



# WORKERS' INJURY LAW & ADVOCACY GROUP<sup>®</sup>

***“How Montana Compares to National Trends and  
Developments in State Workers’ Compensation  
Systems”***

**Chuck Davoli, WILG President  
September 10, 2014 – Big Sky, Montana**

# Step out of the Box ?

- State Workers' Compensation Systems
  - > Why & What was intended ?
  - > What is the current profile and trends of systems ?
  - > Where might we be going ?

# Fundamentals

- Why Workers' Comp ?....a century old phenomenon

- Late 19<sup>th</sup> – Early 20<sup>th</sup> Century development

*“...workers compensation...arose out of the coincidence of a sharp increase in industrial accidents attending the rise of the factory system and a simultaneous decrease in the employee’s common law remedies (for redress) for his injuries...”*

(Larsen, WC Law , Sec 4)

[std. ER defenses were contrib., assumption of risk, fellow servant rule = **fault**]

*“...Common law remedies were inadequate to meet modern conditions and conceptions of moral obligations, and **substitute therefore a system based on a high conception of man’s obligation to his fellow man...**”*

(Puchner v. Employer’s Liability Assur. Corp., (La. 1941), 198 La. 921, 5 So.2d 288, 291)

[See also: Montana Laws 1909, Chapter 67; and, Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 NCCA 720(1911)]

# Fundamentals cont.

- What was intended ?....neither tort nor socialism, but something in between..

*“The American workers’ compensation system is distinguishable from public social insurance in its essentially private nature...and in its mechanism of **unilateral employer liability**...”*

*(Larson, WC Law, Sec.3)*

*“...Workers’ compensation rests upon the sound economic principle that **those persons who enjoy the product of a business** – whether it be in the form of goods or services – **should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product**....the expected cost of injury or death to workers can be anticipated and provided in advance through the medium of insurance, and the premiums can be regarded as an item of production cost in fixing the price of the commodity or service... **the element of fault disappears**... and is subordinated to broader economic considerations...” (Malone & Johnson, La. WC Treatise, Sec 32: Compensation Principles)*

# Objectives intended ?

- A Moral commitment for a better system.
- Private sector liability.
- An Agreement between Business & Labor:

For a **“no fault”** system and a **“Quid Pro Quo”** providing employer **“exclusivity”** or tort immunity in exchange for a **system of adequate and reasonable benefits** providing medical treatment and a wage substitute - **in effect, a balanced system of employer and employee interests.**

# WC Systems Evolved

- By 1920 all but 8 states adopted WC Acts.
- By 1949 all states.
- Fairness and adequacy issues led Congress to consider federalism of system in 1970 OSHA creation and the President's National Commission on State WC Laws.

# 1970 OSHA Act

- “ ...the vast majority of American workers, and their families, are dependent on workers’ compensation for their basic economic security in the event such workers suffer disabling injury or death in the course of their employment; and that the **full protection of American workers** from job-related injury or death **requires and adequate, prompt, and equitable systems of workers’ compensation** as well as an effective program of occupational health and safety regulation...”

# 1972 Nat. Comm. Standards (not all inclusive list)

- Compulsory coverage (Not elective by states).
- Elimination of all numerical and occupational exemptions to coverage.
- Full coverage of work-related (occupational) diseases.
- Full medical and physical rehab. services without arbitrary limits.
- Broad extra-territoriality coverage. (employee choice of venue)
- Elimination of arbitrary limits on duration or total sum of benefits for both medical and indemnity.
- Weekly benefit at least 2/3 of employee AWW to maximum 200% State AWW.
- Employee initial choice of physician. (inc from panel approved by State)
- SSDI offset against receipt of WC indemnity benefits.
- AMA Impairment Guides should not provide guidance for evaluation of disability.
- State oversight of medical care and rehabilitation services.
- Establishment of Second Injury Funds.
- Establishment of alternative benefits in cases of insolvent or uninsured employers.

# Nat. Comm. Considered reverting to tort system

- “...We have considered implications of abolishing WC and reverting to negligence suits, a remedy abandoned some 50 year ago. This option is still inferior to WC: its deficiencies include uncertainties for both employer and worker and the substantial costs arising from litigation over the degree and source of impairment. Such litigation also has serious adverse effects on efforts at rehabilitation...”



# Current Profile and Trends of State WC Systems

**decades of experience – what does it tell us ?**

- Employee WC benefits paid Nationwide 1992 – 2012
- Employer WC costs Nationwide 1992-2012
- Nationwide trends attributed to decreasing costs and benefits
- Breach of quid pro quo & constitutional Tipping point reached ?

