How we got here

Oregon's Workers' Compensation Law

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As a practitioner of Oregon workers' compensation law[1] for 32 years, I have witnessed history in the making as Oregon's workers' compensation law was stood on its head and shaken to its core. To fully appreciate the extent of the change, it is necessary to understand from whence we came. The following is a brief history of the workers' compensation law in Oregon since before it's enactment in 1913 until the present day.

The Hobbesian state of nature

In his work Leviathan, Thomas Hobbes postulated about the state of man before the creation of government:

> which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short.[2]

Such was the state of affairs for workers suffering industrial injuries before the institution of workers' compensation laws. In that time, an injured worker's sole remedy was an action at law against his or her employer. To recover, however, a worker had to overcome three common law defenses, any one of which could be a complete bar to recovery.

The fellow servant doctrine was a common law doctrine that barred or reduced the damages awarded to an injured worker against an employer if the injury was caused by the negligence of a fellow worker or servant. The concept was the injured worker should blame the co-worker and not the employer for his or her injury.

Similarly, assumption of risk was a bar to recovery when the injury occurred as a result of the worker voluntarily exposing him or herself to a known danger. The bar applied when the defendant employer could establish the injured worker voluntarily assumed the risk involved in the dangerous work activity.

Finally, contributory negligence was a complete bar to a worker's action against the employer.

These harsh common law rules were eventually ameliorated or eliminated with the passage of legislation. The Fellow-Servant Act in 1903 and the Factory Act in 1907 were the first cracks in an employer's edifice of defenses. Eventually, *Hill v. Saugestad*, 53 Or 17, 98 P. 524 (1908) entirely eliminated the doctrine of assumption risk.[3]

Employer Liability Law

The Progressive Era arose at the advent of the 20th Century in direct response to the problems wrought by rapid industrialization. Initially a social movement, the Progressive Era eventually led to political actions. Female suffrage, the initiative, referendum, recall of elected officials, the direct election of U.S. senators and child labor laws are all examples of Progressive Era reforms.

The citizens of Oregon used the initiative process to enact the Employer Liability Law (ELL) in 1910. The Oregon State Federation of Labor stated the purpose of the proposed law:

> This is the call of the plain people to the plain people for relief...

The best resource for an exhaustive understanding of the ELL is "Oregon's Employer Liability Law: The Voters' Concern for the Safety of Working Men and Women" by Dan Dziuba and Robert Udziela, in the Fall 2008 Trial Lawyer. In short, the ELL required protection for persons engaged in hazardous employments, defined and extended liability of employers, and abolished contributory negligence. The ELL required persons having charge of "any work involving a

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risk or danger to the employee or the public to use every device, cure and precaution that is practicable to use for the protection and safety of life and limb for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."[4]

As explained by Dziuba and Udziela, "[t]he ELL [did] not create a new cause of action. It gives rise to an action in negligence, but imposes higher standards of care than did the common law upon employers who engage in work involving risk or danger."

The workers' compensation law

The Oregon Legislature passed the workers' compensation law (the Act) in 1913.[5] The Act established the State Industrial Accident Commission (SIAC) "to act as insurer, administrator and quasi-adjudicator" of claims for workers' compensation.[6] Participation and coverage under the Act was voluntary. The Act became the exclusive remedy for the injured worker once an employer elected to be covered under the Act. Participation under the Act required the employer to make contributions to the SIAC. Employers who did not elect to be covered in occupations deemed hazardous were subject to the stricter requirements of the ELL.

With the enactment of workers' compensation laws, workers gave up their right to sue their employer for negligence in return for a system of certain and speedy[7] benefit to compensate the injured worker for medical bills, wage replacement or temporary disability compensation. An award of permanent disability of the injury left a permanent residual and vocational assistance for workers who could not return to their former employment due to their work injury. These were the only benefits available under the Act. Pain and suffering or general damages are not available under the Act.[8]

As originally created, the Act did not provide for administrative hearings. Instead, an injured worker could appeal an award made by the SIAC directly to circuit court where "the circuit court had the power to affirm, reverse, or modify and award and submit questions of fact to jury."[9]

Workers' compensation cases were tried to juries from 1913 until 1965, when jury trials were abolished. Many OTLA attorney members became outstanding trial lawyers by trying workers' compensation cases to juries. A little known fact is workers' compensation cases were given precedence over all other civil matters for calendaring purposes. Sometimes a lawyer would try one workers' compensation case to verdict in the morning then turn around and try another case to verdict in the afternoon.

