SWEEPING NEW ACADEMIC ARTICLE IS A MINOR TREATISE ON THE WORKERS' COMPENSATION PROGRAM, ITS CONTROVERSIES – AND ITS RETRACTIONS

by David B. Torrey

Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS UNIVERSITY LAW REVIEW 891 (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3079871.

Professor Emily Spieler, a renowned expert on workers' compensation law and insurance, has authored a sweeping new article addressing the program in which she highlights its controversies, and explains – and assails – the retractions of the last few decades. For the workers' compensation lawyer new to the field, Spieler's article is a crash-course relative to the history, purposes, and controversies, past and present, which have surrounded our practice. For the old hand, meanwhile, the author's insights, whether one agrees with them or not, will awaken myriad new reflections on our chosen specialty.

The new article has its genesis in a September 2016 Rutgers Law School seminar on the purported fraying of the system, and Spieler's comprehensive analysis is surely the most enriching of the papers that grew out of that meeting.

Spieler commences her article by explaining the basis of the "Grand Bargain," the now-familiar term that she features in her title. Of course, most readers of this periodical will know that the phrase defines the trade-off made a century ago – workers gave up the right to sue their employers in tort for their injuries, but in exchange received the benefit of no-fault insurance benefits. Employers, meanwhile, gave up their right to raise defenses to liability, but won immunity from negligence suits. Even as the author explains the genesis of the system, she reveals an amusing *irony*: the phrase is of recent invention, first found, in the literature of the field, only in 2000. Theretofore, the arrangement was typically referred to as the "great compromise." Spieler thus extinguishes any romantic idea that our predecessors entertained this quaint, Edwardian-period sounding phrase as they first applied the laws. "Grand Bargain," linguistically, stands somewhere between lowbrow contrivance and petty fraud.

The author, in any event, thereafter describes the relative stagnation of the program over the succeeding decades and the responsive 1972 National Commission. That taskforce, authorized as part of the OSHA law, set forth recommendations that worked to modernize laws, increasing coverages of the program and the adequacy of wage-loss and medical benefits. Spieler then moves on to the contemporary period, 1990-2017, which she terms "reversing course." Here, in a major section of her article, Spieler marches the reader through sixteen bullet-pointed aspects of retraction (which she says "is just a partial list"), ranging from some states' abolition of the Rule of Liberal Construction, and the associated premise that the program constitutes remedial legislation; to restrictions on the duration of disability benefits, even to the severely impaired. Among the other bullets, the author correctly includes the increasing popularity (via deregulation), of compromise lump sum settlements as a method of closing claim

files. This phenomenon, notably, has unfolded here in Pennsylvania, where one can encounter a worker, with an *accepted* claim, proposing to lump sum his case just weeks after surgery.

Complaints about this regressive tendency are well-known and have been the subject of several commentaries. Spieler's treatment of the process, however, is enriched by her ensuing discussion of the external forces that play upon the system. These she categorizes as (1) changes in work; (2) changes in safety; (3) changes in work regulation; (3) changes in the social safety net; (4) changes in health care insurance, delivery, and technology; and (5) changes in political equilibrium. For example, she discusses how coverage of workers has declined because of the "fissuring" of the workplace, with more enterprises seeking to use independent contractors in place of traditional employees; and the wholly new phenomenon of the gig economy, whose entrepreneurs follow a similar approach. She also identifies the weakened organized labor movement as a factor that has allowed the pendulum to swing so dramatically away from workers and in favor of business.

Spieler then shifts her focus to describing the system as she perceives it in the present day. A special point within this discussion is the enduring problem with the system not comprehensively covering the workforce because of the many statutory exclusions that have for so long been a feature of compensation acts. She also identifies the phenomenon of the "failure to file claims in the first place" – that is, by those workers who *are* covered. Spieler argues, as have others in both our field, and similarly in tort, that many victims of workplace injury and disease *never assert* claims.

