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Point-Counterpoint: The Workers' Compensation System—Out of Control —A Final Point-Counterpoint

By

Alfred J. Dirska, Esq.

W. Stanwood Whiting, Esq.

NOTE: The need for change in this state's workers' compensation program was addressed by Delegate Martha S. Klima in her article in the Winter, 1987, issue of *The Law Forum*, (Vol. 17, Issue 2) "Maryland's Workers' Compensation System—Out of Control." Last Fall, *The Law Forum* (Vol. 18, Issue 1) printed a rebuttal by Bernard J. Sevel, Esquire, a Baltimore attorney who actively represents claimants in workers' compensation claims. In the meantime, the General Assembly of Maryland enacted significant changes in the Workers' Compensation Act, addressing many of the concerns and recommendations made in Delegate Klima's article.

In "Maryland's Workers' Compensation System—Out of Control," Delegate Martha Klima expressed concern about a number of problems associated with the workers' compensation program in this state, concerns which are shared by a number of persons, not only in the General Assembly, but also in the business and labor communities, and the bar.

Delegate Klima pointed out that workers' compensation costs have been rising rapidly in Maryland, especially compared with the lower costs in nearby states, contributing to the departure of businesses and reluctance of new businesses to locate in Maryland. She noted, for example, the severe decline in employment in manufacturing, perhaps 25% in the last twenty years. Not only has this decline in industry led obviously to unemployment, but the situation has helped to create widespread

underemployment in lower paying jobs in the service sector.

Delegate Klima noted that the high cost of workers' compensation in Maryland, beyond any doubt, was one of the factors contributing to this distressing trend. She pointed to various studies showing, for example, that Maryland's workers' compensation costs are the fifth highest in the United States, nearly 40% above the national average.¹

As important, perhaps, was her observation that injured workers often did not receive prompt, fair and efficient handling of their claims. Too often, she felt, workers' compensation claims became the subject of adversarial proceedings, which could result in a decrease in actual net benefits paid to injured workers and considerable delays in their receiving them. Workers' compensation would work more effectively, she urged, if many routine disputes could be administratively resolved without need for a formal adversary proceeding. Under the current system, a formal hearing is the only means of adjudicating even minor disputes. Experience has shown that many such disputes are the product of a lack of information, misinformation, or failure to communicate.

What Delegate Klima is saying is that if there were a mechanism within the Commission to sort out and resolve such disputes, there would be fewer cases on the formal hearing dockets. With fewer cases on the formal hearing dockets, those cases in which there is a material dispute between the parties would be heard and

decided more quickly. Therefore, the delay in awarding benefits would be reduced.

In response, Bernard J. Sevel, Esq., argued that Delegate Klima was attempting to cut into the business of lawyers representing claimants, and trying to reduce benefits available to injured employees.² In actuality, the changes envisioned by Delegate Klima would reduce attorney involvement on *both* sides of the bar, by removing routine claims from the formal hearing process. Attorneys for employers and insurers would be removed from the process as well as claimant's attorneys, to the ultimate benefit of the injured employees themselves.

Delegate Klima's view was that, in assessing disability, a workers' compensation program should be primarily concerned with actual economic impact upon the injured worker. She pointed out that in the usual adversary process both sides tended to select doctors who would give evaluations sympathetic to their respective sides. The percentages of physical impairment offered by these doctors could be (and often were) so divergent as to leave the Commission with the task of deciding between apples and oranges. Additionally, further delay of an award of benefits often resulted from sending the claimant to the Commission's own physician for still another evaluation.

Delegate Klima specifically argued for *higher* awards where a claimant demonstrates that his injury has caused a severe economic impact. By suggesting that

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Workers' Compensation System A Word

By Bernard J. Sevel, Esq.

The rebuttal by Messrs. Alfred J. Dirska and W. Stanwood Whiting to my response to Delegate Martha Klima's article "Maryland Workers' Compensation System-Out of Control" is, if nothing else, a valiant effort to dignify the anti-working man views of Delegate Klima by suggesting that they are the same as those expressed by the General Assembly in the recent changes to the workers' compensation law. A review of Delegate Klima's suggestions and changes in the law will demonstrate how vastly divergent they are.