# \*Employee Benefits Nationwide (1992-2012)

[\*Source: National Academy of Social Insurance, est's, August 2014)

- > From **1992 to 2011** total benefits declined appx. 40%  
\$1.65 per \$100 payroll in 1992 to \$1.00 per \$100 of payroll in 2011
  
- > From **2010 to 2011** total benefits unchanged at \$1.00 per \$100 wages
  - Medical benefits unchanged at \$0.49 per \$100 covered wages
  - Cash benefits decreased from \$0.51 to \$0.50 per covered wages
  
- \*From **2011 to 2012** total benefits rose by 1.3% to \$61.9 billion
  - Medical benefits paid \$30.8 (49.8%) increased 0.9%
  - Cash benefits paid \$31.0 (50.2%) increased 1.8%
  - Medical benefits unchanged at \$0.49 per \$100 covered wages
  - Cash benefits decreased from \$0.50 to \$0.49 per \$100 covered wages

[**Note: Over the past 30 years, medical benefits have accounted for an increasing share of total benefits, from 33% in 1984 to nearly 50% in 2012**]

# \*Employer Costs Nationwide (1992-2012)

- > Costs DROPPED appx. 40% from 1992 to 2011  
**\$2.13** per \$100 of payroll in 1992 **to** **\$1.27** per \$100 of payroll in 2011
  
- > Slight increase from 2010 to 2011  
**\$1.24** per \$100 payroll in 2010 **to** **\$1.27** per \$100 of payroll in 2011
  
- **2011-2012 Employer \*costs rose by 6.9% to \$83.2 billion**  
However, slight (.03%) increase from 2011-2012 of total payroll  
**\$1.32** per \$100 payroll in 2012  
(\*reflects rising employment and earnings from economic recovery)

**[“Despite uptick in total benefits and costs in 2012, workers compensation benefits and costs per \$100 covered payroll have been lower in 2007 to 2012 than at any time over the last three decades”....NASI, August 2014]**

## Is there a WC crisis ? – if so, for employers or injured workers ?

- **WC Second most profitable line of insurance** – the WC industry w/collateral interests is est. \$77 billion
- The operating ratio decreased from 100.4 in 2011 to 93.8 in 2012\*
  - **In 2012, the industry earned \$6.20 of profits for every \$100 of net premiums** (\*Source: NCCI)
- Claim frequency decreased 5%\* 2011-2012
- **Investment gains up**
  - 2008: 8.7%, 2009: 10.8%, 2010: 14.8% , 2011: 14.7%, **2012: 14%\***



# States that enacted WC legislation in 2012-2013



**43**  
**States**  
**Almost**  
**200**  
**Bills**

Source: NCSL - Workers Compensation — Enacted Legislation Database 2012-13

## Current Trends tipping the balance of employer and employee interests to reduce costs ?

- 1. Mitigating attorney involvement and access to justice for injured workers.
- 2. Influence or control of impartiality and independence of workers comp judiciary.
- 3. Inhibiting and discouraging medical providers from treating injured workers.
- 4. Minimizing costs of liability while retaining exclusivity.

# Top 10 Trends

- “Opt Out” & Alternative WC Systems
- “Carve Out” WC Systems
- Eliminating liberal construction of Work Comp Act
- Exploit AMA Impairment Guides & Causation Guides
- Medical Fee Schedules & Rx Formularies & PBM’s
- Physician Choice (“Gatekeepers” to treatment)
- Arbitrary Benefit Limitations & Caps
- Mental Injuries
- Opioids & Physician Repackaging & Dispensing Issues
- Occupational Diseases

# #1 - Oklahoma Opt Out

## OK SB 1062 (2013)

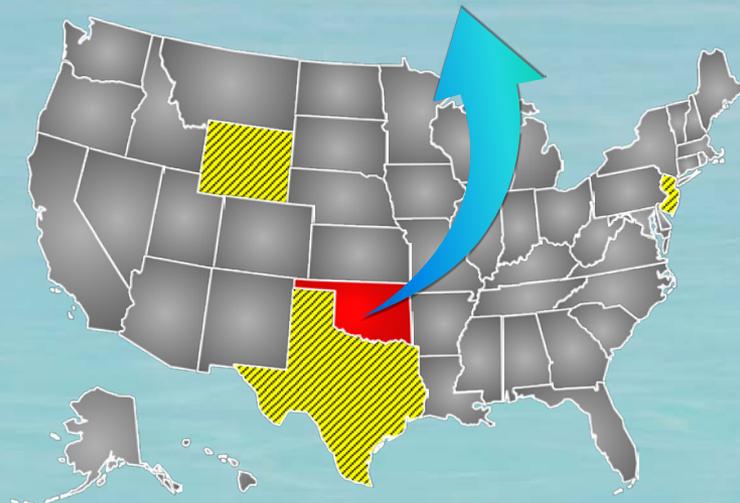
- Permits “qualifying” employers to “opt out” of the state’s work comp system

## OK H.R. 2155 (defeated 2012)

Tx – “Opt In” State

Wyoming – “opt out”

Ag. & Retail only



# Oklahoma Opt Out

New law gives employers:

- Complete authority to determine how benefits systems are designed
  - Imposes arbitrary conditions on an employee's ability to receive benefits
- Selection of treating physician restricted
- Control over dispute resolution system
- Preserves exclusive remedy (?)