To this writer, the most intriguing aspect of the article is Spieler's conceptual analysis of the "competing narratives" that surround our field. As we analyze the challenges that exist with regard to the system, she posits, how do we properly understand the program in the *present* day? Is workers' compensation a remedial social insurance program, as originally conceived; or merely a no-fault liability system imposed as a substitute for tort? On the other hand, is workers' compensation simply a disability management system?

This writer has certainly perceived the tension. For example, the default resolution of claims, even those *not subject to dispute*, via lump sum compromise, I find troubling, but if the program is, or has devolved to, primarily a litigation system, then such settlements reflect a natural resolution of claims. Likewise, this writer found the Oklahoma opt-out scheme to be abhorrent, but if workers' compensation has devolved to mere disability management, then super-empowering employer control over the medical aspects of claims (and coextensive truncating of worker due process) follows logically.

My own perception is that workers' compensation is all three of these items which Spieler so insightfully identifies, but that balance must exist if a program is to be fair and operate successfully. On the issue of narrative, meanwhile, it is notable that some commentators, addressing (presumably) all elements of the community, now refer to workers' compensation as "the industry." That usage, as opposed to the traditional neutral terms like the "program," or "the system," has expanded recently. An industry exists, and robustly so, but default use of the term is reductionism and is, in any event, an unsatisfactory manner to refer to a sector of legal practice.

Spieler, after a hundred pages of critique, concludes her article by fulfilling her promise of reassessing the "Grand Bargain." She suggests that the system works adequately when addressing obvious accidents and injuries, but that traditional exclusions and contemporary retractions have made the system unsatisfactory. Like many academics, she flirts with the idea that fairness and adequacy of compensation for injuries can be achieved by restoring tort liability, but her dalliance with that unlikely-to-be-enacted proposition is set aside in favor of enumerated propositions for progressive change. Among these recommendations are a unified healthcare payment system; return to the National Commission principle of benefit adequacy; increased attention to safety; the ability of workers to bring negligence suits against employers when the compensation act allows no recovery for occupational disease; strengthening of anti-retaliation laws; expansion of covered workers; and "national standards that set a floor and eliminate the desperate state-to-state competition that results in a race to the bottom."

Coming in at 123 pages, with over 600 footnotes, Professor Spieler has shared with us a *tour de force* critical review of the system and its challenges. Indeed, this writer does not perceive that any significant issue has been left unaddressed. She is an adamant, though non-polemical, opponent of the "reversal of course" that marks our field's modern-day environment. *(Re)assessing the Grand Bargain*, her great accomplishment, constitutes a brief against retraction and for reform. Though Spieler does not always acknowledge opposing views – for example, she does not adequately address the legitimate employer anxiety about worker moral hazard, which so pervades virtually every discussion of the system – her account of workers' compensation is educational, enlightening, and humane.

APPENDIX

THE SPIELER ARTICLE: A TOP TEN LIST OF SELECT INSIGHTS

1. ***The workers' compensation system in context.*** Spieler remarks: "The aggregated costs of the different state and federal programs that we were refer to … as 'workers' compensation' are dwarfed by the costs of Social Security, our largest federal social insurance program; [and] the healthcare costs of workers' compensation are insignificant within our nation's total healthcare expenditures." As to this latter observation, Spieler notes that medical costs in workers' compensation, for 2013, were $31.4 billion dollars nationwide, whereas for the same year general healthcare costs were *three trillion*. She notes, "the annual costs of medical care within workers' compensation constitutes only about one percent of the total health expenditures in the country."

Because of this comparatively minor role, she remarks, "[workers' compensation] has largely escaped the notice of most social theorists, economists, and legal scholars. Arguably, few see it as pivotal to social policy in the United States."

