas, unlike Pennsylvania, is a permanent impairment state, and a worker at MMI is assigned a percentage rating and limited, accordingly, in duration of disability benefits. As to this item – always foreign to Pennsylvania sensibilities – one aspect of dysfunction was pointed out: some doctors, in the PPD process, are sloppy, egregiously according workers MMI *without* any follow-up exam.

The Texas agency is proud that the additional 2005 reforms have lowered costs for employers. Premiums are said to "have dropped nearly 64% …." A new agency report gives "credit to … reforms and innovations, implemented in 2005 and beyond." Still, as always, costs do not tell the whole story of success. The *ABA Journal* article has *that* proposition as its thesis. And, at the seminar, an outspoken injured worker's lawyer savaged one reform device, the panel-of-doctors-like "networks and alliances" for medical care. His precise source of irritation: the Texas agency had approved WorkWell's San Antonio network, even though that list of approved doctors failed to include a single Board-certified neurosurgeon. So severe was the speaker's criticism of the reform system that he invoked the political scientist Robert Conquest's second

rule of politics: "The simplest way to explain the behavior of any bureaucratic organization is to assume that it is controlled by a cabal of its enemies."

A. ***No compromise settlements.*** A key feature of the 1989 amendment was abolition of compromise settlements. That's not just rhetoric – it is very difficult indeed for the parties in a Texas workers' compensation case to compromise-settle virtually any issue. Vivid proof of this fact is a 2016 supreme court case which specifically disallowed the parties from settling a case even at the jury trial level. The parties had effected such a settlement, and the trial court approved the same. The *agency* thereupon appealed and was successful in having the agreement overthrown. *Texas Dept. of Insurance, Div. of Workers' Compensation v. Jones & American Home Assurance Co*., 498 S.W.3d 610 (Texas 2016). In any event, just as the old law/new law dichotomy certainly showed in the various panel talks, so too, I sensed, was lawyer frustration that certain controverted issues could not be compromise-settled. (With regard to the Texas abolition of compromise settlements, see David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199, 224 *et seq.* (2007)).

B. ***Appeal to "modified" jury trial de novo from administrative adjudication.*** Another key Texas feature: as in four other states, an appeal to a jury trial *de novo*, on limited issues, is available after the final decision of the workers' compensation agency. The dichotomy spoken of in Texas is between "administrative adjudication" versus appeals "the District Court," ***i.e.***, the trial court.

The administrative authorities, as foreshadowed above, are (1) the Benefits Review Officer, who holds the BRC – a form of mandatory mediation; (2) thereafter, the ALJ, who holds the contested case hearing; and (3), finally, the Appeals Panel. The Appeals Panel is roughly equivalent to the Pennsylvania Appeal Board.

The Appeals Panel decisions are looked to as precedent in lieu of any appellate case to guide counsel. Indeed, one of the presentations at the seminar was an impressive compilation of the Appeals Panel decisions of the law year. These decisions are considered precedent because relatively few appeals (approximately 10%) are taken from the administrative level to the appellate court. An attorney for a self-insured employer's was ultimately to explain that he rarely took an appeal from the Appeals Panel, as the jury trial which comes in between the administrative adjudication and true appellate court review is simply too expensive.

Importantly, the "modified" jury trial *de novo* is on limited issues. On certain issues, exhaustion of administrative remedies must be undertaken. For example, the body part injured in the injury must be "administratively found." "Compensability," in the Texas parlance, "is for the Division."

II. <u>Occupational Disease Recovery</u>

A panel on proving occupational diseases noted that the claimant initially has the burden of proof by the preponderance of the evidence to establish his or her case. No presumptions of causation exist, as in Pennsylvania. (Ironically, if the Appeal Panel finds that claimant met the

burden, it is the employer, on appeal, which bears the burden of proving lack of causation: "the party appealing the decision [of the appeals panel] on an issue [regarding compensability or eligibility for or the amount of income or death benefits] has the burden of proof by a preponderance of the evidence." *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211 (Texas 2010)). In such cases, the toxic agent or agents must be identified.

Proving causation in occupational disease cases is thus difficult. The challenge is complicated by the fact that the claimant, as his or her expert, will often utilize the treating family physician – and not, like the defense, a seasoned forensic expert. Unfortunately, family doctors often utilize legally incompetent "speculative language." This observation will ring true to the Pennsylvania practitioner.

On the burden of identifying the toxic agent, the panelists discussed a 2017 Appeals Panel decision (Appeal 171882), which reversed an ALJ decision granting a Lyme Disease claim. *See* https://www.tdi.texas.gov/appeals/2017cases/171882r.pdf. The worker in that case did indeed have Lyme Disease, "but there was no evidence to establish the type of tick to which the claimant was exposed or that the tick or ticks to which the claimant was exposed carried the bacteria that causes Lyme disease." In the Appeal Panel's view, the physician's "opinion merely suggests a bare possibility of how the claimant was exposed to Lyme Disease." This difficulty on the claimant's part led to a minor trope of the seminar, to wit: "Save the tick!"

III. Pursuit of "Lifetime Income Benefits" (LIBs)

The Texas system is a jurisdiction where, at maximum medical improvement, a worker becomes entitled (or limited) to a permanent partial disability award. However, a worker can pursue "lifetime income benefits," or LIBs, which are similar to the permanent total disability awards of other states. An accomplished claimants' attorney of Plano, TX, William Randell Johnson, spoke at length on his efforts to win LIBs for his clients. Indeed, Mr. Johnson had appealed seven or eight cases to jury trial over the last year. Of course, the fact that some workers' compensation lawyers prosecute cases into the district courts means that such lawyers must have jury trial skills. This is a phenomenon, I believe, of other states, including Maryland and Ohio, where appeal to the trial court is available after exhaustion of administrative remedies.