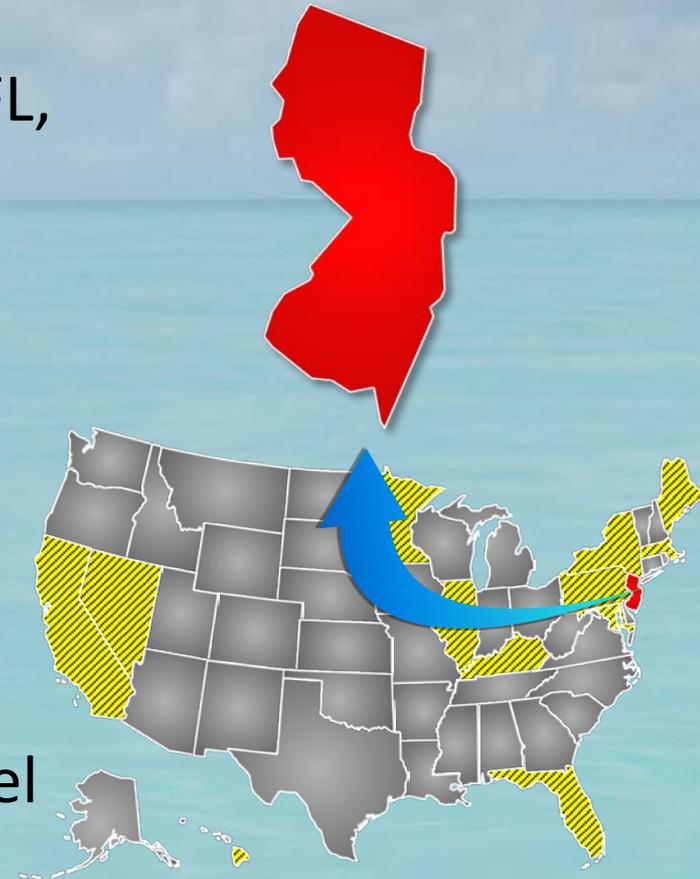
# Union “Carve Out” Programs

Collectively bargained workers' compensation (CBWC) programs

- Authorized: CA, MN HI, MA, ME, FL, KY, NY, PA, MD, NV & IL
- Active: CA, MN, HI, NY, MD & MA
- **NJ AB 3423** (pending)

MN's 4 components:

- ADR – binding arbitration
- Network of Medical Providers
- “Neutral” Physician Examiner Panel
- Vocational Rehabilitation



## #2 - Eliminating Liberal Construction of WC Act

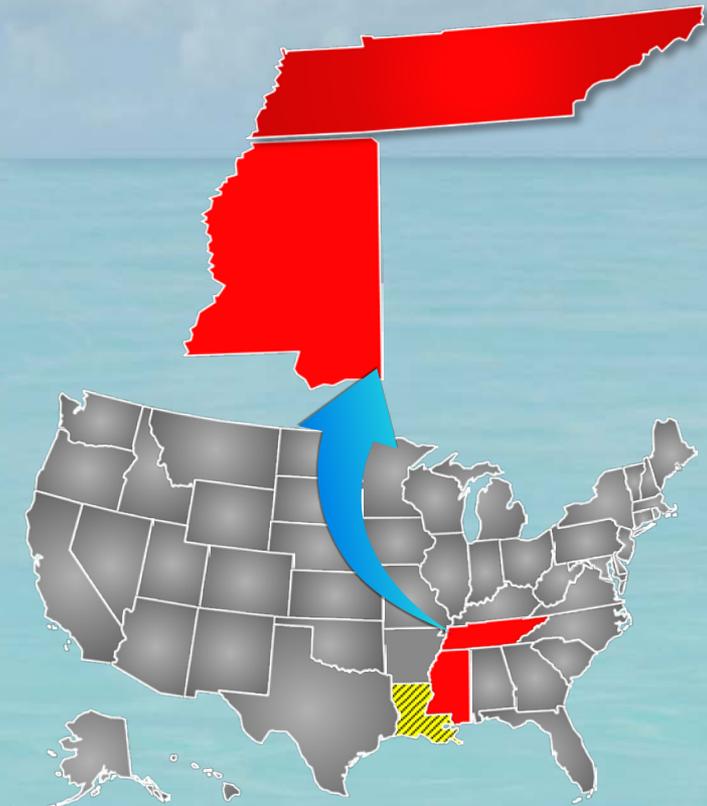
### **TN SB 200 (2013 En.)**

- “without favor to either employee or employer”

### **MS SB 2576 (2012 En.)**

- “Notwithstanding any common law or case law to the contrary, this chapter shall not be presumed to favor one party over another and shall not be liberally construed in order to fulfill any beneficent purposes.”

**Louisiana-(2012 passed MS version)**



# #3 - AMA Impairment Guides 6th Ed.

## Requires use of 6<sup>th</sup> Ed.: (LSHWA, FECA)

KS (SB 187 – 2013 En.)

IL (HB 1698 - 2011 En.)

\*MT (HB 334 - 2011 En.)