The 1965 Reforms

In 1965, in response to a perceived "crisis" in workers' compensation, the Oregon Legislature, for the first time since 1913, enacted significant reforms to the Act:

- Workers' compensation insurance became mandatory and required of all employers and employees.

- A "three-way" system of insurance was developed where the employer could get coverage by buying insurance on the private insurance market, become self-insured or get coverage from the State Accident Insurance Fund (SAIF) a remnant of the insurance portion of the SIAC. The private insurance prong of the "three-way" system injected profit into the workers' compensation system for the first time.

- Jury trials were eliminated. In place of jury trials, the Workers' Compensation Board was created. Hearings

through the Board's Hearings Division replaced jury trials for resolution of disputes with appeals available to the Workers' Compensation Board and eventually, upon its creation, *de novo* judicial review by the Oregon Court of Appeals.

The demise of the jury trial for injured workers is, to my mind, the biggest loss injured workers have suffered. Many of OTLA's best trial lawyers got their start trying workers' compensation cases to a jury before the 1965 reforms. Garry Kahn, Dan O'Leary, Don Atchison, Chuck Paulson, just to name a few, were all OTLA stalwarts who cut their teeth trying workers' compensation cases to juries.

The Goldschmidt Era

The election of Neil Goldschmidt as Oregon Governor in 1986 led to major changes in the workers' compensation law during his single, four year term.[10]

The 1987 session saw the passage of the first so-called "reforms." Perhaps the most significant "reforms" of the 1987 session were the institution of disability rating "standards" for the rating of permanent partial disability awards, the abolishment of *de novo* review at the Court of Appeals, and allowing insurers to rate permanent disability and close their own claims under certain circumstances.

The 1987 session did not achieve all of the changes desired by Governor Goldschmidt and the business community. Additional reforms were sought in 1989, but were blocked primarily through the hard work of OTLA and former House Speaker, Grattan Kerans. I will never forget the OTLA Convention at Sunriver in 1989 when Rep. Kerans and the OTLA leadership were welcomed like conquering heros by the attendees. Our celebration did not last long.

Undeterred, Governor Goldschmidt brought together a task force made up of members of the labor and business communities in the basement of the Governor's mansion, Mahonia Hall, to strike a deal in workers' compensation "reform." Aided by Ted Kulongoski, who was then Goldschmidt's appointee as Oregon's insurance commissioner, the task force met at Mahonia Hall from January to April 1990. The driving concept was the perception the workers' compensation system was costing too much and providing too little. Once complete, the Governor called a special session of the Legislature in 1990 to enact these "Mahonia Hall Reforms." The so-called reforms[11] included:

- The role of Department of Consumer and Business Services in the adjudication and administration of the system increased with a concomitant decrease in the jurisdiction of the Workers' Compensation Board in cases involving medical, vocational and permanent disability disputes.
- Redefinition of what was a "compensable injury" with an increase in the burden of proof placed on injured workers from material contributing cause (*i.e.* significant factor)[12] to major contributing cause (more than 50%) and introduced consideration of "pre-existing conditions" in the initial compensability analysis.
- The permanent disability standards became more rigid in application and a mandatory reconsideration process came into being.
- Compromise and release of workers' claims was allowed through Claims Disposition Agreements (CDAs).
- Significant limitations were placed on palliative medical care after claim closure.
- Managed Care Organizations

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(MCOs) were created.

- The Management-Labor Advisory Committee (MLAC) was created to continue the work started in the basement of Mahonia Hall.

The 1987 changes saw significant changes to the law concerning claims for mental conditions or so-called "stress claims." The burden of proof was raised to required proof by clear and convincing evidence among other changes. These changes have made it exceedingly difficult to win a claim for a mental condition.

In the span of one term, the Goldschmidt administration radically changed Oregon's workers' compensation system. Most trial lawyers and their injured clients would argue not for the better.

In the 1990 election, Republicans took control of the Oregon House for the first time in many years and in 1994, the Republicans secured control of both chambers of the Oregon Legislature for the first time in decades, thus setting the stage for changes to occur in 1995.