On the other hand, she posits that the costs of workers' compensation actually far exceed the "direct federal investment in occupational safety." Further, if one looks carefully at work-induced disability, it turns out that many recipients of SSD actually secure their awards based on work-related disabilities. (In Pennsylvania, we routinely approve lump sum compromise settlements, with the worker testifying that he is on SSD, or soon to apply for the same, based

exclusively on the work injury.) An unfortunate conclusion is that "workers' compensation only covers a fraction of the costs associated with occupational injury and mortality."

2. ***Interest groups in policy debates seem static, but philosophies have changed.*** Spieler points out an irony – the interest groups that debated what workers' compensation laws should look like 100 years ago are much the same as in the present day: "The parties involved in the legislative battle [of old] look very much like those involved today: Insurance companies, employers, trade associations and organizations of employers, workers and unions, lawyers (particularly plaintiff's tort lawyers) and administrators of the state systems." On the other hand, in surveying the retraction of the last few decades, she notes, "The resurgent ideology of free markets and free labor – echoing the language of politicians and judges of the 19th century – [have come] to permeate state legislatures and supplanted the communitarian ideals of the New Deal."

3. ***No-fault liability as arresting evolution of a workplace negligence law***. Irony abounds. Spieler makes a perhaps counterintuitive remark on a long-term consequence of workers' compensation no-fault programs: "These are laws that effectively led to the freezing of tort theory regarding workplace hazards." Perhaps, she suggests, tort theory would have continued evolving in favor of injured-worker plaintiffs had workers' compensation not been enacted. She states, "It is reasonable to suggest that tort liability for workplace harms would have been liberalized during the course of the 20th century, but for the existence of this program."

4. ***How to compensate permanent partial disability and occupational diseases, has never been effectively addressed.*** In discussing the 1972 National Commission, the author remarks, "no consensus was reached regarding the appropriate approach [relative] to compensation for permanent partial disability, and a call was made for a continuing state and federal examination of the possible approaches to these disabilities." Also unresolved, in her opinion, was an effective approach to compensation for occupational diseases. Although "subsequent reports explored the barriers [to compensation and such problems], no solution has yet been found for the long-term consequences of prevalent occupational diseases." Spieler, on this latter point, accepts the estimate that only 20 percent of the costs of occupational illnesses are borne by the system. "Instead," she states, "costs are being transferred to the workers themselves, to their families and communities, and to other benefit programs."

5. ***National Commission as not anticipating remarkable growth in medical costs.*** According to Spieler, the critical benefits issue for the Commission, in 1972, was indemnity (disability) benefits: "Later-developing issues," she declares, "including an explosion of medical costs that would drive increases and overall costs in the following decades, could not have been foreseen."

6. ***Is workers' compensation a disability management system?*** Spieler recognizes that the insurance industry and its spokesmen have, for the last few decades, characterized workers' compensation as a disability management system. Spieler remarks that commentators "came to say in the 1990's, 'workers' compensation is a disability management system not a benefit system' – a notion that it obviously contradictory to earlier characterizations of the program."

Here, in any event, Spieler seems to show some sympathy for the advocacy that the system's focus should be return to work – and as promptly as possible. She recognizes, for

example, the commentary of popular Sarasota blogger Bob Wilson, who suggests that the phrase "workers' compensation" be changed, universally, to "workers' recovery." (To Spieler, this reductionism is the essence of considering the program as disability management.)

On the other hand, she has *no patience* with the argument that the medical care of injured workers should be discretely managed to ensure their prompt return to work. Spieler, on this point, remarks: "One current justification for a separate insurance and payment: that injured workers need different or more aggressive medical care than those injured at home. There is no medical justification for this position: everyone needs to be returned to full functioning as quickly as possible, and a focus on achieving this more quickly for injured workers is driven by other incentives, including the desire to limit the cost of disability benefits paid to the worker."