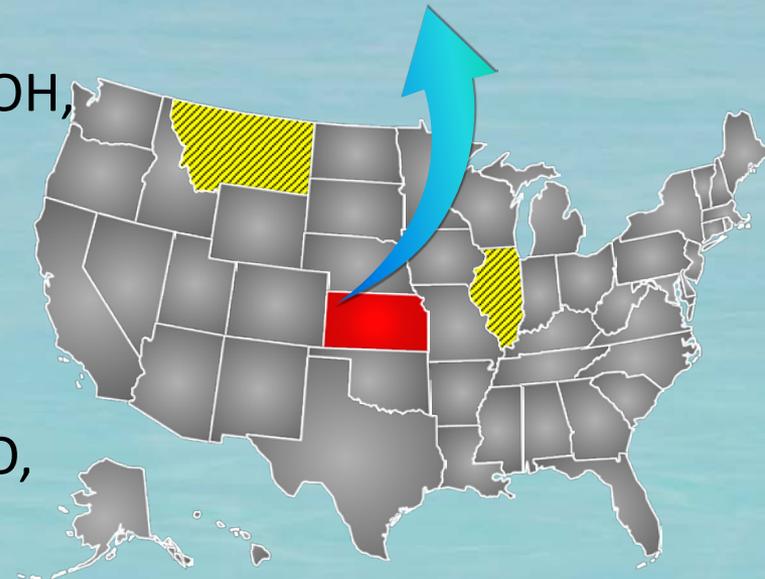
AK, AZ, LA, NM, OK, PA, TN, WY

## Rejected 6<sup>th</sup> Ed.: NH, NY, KY, IA & UT

5<sup>th</sup> Ed.: CA, GA, HI, IA, KY, MA, ND, NH, NV, OH,  
RI, VT, WA

4<sup>th</sup> Ed.: AL, AR, KS, ME, MD, SD, WV  
CO & TX (considering 6<sup>th</sup>)

Own: CT, DE, \*FL, ID, IL, IN, MI, MN, MS, MO,  
NE, NJ, NY, NC, OH, SC, VA, WI



# Impact of AMA 6<sup>th</sup> ed.

- 6<sup>th</sup> Edition published 2007
- \*NCCI analysis :
  - MT** – ave. impairment decrease by **-28%**
  - TN** - ave. impairment decrease by **-25%**  
and decrease 16% whole body rating.
  - NM** – ave impairment decrease by **-32%**  
and decrease of 6% whole body rating.

[\*NCCI Legislative Research, Moss/McFarmand/Mohin /Haynes, July 2012]

# #4 - Medical Fee Schedules

## **IN HB 1320** (2013 En.)

>Medical services at 200% of Medicare's reimbursement rate

## **VA HB 1612** (2013 – defeated)

>Stakeholders asked to come up with new proposal

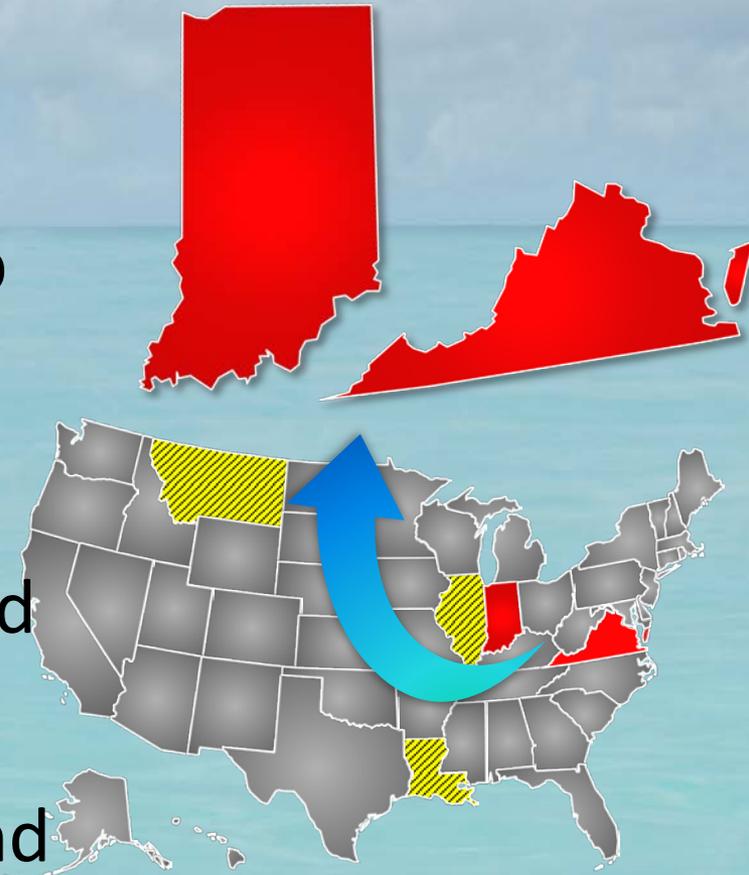
## **MT HB 334** (2011 En.)

>Freezes medical Fee Schedules

>Disparity between referring and treating physicians

## **IL HB 1698** (2011 En.)

>Reduced by 30% for doctors and hospitals



# #5 - Physician Choice “Gatekeeper” Issues

## **OH HB 34** (2013 – language removed)

- Would have restricted workers ability to choose treating physician if worker didn't return to work within 45 days

## **MS SB 2576** (2012 En.) – “Presumptive Choice”

- If an employee is treated by a physician for six months or longer or if the employee has surgery performed by a physician, that physician is deemed the employee's selected physician.