1995 changes

Another round of major changes occurred in the 1995 session in the form of SB 369. The changes were promulgated as proposals to restore the Mahonia reforms which had allegedly been substantially changed by judicial decisions between 1991 and 1995. In fact, the 1995 changes went much further and decreed:

- That a combined condition was compensable only as long as, and to the extent, the otherwise compensable injury was the major contributing cause of the combined condition or the need for treatment.

- That the definition of "objective findings" to be verifiable indications of injury or disease, and excluded physical findings or subjective responses to physical examinations that were not reproducible, measurable or observable.

- That an injured worker who believed a condition had been incorrectly omitted from the acceptance notice, or that the notice was otherwise deficient, must first communicate, in writing, to the insurer or self-insured employer the worker's objections. And precluded a worker who failed to comply with this requirement from taking the matter up at a hearing.

- That a claim closure was authorized before a condition became medically stationary under some circumstances.

- That an aggravation claim must be accompanied by an aggravation claim form.

Injured workers suffered as a result of so-called reforms agreed to in 1990 by the Mahonia Hall task force — meeting at the governor's mansion — and adopted by a special session of the Legislature, later in 1990.

- That exclusive jurisdiction for medical treatment disputes resided with the director of the Department of Consumer and Business Services.

Initially proposed to plug holes in the original Mahonia Hall legislation, the 1995 "reforms" were in fact a mean spirited and punitive attack on injured workers. The 1995 legislation was passed without approval from the Management Labor Advisory Committee. The legislation became law in any event because the Senate President, Republican Gene Derfler, held hostage one of Governor Kitzhaber's legislative priorities. Approval of the 1995 legislative changes were the ransom paid to free the Governor's preferred legislation.

Senate Bill 757 in the 2003 Legislative Session changed the manner in which permanent disability awards were made. The former distinction between scheduled and unscheduled body parts was replaced with the concept of "whole person impairment." Senate Bill 757 also included the concept of "work disability." Work disability awards can sometimes greatly increase a worker's permanent disability award.

Observations

In conclusion, the history of Oregon's workers' compensation system reveals movement over the years from a no fault, judicially based jury system to an administrative, bureaucratic and, some would say, punitive model.

On a personal level, this movement toward an administrative, bureaucratic model has been extraordinarily frustrating. I remember what the system was like prior to the initial 1987 Goldschmidt reforms. While it is true benefit levels have gone up over the years, the number of injured with compensable claims has been limited. Workers are routinely blocked from entering the system due to the focus on major contributing cause and pre-existing condition limitations. While Oregon workers' compensation insurance rates have steadily dropped over the years due to the major cause and pre-existing condition limitations, the injured workers excluded from the system remain injured. The costs of their care is now borne by private health insurers and the Oregon Health Plan instead of by the party who should be responsible: Oregon's employers.

Also frustrating to watch is the dramatic drop off in the number of lawyers who handle workers' compensation cases. Early in my career (mid-1980s) it was not uncommon for small town general practice lawyers to handle workers' compensation cases as part of a general practice. With each successive wave of legislative change, and the changes to the administrative rules that follow, more and more lawyers find it impossible to keep up with the changes and have dropped workers' compensation as part of their practices. Workers' compensation law has become a very specialized area of the law where a relatively small number of lawyers ply their trade. It is very difficult to attract new lawyers into the practice of workers' compensation law on behalf of injured workers.

Whether the pendulum will swing back in favor of a jury-based model remains to be seen. Employers and stakeholders who have benefitted from what they call "The Oregon Success Story"will resist mightily any change that will cede back to injured workers the rights they lost in 1965 and the Goldschmidt/Mahonia Hall Era.

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1 *See* ORS 656.001.
2 Leviathan,
3 *See* also Kevin Keaney, Oregon State Bar Workers' Compensation (2008 rev.) Chapter 1, History and Perspective, § 1.2.
4 ORS 654.305
5 1913 Or Laws ch. 112.
6 Keaney, Oregon State Bar Workers' Compensation (2008 rev.) Chapter 1, History and Perspective, § 1.4.
7 In theory.
8 Unless the worker has a third party claim or claim under the ELL where the worker would get both workers' compensation benefits and the opportunity to seek general damages from a negligent third party.
9 Keaney, *Id.*
10 The Goldschmidt Era is also significant for tort reform measures including caps on damages for the first time in Oregon history.
11 Chapter 2, Oregon Laws 1990, Special Session (SB 1197).
12 *Summit v. Weyerhaeuser*, 25 Or App 851, 856, (1976).