In the area of the use of the AMA Guide, Delegate Klima urged that the AMA Guide be the exclusive guide for evaluation. The General Assembly in its wisdom recognized that the AMA Guide does not address all of the aspects of disability and added additional criteria: pain, weakness, atrophy, loss of endurance, and loss of function which must be addressed as part of the evaluation process. As a matter of fact, contrary to Delegate Klima's views, the law does not mandate that the Workers' Compensation Commission, when adopting its permanent rules, even use the AMA Guide. It must be noted that Article 101 Section 36C(a), which directs the Workers' Compensation Commission to adopt a guide, does not even mention the AMA Guide.

Messrs. Dirska and Whiting again return to Delegate Klima's theme that the AMA Guide should be used as a standardized method of evaluation and suggests some mystical mechanism within the Commission that would produce awards acceptable and fair to both sides without the interven-

tion of a commissioner or the efforts of an attorney on either side. If anyone is prepared to believe that such a thing is possible, they should be very wary of people selling swampland in Florida or shares in the Brooklyn Bridge. Delegate Klima as well as Messrs. Dirska and Whiting still believe that evaluations can be reduced to sheer numbers and the translation of those numbers into awards can be done without some form of adversarial approach.

The provision of the code itself as quoted in my earlier response to Delegate Klima's article legislatively gives the commissioner the right to consider various factors which are not included in a doctor's evaluation when translating the anatomical impairment, found by the doctors, into a permanent disability award. It is interesting to note that, here again, the legislature ignored Delegate Klima's plea and did not alter that provision of Article 101 in its most recent revision. (See Article 101, Section 36(j)).

The court of special appeals has enlarged upon Section 36(j) which referred only to "Other Cases" and has found that the commissioner is also not bound by anatomical disabilities in awarding compensation for disability to scheduled members listed under Article 101, Section 36(c) and (d). See *Gly Construction Co. v. Davis*, 60 Md. App. 602, 483 A.2d 1330 (1984); *Tuboya v. Joines*, 69 Md. App. 607, 519 A.2d 215 (1987).

Messrs. Dirska and Whiting lament the necessity for a formal hearing as though it constituted some unacceptable stumbling block on the road to justice. As Messrs.

Dirska and Whiting are perfectly aware, the average workers' compensation hearing takes anywhere from ten to thirty minutes. Their article ignores the current rules of the Commission which require all cases to be addressed on an informal basis for the purposes of resolution without hearing before a hearing can even be requested. Consequently, under the present system, hearings are only held on those cases where the parties cannot reach a stipulation or settlement. Short of trampling on the rights of one side or the other, I cannot possibly imagine how the utopian system envisioned by Messrs. Dirska and Whiting could be placed in practice.

Delegate Klima's response is to develop a nonadversarial approach to compensation which would function without lawyers. As pointed out in my previous response to Delegate Klima's article, one need only look at the Federal Employee's Compensation Act (FECA), in order to get some idea as to how that system would work.

Under the FECA, attorneys are essentially excluded from the Act because of an attorney's fee system built into the Act which essentially denies the opportunity of the attorney to receive a fee. Therefore, under the FECA there are few attorneys, if any, willing to accept a case on behalf of the claimant.

If this is the type of system that Delegate Klima envisions in her brave new world of compensation then an examination of the efficiency of that system and how well it meets the needs of the claimant will dem-

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rating doctors be required to use standardized impairment guidelines such as those published by the American Medical Association, Delegate Klima sought to provide a uniform, comprehensive basis for evaluating anatomical impairment.

It is interesting to see that, on balance, the previous session of the Maryland General Assembly took to heart the recommendations and comments of Delegate Klima more than those of Mr. Sevel and others of like opinion.