## **MT HB 334** (2011 En.) pre & post 7-1-11 rules

Any time after acceptance of liability, employer/insurer choice usurps employee choice, or if physician fails to comply with the treating physician requirements (“U&T” Guidelines)



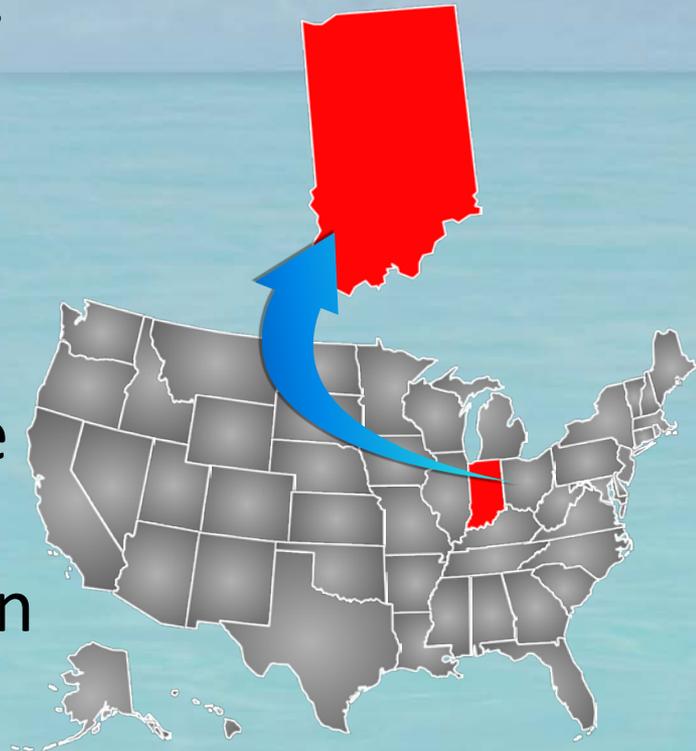
# #6 - Arbitrary Limits on Benefits

## Indiana – (industry model)

- Limits TTD benefits to 500 weeks
- Terminates TTD benefits without prior notice

## IN HB 1320 (En. 2013) increased:

- Permanent partial impairment benefits
- Maximum AWW to 20% over the next three years
- Maximum compensation that can be paid for an injury



# Arbitrary Limits on Benefits

## **GA HB 154** (2013 En.)

- Limits medical benefits for non-catastrophic injuries to 400 weeks after 7/1/13
- Increased max weekly TTD from \$500 to \$525 per week
- Increased max TPD from \$334 to \$350 per week

**MT** – 260 wk/60 mth cap w/2 yr recertifications – impact 2016.  
PTD exempt. 5 year limit to reopen from date of termination.  
No palliative care or maintenance after MMI.

## **OK SB 1062** (2013 En.)

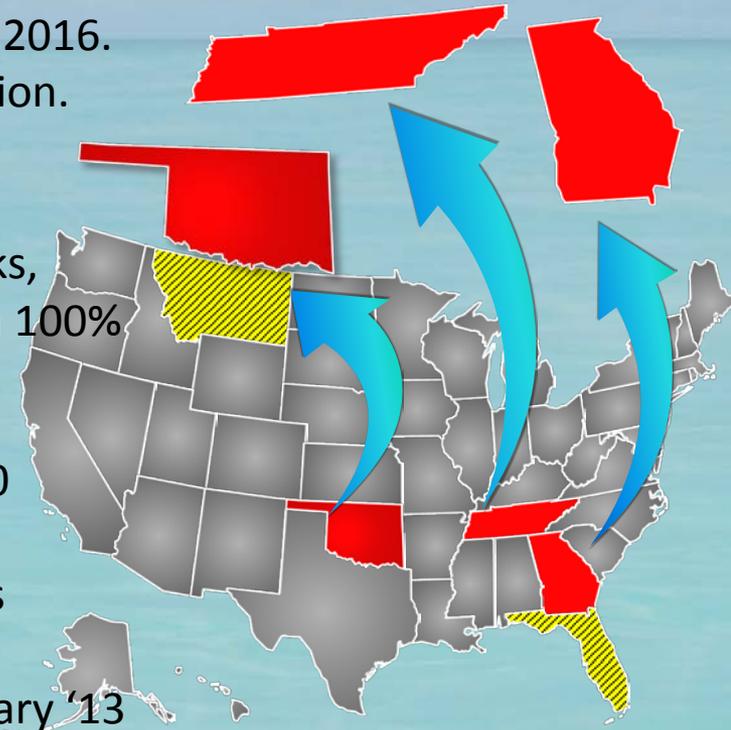
- Decreases TTD maximum duration from 156 to 104 weeks,
- Decreases TTD maximum weekly indemnity benefit from 100% to 70% of SAWW
- Decreases max duration from 500 to 250 weeks
- Decreases PPD max weekly indemnity from \$323 to \$250

