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by Bernard J. Sevel, Esq.

I initially read your Winter, 1987 publication (Volume 17 Number 2) with interest; however, upon reading the article by Representative Martha S. Klima, "Maryland's Workers' Compensation System — Out of Control," my interest turned to dismay. Representative Martha S. Klima is renownly biased and speaks not as an attorney but as a lay person in the legislature introducing bills which are anti-attorney. Additionally, she blatantly urges a reduction in attorney involvement in the workmen's compensation system.

Representative Klima for a long time has been the spokeswoman for the anti-labor and anti-workmen forces who have been lobbying the legislature to undermine the workmen's compensation program. Before addressing myself to specifics in disputing Representative Klima's propaganda, I would like to point out that historically the workmen's compensation law was enacted as social legislation to benefit the workman. In the current frenzy to "reform" the workmen's compensation system, the workman who was the originally intended beneficiary of the Act seems to have been forgotten. Representative Klima's article cites various statistics which are certainly susceptible to challenge. Unlike Representative Klima, I do not have the forces of the insurance industry behind me to be able to present to you at this juncture specific statistical data to dispute the data provided to you. Nevertheless, I recall reading an article recently published in the Baltimore Sunpaper where the insurance industry, in a similar orgy of statistics, indicated that Maryland stood very high among the various states with regard to the cost of workmen's compensation.

On analysis, however, it turned out that the states with which Maryland was compared were primarily states where the bulk of the population were rural rather than industrial. I am not sure which of the states were eliminated from that study. However, I know that Pennsylvania was one of them. Several other industrial states were not included in the study, while the more rural states were. Accordingly, it is small wonder that Maryland stands higher than, say, West Virginia with regard to the cost of workmen's compensation. The original insurance association that presented this data eventually and probably somewhat sheepishly admitted that the more industrial states were not included because they do not report their figures to this particular organization.

I would like to point out that Maryland has had one of the best workmen's compensation programs in the country. It is well run and has for a long time answered the needs of the intended beneficiary, the working man.

The article by Representative Klima would suggest a different type of approach to workmen's compensation, rather than the present adversary approach. Representative Klima would like a system of push buttons. In short, she would standardize things not readily susceptible to standardization to the point that the right of the commissioners to exercise discretion would be minimized, if not eliminated.

Let us examine some of her recommendations piece by piece.

Rating system: Representative Klima urges the use of the AMA Guide as a push button device for "standardizing disability ratings." In questioning physicians with regard to the manner in which the AMA Guide should be used, one finds that the AMA Guide primarily addresses itself only to loss of motion. Consequently, if a joint may be moved through full range of motion, regardless of pain, the disability rating mandated by the AMA Guide is zero.

One hears frequently of a torn meniscus in the knee. The purpose of the meniscus in the knee is to provide for a cushion between the ball joints of the knee and the sockets in which the joint functions. When the meniscus is torn, the roughened edge produces pain and limits the motion of the knee. The usual surgical procedure is to remove some of the meniscus so as to get rid of the roughened area but to still leave enough meniscus to provide the necessary shock absorber within the knee joint. If a physician were to find it necessary to remove the entire meniscus both from the lateral and medial side of the knee, the end result would be a knee devoid of shock absorber material and, therefore, subject to all sorts of deterioration. Nevertheless, with the total removal of the meniscus, the motion of the knee is not impaired. Consequently, under the AMA Guide the disability rating in that circumstance would be zero.

Representative Klima would urge that no other aspect of evaluation need be rated except motion. This, of course, is absurd. A person's use of a part of his body may be limited by pain, loss of strength, and loss of endurance even though he contin-

ues to have full passive motion. Certainly, there are other criteria to evaluate disability other than motion.

The insurance carriers and the self-insurers of workmen's compensation have been urging for years the use of the AMA Guide because of the reasons above stated. Under the most severe disabilities, an evaluation by the AMA Guide yields only a very minimal rating because it addresses itself only to motion and nothing else. Any qualified physician knowledgeable with regard to ratings will tell you that the AMA Guide is, of course, useful as long as one recognizes its limitations. It should be used only to rate that portion of the disability which involves loss of motion. However, other factors must be considered such as those mentioned above and which have been included, by the way, in the recent change in the workmen's compensation law.