The amendments enacted and signed into law by Governor Schaefer on June 2, 1987, require that evaluating doctors must now use the AMA's *Guide To The Evaluation of Permanent Impairment*.³ The law also increases benefits for serious permanent disabilities⁴ and compels prompt handling of claims by employers and insurers by reducing the time deadlines to contest or pay initial claims,⁵ and increasing the penalty amounts for late payments.⁶

The amendments also provide for a cost-of-living increase in permanent total disability benefits⁷ and expand the services available to injured workers under vocational rehabilitation.⁸ Also, increases in certain benefits for temporary total disability are prescribed.⁹

On the other side of the coin, some benefits for minor, permanent, partial disability, in certain cases amounting to less than 15% loss of use of the body as a whole, have been reduced.¹⁰ It is possible that this small step will encourage workers who have sustained relatively minor injuries, or who recover without significant disability, to entrust their claims to prompt informal resolution. For permanency benefits in this category, for example, a 1988 award (for an injury sustained in 1988) would be 37.5% less than under the pre-amendment statutory schedule. The idea here, of course, is to help reduce unwarranted windfalls to employees who have recovered completely from minor strains, soft tissue injuries, and similar mishaps.

Attorney Sevel's hand-wringing about the supposed ill effect of workers' compensation reform has been shown to be unwarranted. As to his concerns about the fate of the injured worker, available benefits have been increased in all those situations where genuine economic loss has resulted. Thus, the attack on Delegate Klima as being "anti-labor and anti-workmen" is misdirected.

It is hoped that the reforms already enacted, and those yet to be effected, will achieve the goal of reducing employer costs for workers' compensation while

increasing benefits to workers who suffer economic loss from industrial injuries. The result will be increased employment in Maryland, as the cost of doing business in Maryland becomes competitive with that of our sister states, and fairer treatment of the injured worker. Surely, all Marylanders will benefit from these changes.

¹ The study included all states from which reliable and complete statistical data was available including, for example, the state of Illinois (Chicago). Mr. Sevel's assertion that the study was of rural areas cannot accurately apply to Chicago, Illinois. In any event, the well-respected earlier study done by Dr. John F. Burton, Jr., Ph.D., Professor in the New York State School of Industry and Labor Relations of Cornell University and former chairman of the National Commission of State Workers' Compensation Laws, which included all 50 states, concluded that Maryland is the fifth highest state in the nation respecting workers' compensation costs, exceeded only by Alaska, Hawaii, California, and the District of Columbia.

² On the first page of his article, Mr. Sevel states that "Maryland has one of the best workmen's compensation programs in the country. It is well run and it has, for a long time, answered the needs of the intended beneficiary, the working man." However, what Mr. Sevel originally viewed as a "well run" program became a "bureaucracy," when considering informal resolution, through which the claimant would not be able to work his way without the assistance of an attorney.

³ See Md. Ann. Code art. 101, § 36C (1957) (amended 1988), which also requires the Workers' Compensation Commission, before July 1, 1988, to adopt its own guides for use by evaluating physicians. It is difficult to understand Mr. Sevel's alarm about standardizing the methods by which doctors evaluate impairment in injured workers. The 1987 amendments permit doctors to address not only the anatomical impairment measurements used by the AMA Guides, but also such factors as pain, loss of endurance, and loss of function. The use of these additional subjective factors have allowed the doctors to whom claimant's attorneys refer their clients to continue to turn out reports with high disability ratings. It is of interest to note, however, that in the part of their reports which utilize the AMA Guides, these doctors have found actual objective impairment to be pretty much the same as those found in independent medical evaluations requested by employers and insurers.

⁴ Sec. 36(1)(a) provides that compensation payments for permanent total disability, caused by injuries occurring on or after January 1, 1988, will be subject, effective that date, to an annual cost of living adjustment, which is the initial annual compensation rate multiplied by the percentage change in the Consumer Price Index, not to exceed an adjustment of 5% per year. This change provides that claimants receiving such benefits, who are also entitled to Federal disability benefits under Social Security, shall have workers' compensation benefits reduced as necessary to prevent social security benefits from being reduced.