IV. Review of Recent Appeal Panel Decisions

In the important Appeals Panel update presentation, the speaker reviewed the Lyme Disease case referenced above. There, the tick went missing and could not be verified as having borne the disease, thereafter to be communicated via bite to the worker. The claim was denied. The presenter agreed with the comments of the previous speaker. In such cases, claimant needs to "Save the Tick"!

Meanwhile, judging from the review of recent cases, the all-important course of employment test in Texas (actually, "course and scope"), seems to be liberal. For example, an injury developing by merely walking can constitute a "course and scope" injury. Of course, in states like Virginia, with its dogged fidelity to the "accident" requirement, such injuries are conceptualized as not arising in the course of employment. Even in Pennsylvania, such injuries

are on occasion denied because our statute speaks of injuries arising in the course of employment and "related thereto" – the latter concept implicating *medical causation*, which is often absent in such cases.

A recent case of the Texas Supreme Court, entertaining a dispute over whether a worker was travelling as part of his work or was, instead, merely commuting, resolved the matter in favor of the worker's widow. The dissent indicates that the majority construed the law liberally, at least on this point. *See Seabright Ins. Co. v. Lopez*, 465 S.W.3d 637 (Texas 2015) (worker in the oil and gas field, laboring at remote locations, and who lived during the week at a motel, sustained fatal injuries in course and scope of employment when he was travelling from motel to worksite).

V. Points from a Carrier Physician: "A Biopsychosocial Approach to Preventing Delayed Recovery."

Dr. Marco Iglesias, Chief Medical Officer of Broadspire, advocated the strategy – now familiar in occupational medicine presentations – of expediting the injured worker's prompt return to productive employment. He stressed, as he did in his well-crafted seminar paper, the "biopsychosocial model" of medicine. That model is in contrast to the "biomedical," which "reduces illness and injury to its most basic units; the body is seen as a machine that operates on the basis of physical and chemical processes." The biopsychosocial model, in contrast, "[l]ooks at an individual's injury or illness through three lenses: biological (e.g., age, gender, the disease itself, comorbid conditions); psychological (e.g., the person's beliefs, emotions, distress, coping strategies, illness behavior); and social (e.g., family and other support systems, work conditions and relationships, cultural background, societal expectations). [This model] allows us to approach the individual at the center of the claim more holistically."

The doctor opined that many psychosocial factors do indeed play into workers' compensation claims. In light of this fact, claims of long duration in many cases call for compromise settlement. This is so as the injured worker is able to "move on" beyond his or her claim. Of course, "moving on" is the lingo which injured workers themselves often use when asked for their motivation in settling.

Dr. Iglesias emphasized that a critical intervention in an injured worker's case must be to "talk about function, not pain." Perhaps, Doctor Iglesias posited, doctors and lawyers should not cleave to the "analog pain scale," the familiar 1 to 10 – always soliciting the worker to *make complaints* about pain. Instead, the focus should on a revamped, analogous "*function* scale." The doctor emphasized, "Most of the time, injured workers want to talk about their pain. This can be counterproductive since focusing on pain can make it worse. On the other hand, distraction and activity reduce pain. Redirect conversations about pain to those that focus on activity and function."

Dr. Iglesias' paper is also available online at the Crawford & Co. website: https://www.crawco.com/resources/a-biopsychosocial-approach-to-preventing-delayed-recovery. This white paper is recommendable whether or not one agrees with its philosophy.

VI. Advantages of Non-subscription

As discussed above, Texas is the only state where workers' compensation is not mandatory. Employers are not obliged to opt-in, and many large employers in fact do not. These enterprises are called "non-subscribers." Such employers open themselves up to tort liability, but in the present day a common approach is for employers to establish a private occupational injury program and then oblige workers to arbitrate any dispute as a condition of employment. Critique of this approach was a major feature of the 2015 ProPublica assessment of workers' compensation laws. *See* Michael Grabell & Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp* (October 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp. (Some have asserted that this critique, too, is unduly biased.)

In-house counsel for one such non-subscriber noted that it maintains an ERISA-governed employee insurance plan for most workers, but for its construction company subsidiary it does carry workers' compensation. She believed that running its own program "helps workers and also helps physicians as to understanding the process…." Communicating with physicians is easier in non-subscription. As part of its plan the company employed its own employee nurse case managers, and she conceptualized using them as "just an employee helping another employee."

VII. Utility of Nurse Case Managers

A corporate claims manager thoroughly endorsed the use of nurse case managers (NCMs). He found their acting as the liaison between worker and adjustor or employer was very valuable. They can, for example, serve to communicate to the worker the specifics of light duty, and educate the doctor on the issue as well. The NCM is especially valuable as an agent of early intervention in a complex case. Use of the nurse case manager can also show the employee and physician that the employer *cares* about the case. In the end, however, the claims manager was unapologetic about the ultimate mission of the NCM: "The nurse case manager is there to help you to get the claimant *back to work*."

In Texas, as in Pennsylvania, dissent exists in the claimants' bar over the use of NCMs. One claimants' attorney complained that he does not receive the NCM reports from the carrier as part of discovery, even though they are plainly, in his view, discoverable. (That is certainly the Pennsylvania rule.) The NCM proponent quoted above was challenged from the audience as to *who is served* by the NCM: employer or employee? Plainly, injured workers' lawyers in the audience felt that the NCM was the agent of the employer. They believed that nurse case managers possess an "inherent conflict of interest."

This belief sounds correct. Nurse case managers are a constructive, even invaluable, part of modern claims adjustment and disability management. Still, no person can serve two masters without the involvement of major tension.