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 judge 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 field. 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 thorough 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 in my state, 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 has so skillfully identified, but that balance must exist if a program is to be fair and operate successfully.)

On the issue of narrative, it is notable that some prominent 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 revisionist, reflects estrangement of injured workers, and is insulting to the dignity of that aspect of the community.

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 all aspects of the system – her account of workers' compensation is at once educational, enlightening, and humane.