⁵ Before the 1987 amendment, the employer and insurer were allowed 30 days, after filing of a claim for compensation, to dispute the compensability of the claim, § 40(a). The present law

still allows 30 days for the filing of contesting issues. However, the recent amendments provide that, if the employer and insurer fail to either commence paying temporary total disability benefits, or to file contesting issues, "without good cause" within 21 days of the claim's filing, the employer and insurer are subject to assessment of a fine of up to 20% of the payment amount. The failure of the employer and insurer either to pay temporary total benefits or to file contesting issues within 30 days "without good cause" may now result in a fine of up to 40% of the payment amount.

These fines are to be remitted to the claimant. If an employer or insurer pays compensation benefits before an award is issued, the payment will not be considered a waiver of the rights of the employer or insurer to contest the compensability of the claim within 30 days of its filing. See § 36(2)(iv).

⁶ See § 36(11), which provided for penalties being assessed against the employer and insurer for failing to pay a compensation award within 30 days of its issuance (or of the date when payment was due) under its statutory predecessor, § 36(10). The late payment penalty, under the 1987 amendments, is up to 20% of the amount of the overdue payment, if the Commission finds that the employer or insurer failed to commence payment within 15 days "without good cause," and up to 40% for unjustified nonpayment within 30 days, such fines to be remitted to the claimant.

⁷ The potential rate for "serious disability" has been increased from a maximum of two-thirds of the state average weekly wage to 75%, effective January 1, 1988, see § 36(3)(a)(iii). "Serious disability" benefits are paid whenever a single accident results in permanent partial disability, excluding disfigurement, of 250 weeks or more. Benefits are paid for one-third more weeks (rounded off to the nearest whole number), as under pre-amendment law.

⁸ The pre-amendment law entitled an injured employee to vocational rehabilitation "as reasonably necessary to restore him to suitable employment" whenever the claimant was disabled, as the result of an injury, from performing work for which he was previously qualified. The 1987 amendments specifically define "vocational rehabilitation," for the first time, and delete the old requirement that rehabilitation be a process which would "restore" an injured claimant. The new definition is "professional services reasonably necessary to enable an injured employee, as soon as practical, to achieve maximum medical improvement and secure suitable gainful employment." This definition would seem to expand the old concept of vocational rehabilitation, to include, not only actual training and education, but job placement and other services which would return the claimant to his pre-injury level of employment "to the extent possible." See § 36(8).

Here again, the 1987 General Assembly expressed its concern that the focus of workers' compensation be on the industrial capability of the injured worker.

⁹ As to injuries for which the initial claim is filed on or after January 1, 1988, a possible increase in the rate of temporary total disability benefits is allowed, where a petition to reopen for worsening of condition is filed. In such a case, the average weekly wage in effect at the time of the reopening, rather than as of the date of injury, is applied. This amendment, contained in § 36(2)(iii), provides for payment of temporary total benefits at the rate of two thirds of the

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onstrate the naivety of both Delegate Klima and Messrs. Dirksa and Whiting with respect to their views as to how the Maryland workers' compensation system should be restructured.

In point of fact, a claimant seeking compensation under FECA will search in vain for an attorney to represent them. The administrative failure of the FECA to respond to the needs of the claimant has been documented over and over again in various newspaper articles. For the most part, the frustrated claimant who cannot get a response to his request from the FECA Commission must resort to congressional intervention. I would hate to see the same mistakes repeated in Maryland.

Messrs. Dirksa and Whiting in one of their footnotes sought to point out a discrepancy with regard to my view of the Workers' Compensation Commission in Maryland. As I pointed out in my earlier article, Maryland has one of the best workers' compensation systems in the country. I stand by that comment. Messrs. Dirksa and Whiting felt that my categorizing them as a bureaucracy was inconsistent with my earlier comments. Of course, it is a bureaucracy! Any governmental function has to be a bureaucracy. While the system as it is today constitutes one of the best in the country, it functions that way because there are attorneys in the system to keep the interests of the client moving through the system. It should be noted that in my original article, the bureaucracy to which I referred was a "new Commission" that would result from an expansion of the present Commission (if attorneys are excluded from the system, it will be necessary to expand the Commission to meet the needs of the unrepresented claimant). We all know that as a bureaucracy gets bigger, it becomes more difficult to function within it. The Maryland Workers' Compensation system would not continue to be one of the best in the country if attorneys were removed from the system as urged by Delegate Klima and Messrs. Dirksa and Whiting.