Representative Klima laments the fact that standards are not available so as to reduce the evaluation of disability to something similar to a multiple choice question. I urge that the more you standardize something such as industrial loss of use or disability, the more you remove the discretion from the workmen's compensation commissioner. If the commissioner is deprived of that area of discretion, so vital to the administration of justice, the likelihood of injustice to the workman becomes unacceptable.

The American system of justice has functioned better than any other justice system in the entire world without the standardized structured framework advocated by Representative Klima. The American system of justice has relied on the discretion of twelve lay jurors in liability cases to assess such things as disability, pain and suffering and other damages which do not lend themselves to a numerical evaluation by a scale or a ruler. Representative Klima would urge that if you cannot measure something it does not exist. Consequently, pain would never be a factor in any framework advocated by Representative Klima. We have allowed in the past and continue to allow jurors to assess the severity of factual situations to determine whether or not someone is to live or die for a crime. What is so terrible about allowing a commissioner the discretion to assess disability within the definition of disability outlined in the law as it now exists? I, for one, prefer to have commissioners who are knowledgeable and are appointed because of their knowledge and experience rather than having the office of the workmen's compensation commissioner reduced to an administrator who simply approves numbers established by strict formulas. It is urged that every individual is different and the effects of an injury on each individual is different. This difference is recognized in the Workmen's Compensation Law, which states:

> [T]he Commission shall determine the portion or percentage by which the industrial use of the employee's body was impaired as a result of the injury and in determining such portion or percentage of impairment resulting in industrial loss, the Commission shall take into consideration, among other things, the nature of the physical injury, the occupation, experience, training and age of the injured employee at the time of the injury....

Md. Ann. Code Art. 101, Section 36(4) (1983). I would hope that Representative Klima will concede that justice can best be served by allowing the commissioners to continue to exercise that discretion set forth in the Act.

"What is so terrible about allowing a commissioner the discretion to assess dissability within the definition... in the law..."

Attorney involvement: Representative Klima has a long history of advocating the removal of attorneys from the system. Her obvious intent is to leave the workman at the doubtful mercy of the insurance carrier and/or the self-insured employer. When she mentions attorney involvement, she really means claimant attorney involvement. She obviously intends to remove claimant's attorneys from the system by so structuring the framework of compensation as to make it a push-button type of system devoid of any discretion on the part of the commissioner. Is anyone so naive to believe that the departure of claimant's attorneys from the compensation scene will necessarily signal the departure of employer's attorneys from the scene? On the contrary, employer's attorneys will continue to practice and employers will continue to pay attorneys to represent them. The only difference would be that the claimant will be unable to secure counsel in that the system will be so rigged as to remove any opportunity for a claimant's attorney to be paid.

One wonders then what will happen to the claimant who appears to have been totally overlooked by Representative Klima's plan for a new world of compensation? The average workman in Maryland has something less than a high school education and probably not much more than an elementary school education. What will then happen to the claimant injured on the job where the insurance carrier, as he so often does, will dispute the claim and refuse to pay the claimant for any one of the many delaying issues allowed under the workmen's compensation procedure? Who will champion the less than literate claimant whose compensation has been either terminated or not started and who does not know where to obtain medical treatment or how to go about it or even to whom he should address his request? Who will look after the right of the claimant who has been fired because he has been injured? Admittedly, the Act does provide for penalties to be imposed on the employer who fires a claimant because of having initiated a compensation claim. But in the absence of a claimant's attorney, who is there to enforce it? Anyone who looks into a qualified compensation attorney's file will see countless correspondence with the employer arranging for medical treatment and particularly in forwarding medical bills and determining which medical bills have been paid and which bills have not been paid. Far too often claimants are sued by treating medical facilities who have received only partial payment because the employer has arbitrarily interpreted the medical fee schedule in such a way as to so drastically cut the doctor's bill that the doctor turns to the claimant for payment.

While the law does not permit such actions by the doctors directly against the claimant, how is the claimant to deal with it without counsel representing him? How is the claimant to deal with the problem of compensation when the carrier suggests that they do not have adequate medical documentation to support a temporary total disability payment? Where is a marginally literate claimant to turn to obtain the documentation necessary to support his claim?