## **TN SB 200** (2013 En.)

Increased maximum total benefits from 400 to 450 weeks

**FL** Constitutional challenge – 104 wk TTD cap or MMI

- Westphal v. City of St. Petersburg*, No. 1D12-3563, February '13



# #7 - Mental Injury

## **MN SB 1234** – (2013 – En.)

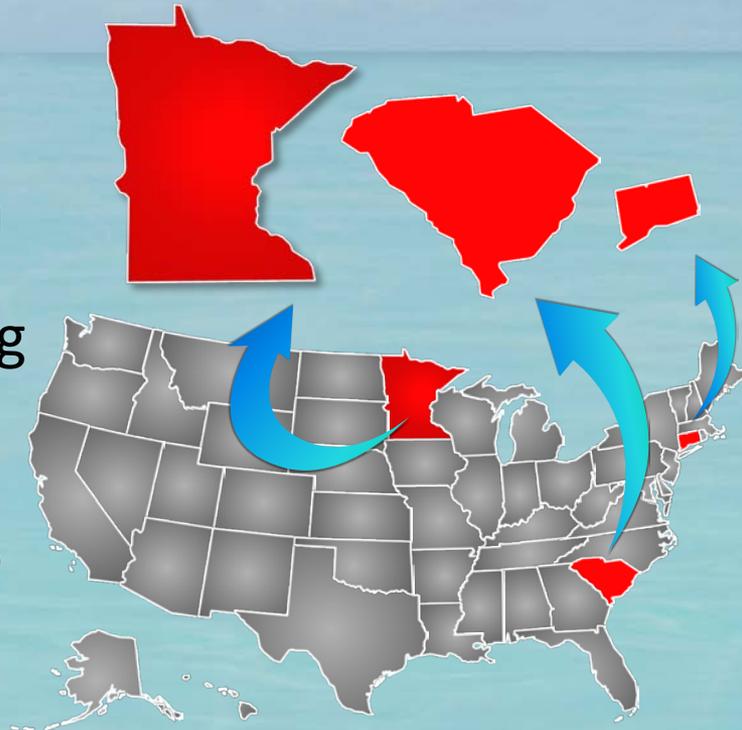
- Expands defn. occupational disease and personal injury to include mental impairment

## **CT SB 823** – (2012 defeated)

- Would have expanded Connecticut's coverage to individuals diagnosed with post-traumatic stress syndrome as a result of witnessing a death or maiming

## **SC HB 3369** – (pending)

- Longshore Bill - Deletes requirement that workers provide medical evidence that working conditions caused any mental trauma



## #8 - Opioid “Abuse”

- > Prescription drug monitoring programs (PDMP)
- > Restrictive MTGs with drug pre-screening & ongoing monitoring & PBM utilization reviews
- > Washington - “industry model”
  - doctors can not increase opioid doses beyond 120 milligrams when a patient does not demonstrate “improved functionality.”
- > Texas ODG - Rx \* “Closed Formulary” Schedules

[\*WLDI reports 80% cost decrease for non-formulary Rx with total Rx savings 15-30%]

# #9 - Dr. Reimbursement for Repackaged Drugs

## Florida SB 662 – (2013 En.)

- Reimbursement capped at 112.5% of AWP price of the drug plus \$8 dispensing fee

## IN HB 1320 – (2013 En.)

- repackaged drugs cannot be sold for a higher price than the AWP established by the original manufacturer



# #10 - Occupational Disease

## MO SB 1 – (2013 – En.)

- Provides that OD are now exclusively covered by work comp
- Defines “occupational disease” to include mesothelioma, asbestosis and other related diseases
- Expands benefits for OD caused by toxic exposure to 200% of state’s AWW for 100 weeks
- For meso cases 300% of state’s AWW for 212 weeks
- Creates Mesothelioma Risk Management Fund
- Allows Psychological stress of police officers



# Emerging Issues

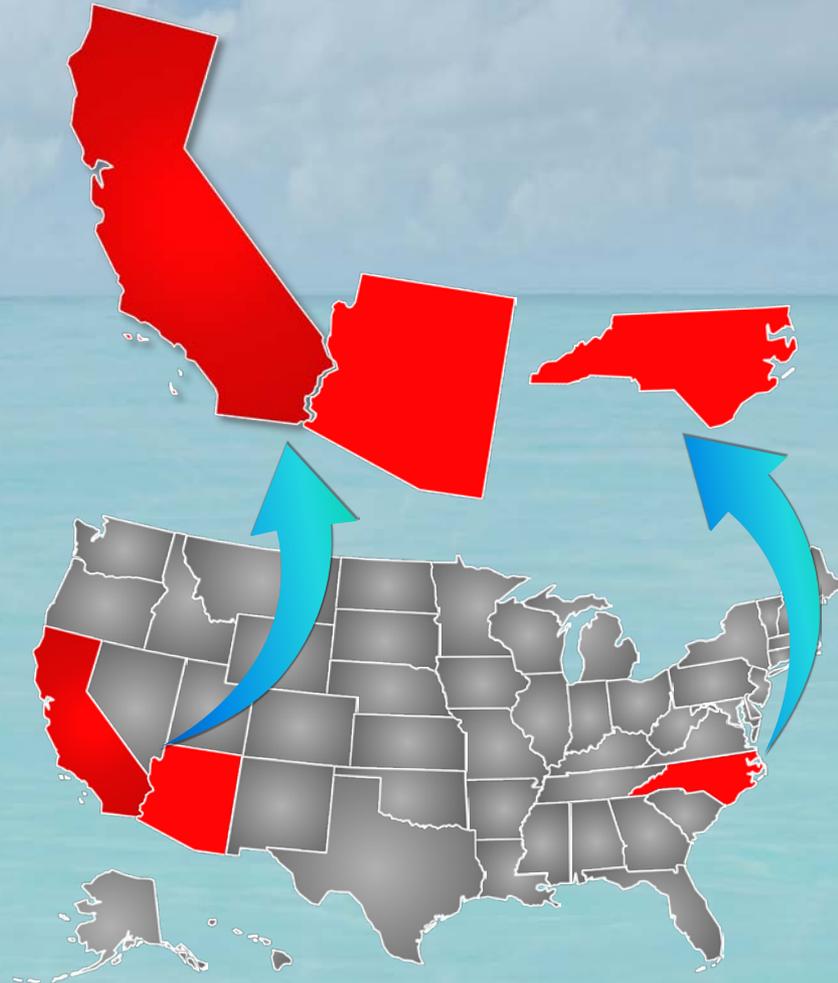
- Professional Athletes & Cumulative Trauma
- Longshore & Work Comp Jurisdiction
- Medical Marijuana
- Obesity & other co-morbidity factors
- Civil vs. Administrative Proceedings
- Rx Formularies & Cost Controls (PBM's & Compounding Restrictions)
- Medical Treatment Guidelines (EBM) Application
- Mitigate “take your victim as you find him” principles
- Employer Misclassification