Still, Spieler reflects on the historical phenomenon which led employers to view the system as one of disability management, to wit, that a hundred years ago, few workers stayed in a single job for an extended period of time, and labor turnover was high: "This high turnover undoubtedly contributed to the early sense that workers' compensation was designed to provide limited wage replacement and medical care to workers; it was not intended to be part of a system that involved continued employment. Over time, unionization and improved working conditions led to more stability in the workforce; workers tended to stay longer in jobs as the century progressed. Expectations for longer tenure undoubtedly contributed to the focus in workers' compensation on disability management and return-to-work for injured employees."

Spieler also recognizes that, while employers often stress return to work, they are also happy to receive (and usually demand) resignations and agreements not to reapply from their workers as part of compromise settlements. She might also have pointed out that vocational rehabilitation as a workers' compensation benefit is slowly on the way out among states. In Pennsylvania, for example, a jurisdiction where employers were never responsible for vocational rehabilitation, the common law that demanded that employers connect permanently disabled workers with modified duty was overthrown by the legislature in 1996.

7. ***The importance of tort immunity.*** The author, in discussing about how hard business has fought back, in legislatures, as against the intentional tort exceptions (typically established in case law) remarks, "court decisions [on that issue] became a political lightning rod in the states, demonstrating the critical importance of the promise of tort immunity to employers."

8. ***Do compromise settlements really gauge adequacy?*** In discussing permanent disability compensation, particularly for permanent total cases, Spieler insightfully remarks, "these cases are also often classified as partial disability cases and settled without any real review of the long-term employment possibilities for the injured worker."

9. ***Injured worker inability to understand a complex system.*** Spieler at one point remarks that injured worker claimants are often "caught in endless Kafkaesque claims administration and litigation…." "Lawyers," she posits, "even the best of them … are unable to solve the problems for their clients. State administrations lack information in the language that injured workers seek. The more complex the claim, the more difficult this becomes." These are longstanding aspects of criticisms to which some agencies have tried to respond. Some have been

undermined, as with the Missouri legislature's abolition of the Attorney Advisor position. Of course, with regard to litigation, most people have only occasional and transient interface with legal systems, so it would be odd to encounter an injured worker highly sophisticated about court proceedings. In a recent case of mine, I could not get an injured worker to understand the concept of a statute of limitations.

10. ***Select references.*** Professor Spieler's article features meticulous footnotes in which she supplies her authorities. The article, indeed, constitutes a goldmine for the researcher. I have cataloged many of her major references in Appendix H (Research Guide) of the Torrey-Greenberg treatise, but here are items that are new (or that were not well-known to me):

Alison Morantz, *Economic Incentives in Workers' Compensation: A Holistic, International Perspective*, 69 RUTGERS UNIVERSITY LAW REVIEW 1015 (2017).

Robert L. Rabin, *Accommodating Tort Law: Alternative Remedies for Workplace Injuries*, 69 RUTGERS UNIVERSITY LAW REVIEW 1119 (2017).

Katherine Lippel & Freak Lotters, *Public Insurance Systems: A Comparison of Caused-Based and Disability-Based Income Support Systems*, in HANDBOOK OF WORK DISABILITY: PREVENTION AND MANAGEMENT (2013) (features an overview of international systems).

J. Paul Leigh & James P. Marcin, *Workers' Compensation Benefits and Shifting Costs for Occupational Injury and Illness*, 54 JOURNAL OF OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 445 (2012).

Lynn Rhinehart, *Workers at Risk: The Unfulfilled Promise of the Occupational Safety and Health Act*, 111 WEST VIRGINIA LAW REVIEW 117 (2008).

Andrew R. Klein, *Apportionment of Liability in Workplace Injury Cases*, 26 BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW 55 (2005).

Jonathan Gruber & Alan B. Krueger, *The Incidence of Mandated Employer-Provided Insurance: Lessons From Workers' Compensation Insurance*, 5 TAX POLICY & ECONOMICS 111 (1991).

Edward Berkowitz & Monroe Berkowitz, *The Survival of Workers' Compensation*, 58 SOCIAL SERVICES REVIEW 259 (1984) (discussing attitudes towards workers' compensation in the context of the New Deal.)