In my response to Delegate Klima's article, I pointed to the shortcomings of some of the studies quoted by the insurance industry and Delegate Klima which rated Maryland high among other neighboring states with respect to cost of workers' compensation. I pointed out that the more industrial states in close proximity of Maryland were excluded from the study and that some of the more rural states were included in the study thus artificially making Maryland's numbers look high. Messrs. Dirksa and Whiting urge that my

observations are incorrect in that Illinois was included in the study. There is no doubt that Chicago is an industrial center. However, if you compare the population of Chicago with the total State of Illinois, you will note that you have an industrial center within a large agricultural state. Consequently, their example fails to alter my original observations. Both the article of Delegate Klima and the rebuttal of Messrs. Dirksa and Whiting fail to explain why among some of the studies the insurance company profits from workers' compensation in Maryland are among the highest of any of the states in the country. They have not explained it nor did their rebuttal even address it. One has to assume, therefore, that they cannot explain it without acknowledging that a substantial portion of the cost of workers' compensation in Maryland goes into the pockets of the insurance companies. Insurance companies have long acknowledged that a major portion of their profits are derived from the investments of the collected premiums. Has not Delegate Klima or Messrs. Dirksa and Whiting even wondered about the coincidence of the so called "insurance premium crisis" and the sudden drop in interest rates? Has it not occurred to them that the sudden drop in interest rates drastically reduced the income of the insurance companies? Consequently, the need to maintain profits necessitated the sudden increases in premiums. Unfortunately, Delegate Klima and Messrs. Dirksa and Whiting have, either wittingly or unwittingly, allowed themselves to be used to spread the fear of a crisis ingeniously devised by the insurance industry.

Happily, the Maryland legislature did not rush in panic to endorse the disastrous changes urged by Delegate Klima, but instead made some adjustments to the present system.

Only time will determine the wisdom of these most recent changes.

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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.

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average weekly wage, up to 100% of the state's average weekly wage, not to exceed 150%, and not to be less than 100% of the initial temporary total rate.

This provision will afford some protection against inflation to the injured worker who, after having reached maximum improvement, thereafter becomes temporarily disabled as a result of his injury. For example, the worker injured and forced to miss work in 1988, now earning an average of \$580 per week, is paid temporary total disability benefits at the maximum rate of \$382. Under the pre-amendment law, this claimant, having returned to work but then forced off the job due to a worsening of his condition in 1993, could only receive the 1988 maximum of \$382 during his period of temporary disability in 1993. This particular amendment anticipates the likelihood of the state's average weekly wage continuing to increase, so that, for example, if the state average weekly wage increases to \$480 in 1993, the injured worker would receive temporary total benefits at that higher rate.

¹⁰ The 1987 amendments introduced a lower scale of permanent partial disability benefits for minor disabilities, as to injuries occurring on or after January 1, 1988. See § 36(3)(a). With two exceptions, whenever a permanency award for such an injury is for a period less than 75 weeks, the maximum benefit rate will be \$80 per week, arising out of injuries sustained in 1988, and \$82.50 per week, arising out of injuries occurring on or after January 1, 1989.

The first exception is that the lower rate does not apply to permanent disability of any of the fingers, great toe or thumb. As to these members, the higher permanency rate of two-thirds of the average weekly wage, up to one-third of the state average weekly wage, applies. In addition, in these cases, the Commission may consider the industrial effect of the injury by considering such factors as the occupation, experience, training and age of the employee, resulting in additional benefits being awarded up to 75 weeks.

The second exception to the lower tier is that "public safety employees," such as police officers and professional fire fighters, are entitled to the old, higher rate, regardless of how small the permanent disability might be.

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