# Professional Athletes

**AZ SB 1148 (2013 – En.)**

**CA AB 1309 (2013 – En.)**

**NC SB 614 (2013 –  
defeated)**



# Longshore & Work Comp Jurisdiction

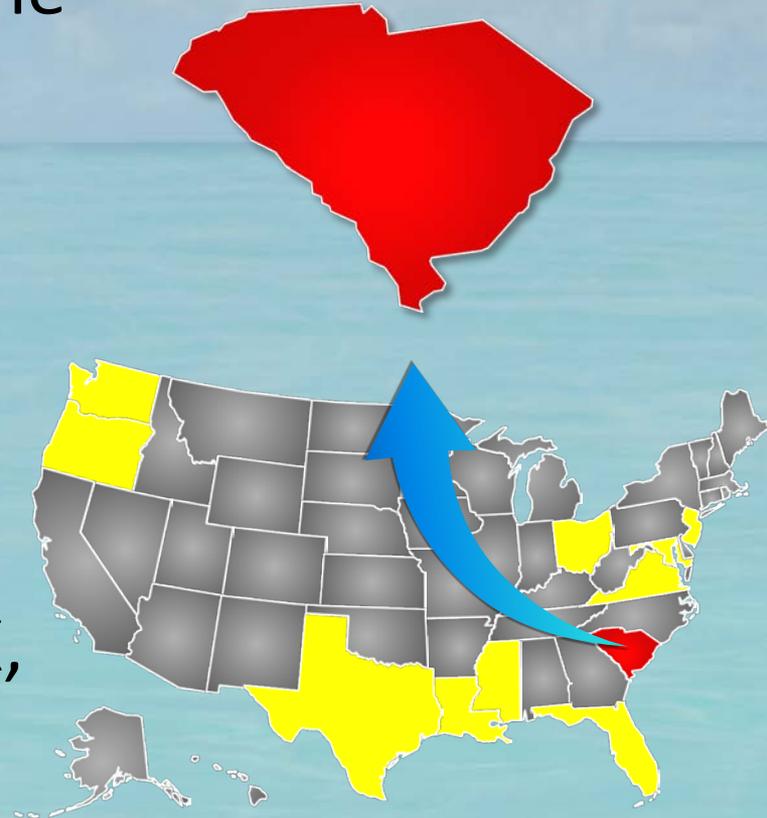
## **SC HB 3369** (2013 - pending)

- Prevents workers covered by the federal Longshore Harbor Workers' Compensation Act or the Jones Act from filing state workers' compensation claim

**VA** (2012 – En.)

## **Exclusive Jurisdiction States:**

- FL, LA, MD, MS, NJ, OH, OR, TX, VA & WA



# Medical Marijuana

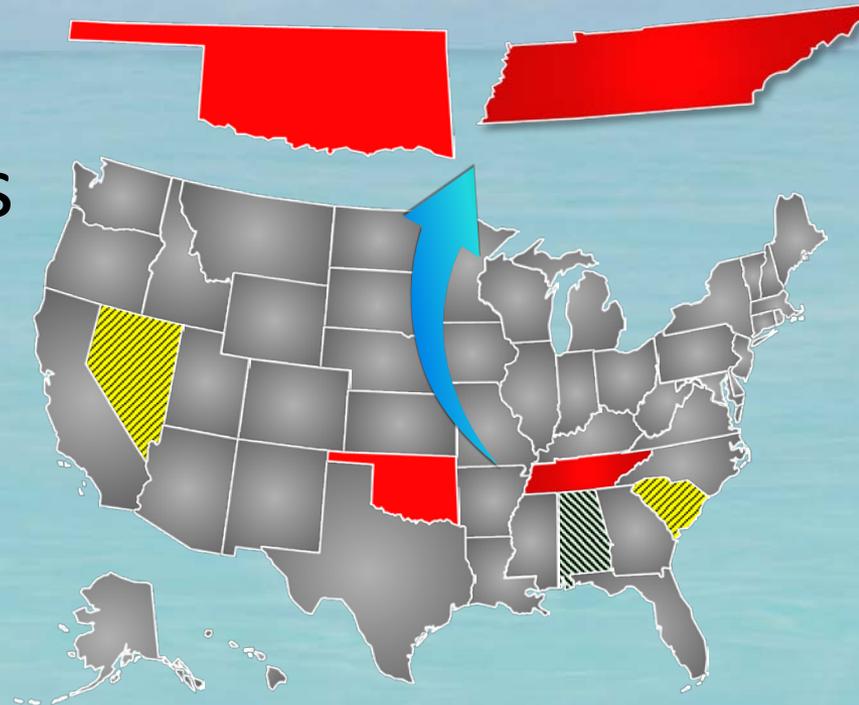
- Medical marijuana – 20 states
- Recreational marijuana – (CO & WA)
- Legislative Issues:
  - Not covered by state workers' compensation system(s)
  - Preventing employees from being terminated for medical use or off-duty legal activities

