State: Fla.
Panelist: Grand Bargain Imperiled, but State Has Constitutional Safeguard: Top [2017-08-09]

ORLANDO, Florida — Most states are racing to the bottom on providing adequate workers' compensation benefits, but Florida has a unique Constitution that prevents legislative overreach on reducing comp awards, a national expert said here Tuesday.


Michael Duff

Professor Michael Duff from the University of Wyoming College of Law was one of five panelists to address the current state of the grand bargain — the balance between an implicit requirement of benefit adequacy for injured workers and employer immunity from torts.

The panel addressed hundreds of attendees at the 72nd Annual Workers' Compensation Educational Conference and 29th Annual Safety & Health Conference, sponsored by the Workers' Compensation Institute. The conference is billed as the nation's largest workers' compensation gathering and last year attracted an estimated 8,000 attendees from 44 states.

Duff, the grandson of a Kentucky coal miner and a former blue-collar worker himself before he graduated from Harvard Law School, said worker benefits stabilized in 1972 following a report by President Richard Nixon's National Commission on State Workmen's Compensation Laws.

The commission warned of an erosion of worker benefits nationally and considered, but rejected, the idea of a federal takeover of workers' compensation.

But its final report called for the appointment of a federal commission to "provide encouragement and technical assistance" to the states, and to test their compliance with 19 recommendations Nixon's panel determined were essential to maintain the grand bargain.

The commission was never appointed.

Four years before the commission issued its report, Florida amended its Constitution for the sixth, and so far, final time, and crafted Section 21, which granted all citizens an open-courts right to remedy. It prohibits lawmakers from eliminating a right that existed at the time the Constitution was ratified without a good reason. The Legislature has the burden of proving

there's a good reason, Duff said.

Duff, dubbing himself the “prophet of doom,” said Florida is at the epicenter of the national debate on whether the grand bargain is still viable.

“We’ll continue to see the race to the bottom across the country,” he said. “But Florida is really important because there are legal checks that don’t exist in other systems.”

Section 21 essentially forces the state Supreme Court to weigh the question of reasonableness when there is an abolition or impingement on a remedy that existed before the enactment of the new Constitution in 1968, Duff said.

That hasn't stopped lawmakers from making revisions that resulted in constitutional challenges, he said.

In the spring of 2016, Florida’s Supreme Court declared as unconstitutional a strict cap on claimants’ attorney fees and a 104-week cap on temporary disability benefits.

Maitland claimants’ attorney Geoff Bichler, who was program director for the panel discussion, said the plaintiffs’ bar is girding for other constitutional battles. The issues include a $150,000 cap on death benefits, and a cap on the state’s maximum weekly compensation rate, which Bichler said is unfair to high-wage earners who, pre-injury, earned far more than the cap, currently set at $886 per week.

West Palm Beach defense attorney H. George Kagan defended Florida’s workers’ compensation act overall while conceding that a handful of bad actors have created distrust in the system.

Legislators have not helped, Kagan said, by enacting hundreds of pages of law that would make “the central planning committee of the Soviet Union proud.” The rules and regulations have left injured workers confused and as “helpless as a turtle on its back,” Kagan said.

He suggested that before lawmakers try to further reform Florida’s system, a select panel of legislators should volunteer to experience the system as injured workers do.

Panelist Robert H. Wilson, president of WorkersCompensation.com, said Florida’s system works 85% of the time but that the other cases take up 90% of the litigation because they deal with costly, catastrophic claims.

Wilson said there has been an erosion of benefits nationwide, but he noted that when the states enacted workers’ compensation about a century ago, they did not foresee a future that entailed covering occupational illnesses and repetitive stress injuries.

“The cut of benefits in many states and the focus of legislators to control costs have certainly violated the grand bargain,” he said. "And the laws always lag behind medicine and technology."

Panelist Elizabeth Gobeil, a judge on the Georgia State Workers’ Compensation Board, said the Florida Supreme Court decisions in Castellanos v. Next Door Co. (over the attorney fee issue) and Westphal v. City of St. Petersburg (over the cap on temporary benefits) might have spurred legal actions in other states.

Several state legislatures are reacting to recent court decisions, she said:

- Protz v. Workers’ Compensation Appeal Board in Pennsylvania. The state’s high court found the legislature had unconstitutionally delegated its authority to the American Medical Association’s Guides to the Evaluation of Permanent Impairment and removed a section of the law that had allowed employers to use independent rating evaluations to cap benefits.
- Injured Workers’ Association of Utah v. State, which followed Florida’s Castellanos ruling by about a month and also struck down the statutory attorney fee schedule as unconstitutional, allowing attorneys to charge “reasonable” fees.
- Clower v. CVS Caremark Corp., in which an Alabama county circuit court judge found the entire workers’ compensation act unconstitutional over its statutory provisions that cap attorney benefits at 15% of the benefits secured, and the $220 weekly cap on permanent partial disability benefits. The judge has stayed his ruling to give the legislature time to remedy the act.
- Parker v. Webster County Coal, in which a divided Kentucky Supreme Court struck down a statute that cut off workers’ entitlement to income payments once they become eligible for Social Security retirement benefits.

Duff, the Wyoming law professor, said the legal challenges are indicative of a national system that no longer is living up to its mandate.

“I don’t think we do have a grand bargain. I think we have the echoes of the grand bargain. The long and the short of it are workers are not organized. Workers these days really depend on organizations of plaintiffs’ attorneys to push their issues. You don’t see a large influence from organized labor,” said Duff, a former Teamster.