I am certain the insurance industry would be overjoyed to be rid of the claimant's attorney. Certainly it costs them more money because if claimant's

attorneys were not in the system to keep the employers and the insurance companies honest, all of the well meaning language in the Act put there to protect the claimant would be meaningless.

I know that Representative Klima in the past has suggested that the Workmen's Compensation Commission can provide the necessary support services for the claimant that is now being provided by the attorneys. There are two fallacies to this suggestion. First, it will never work in that the claimant would not be able to work his way through the bureaucracy already built into the Workmen's Compensation Commission without the assistance of an attorney. Secondly, it would require such a tremendous increase in the size and staffing of the Workmen's Compensation Commission that Representative Klima's plan would remove the burden of compensation from the shoulders of the employer and the compensation carrier and shift it to the shoulders of the public whose tax money would have to support this grossly inflated bureaucracy, i.e. the new Workmen's Compensation Commission.

An example of the problems created by removing attorneys from the system may be found in the current Federal Employee's Compensation Act. This system does, in fact, discourage attorneys from the system. It is called "a non-adversary system." The law is set up so that attorneys are so discouraged from the system, that attorneys will not accept cases under the Federal Employer's Compensation Act. Accordingly, the claimant, as a federal employee injured on the job, often goes months and years waiting for his or her claim to be processed and usually is required to seek congressional intervention before any action is taken on a particular claim. Even though this system is horrendous as it functions now, it is not as horrendous as it would be under Representative Klima's plan. The main difference would be that under the Federal Employee's Compensation Act, the employer is the federal government whose attitude toward their employees at least should be benign. Such is not the case when the employer's representative is a profit motivated insurance company or profit motivated self-insured businessman. Consider also that basically the level of education of the government employee is substantially higher than the level of education of the average workman in the State of Maryland. Nevertheless, government employees search fruitlessly for attorneys to assist them in cutting through the endless bureaucracy to secure the compensation provided for in the very structured Federal Employee's Compensation Act.

In short, you can build the most sophisticated workmen's compensation structure but it will not work without attorneys looking out for the interest of their clients and making it work. Certainly, profit oriented insurance companies and profit oriented employers are not going to do anything to further the interest of justice when to do so is inconsistent with their purpose in business, namely profit.

I am sure that Representative Klima's main quarrel with permanent partial disability awards is that attorney's fees, as they are now constructed, are approved only from permanent partial disability awards. Consequently, if she is successful in eliminating permanent partial she will achieve her ultimate goal of eliminating attorneys from the system.

"workmen's compensation insurance profits in Maryland rank near the top of all the states in the United States."

The workmen of this state gave up a valuable right when the workmen's compensation law was first enacted. That right is the right of the workman to sue his employer because of a work related injury. In return for giving up that right, the employee was guaranteed certain compensation rights and benefits. Now the insurance industry and the self-insured through their spokesperson Representative Klima seek to take away those benefits.

Additionally, it is interesting to note that nowhere in Representative Klima's article does she mention an additional interesting statistic, namely that workmen's compensation insurance profits in Maryland rank near the top of all the states in the United States. Apparently all of the money being spent in the system is not going into the pockets of the workmen's compensation attorneys as suggested by Representative Klima.

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Mr. Sevel has served on the Port Operations and Stevedoring Committee and the Longshoremen's and Harbor Workers' Compensation Act Committee of The Maritime Law Association of the United States. He is a member of the Advisory Committee to the United States District Court for the District of Maryland on Admiralty Rules. He has been a guest speaker for the Maritime Forum for the Port of Baltimore, Steamship Trade Association on federal compensation law, Federal Bar Association on changes in compensation law and harbor workers' rights under the Federal Maritime law and the Maryland State Bar Association on Maryland workmen's compensation.

Since 1977, Mr. Sevel has been an instructor on Maryland State and Federal Compensation Law for the Maryland Institute for Continuing Professional Education of Lawyers.

Mr. Sevel is also Chairman of the Workmen's Compensation Committee of The Bar Association of Baltimore City. He has been called upon on various occasions to testify before the House and Senate Committees on workmen's compensation.