# Obesity

- American Medical Association (AMA) has reclassified obesity as a medical disease
- May use this argument to justify:
  - over reserving
  - introduce legislation aimed at reducing benefit levels for individuals with a high BMI
  - \_ proportioning post-accident disability causation

# Civil Court vs. Administrative System

- **OK SB 1062** (2013 – En.)
- **TN SB 200** (2013 – En.)
- Administrative systems now used in all states other than Alabama
- **SC & NV** – Atty's n/a
- **AL** – only judicial branch



# MTG – EBM “Guidelines”

- **Tx “ODG”** : CT & MO (State Fund), HI, KS, NE, NM, ND, OH, OK, VT, WY
- **ACOEM** : CA, NV, UT
- **Considering ODG/ACOEM** : AK, AZ, CT, GA, IL, KT, MD, \*MI, NC, PA, \*SC, SD, \*TN
- **Own** : AR, CO, \*DE, FL, LA, ME, MN, MS, MT, NY, OR, RI, WV
- **None**: AL, ID, IN, IA, NH, NJ, \*VA, WA, \*MN, \*WI
- [\* States with active assessment of MTG – EBM]

# Constitutional tipping point reached ?

(Tip of the wc deform iceberg?)

- Florida – *Padgett v. State of Florida*

*(11<sup>th</sup> JCC – Miami-Dade, 11-13661 CA 25, 8-14-14)*

*Judgment: Chap 440, F.S. exclusive remedy was violation of due process requirements of 14<sup>th</sup> Amendment to US Const, and Florida Const. by providing **inadequate** WC benefits in exchange for the right to trial by jury.*

*1935 - Florida WC Act abrogated civil rts to jury trial in exchange for fixed rts of benefits in quid pro quo agreement, with option EE to “opt out” for tort remedy.*

*1968 - Florida Constitution amended w/citizen guarantee of access to courts and right to be rewarded for industry.*

*1970 – Rt to EE “opt out” repealed by legislature.*

*1974 to date – Further Amendments to WC Act eliminating/Restricting WC benefits despite 1974 Amendments adopting std’s from the National WC Comm.*

*-2003 – Legislature repealed wage loss benefits, capped permanent benefits, and required EE co-pays for medical benefits.*

# Padgett, cont.

- Judge Cueto.....p.8

*“...Until the repeal of the ‘opt out’ provisions in 1970 the exclusive remedy was not really exclusive at all. It was only exclusive for those employees who did not ‘opt out’...The Act became the exclusive remedy in 1970, two years after the (Fla. Const) Declaration of Rights, with no reasonable alternative benefit provided by the legislature for the loss of the right to opt out. Benefits provided by the Act should have increased substantially to account for the change in the value of the trade, ie allegedly fast, sure and **adequate** payments in exchange for the tort remedy that was cumbersome, slow, costly, and under which it had been legally difficult for injured workers to prevail....Remember, workers’ compensation is a scheme under which employers are required to pay for injuries that may be wholly caused by the employee/victim. Employers who run a safe business should be able to ‘opt out’...”*

*“...The purpose of the WC Act is for the employer who benefits or profits from an employee’s labor must relieve society of the consequences of a broken body, a diminished income, (and) an outlay for medial and other care...” (Mobile Elevator v. White, (Fla 1949), 39 So.2d 799)*

# Benefits of WILG Partnerships & Coalitions

- **Continuing Legal Education, Annual Conference & Seminars**
  - Information will give you competitive edge and keep you abreast of legislative and policy developments
- **Website**
  - Includes access to listserves, deposition bank, CLE's, legislation, document bank & case law research
- **Publications**
  - Workers' First Watch, Monthly E-newsletters, Legislative updates, E-clips, Tembow, and Special Reports
- **Practice Sections**
  - Longshore/DBA, FECA, Black Lung, Veterans, New Lawyers, Wage & Hour & Paralegal

# Benefits of WILG Partnerships & Coalitions

- **Public Education & Media**
  - Focus on injured workers' safety
  - Proactive Policy & Legislative Developments
- **Deposition Bank and Pleading Assistance**
  - Plaintiff's only deposition bank with over 700,000 depositions!
- **Amicus Briefs and Proactive Task Force Initiatives**
  - Members may request assistance
- **Affinity Partnerships**
  - Services helpful to your practice

# Thank-you !

For further information about WILG go website:

<http://www.WILG.org>

Or contact: Jennifer L. Comer, Executive Director

[jennifer@wilg.org](mailto:jennifer@wilg.org)

Workers' Injury Law & Advocacy Group

333 Daniel Webster Hwy, #33

Meredith, NH 03253

917-280-5237 or 614-940-7979