



2018 Annual Meeting  
& Educational Conference

# Constitutional Challenges to Workers' Compensation

Mark Walls  
Safety National

# **WHY IS THIS HAPPENING?**

**FEELING THAT BENEFITS ARE INADEQUATE.**

**NO RELIEF THROUGH LEGISLATURES**

**COURTS WILLING TO LEGISLATE FROM BENCH**

# FLORIDA

## **CASTELLANOS**

**2016 DECISION FOUND ATTORNEY FEE CAP  
UNCONSTITUTIONAL  
“DUE PROCESS”**

## **WESTPHAL**

**2016 DECISION FOUND 104 WEEK CAP ON TTD BENEFITS  
UNCONSTITUTIONAL  
“RIGHT TO ACCESS COURTS”**

# **OKLAHOMA**

**2013 REFORM BILL HAS BEEN TORN APART BY COURTS.**

**TORRES VS SEABOARD FOODS (2016)  
180 DAY EMPLOYMENT REQUIREMENT FOR CUMULATIVE  
TRAUMA CLAIM  
“DUE PROCESS”**

**MAXWELL V SPRINT (2016)  
PPD REDUCED IF WORKER RETURNS TO WORK  
“DUE PROCESS”**

**VASQUEZ VS DILLARDS (2016)  
OKLAHOMA OPTION  
“DISPARATE TREATMENT FOR MEMBERS OF A SINGLE  
CLASS”**

# OKLAHOMA CONTINUED

**GIBBY VS HOBBY LOBBY (2017)  
FORFEITURE PROVISION ALLOWING BENEFIT  
TERMINATION FOR MISSED MEDICAL APPOINTMENTS.  
“ADEQUATE REMEDY PROVISION”**

**TOTAL OF 44 PROVISIONS OF 2013 REFORMS STRUCK  
DOWN BY COURTS.**

# KENTUCKY

**PARKER V WEBSTER COUNTY COAL (2017)  
END DATE FOR INDEMNITY BENEFITS BASED ON  
“QUALIFICATION” FOR SOCIAL SECURITY RETIREMENT  
“EQUAL PROTECTION”**

# PENNSYLVANIA

**PROTZ VS WCAB (2017)**

**IRE PROCESS THAT EVALUATED IMPAIRMENT BASED ON  
“MOST RECENT EDITION” OF AMA GUIDELINES  
UNCONSTITUTIONAL DELEGATION OF REGULATORY  
DUTIES TO ANOTHER PARTY**

# LOUISIANA

**PIERCE VS LAFOURCHE PARISH COUNCIL (2000)  
BENEFIT TERMINATION BASED ON RECEIPT OF SOCIAL  
SECURITY RETIREMENT BENEFITS  
EQUAL PROTECTION**

**BARBER VS LOUISIANA WORKFORCE COMMISSION  
(2017)  
PERMANENT INJUNCTION AGAINST ELEMENTS OF THE  
MEDICAL TREATMENT GUIDELINES.  
APPEAL TO SUPREME COURT DENIED AS INJUNCTION  
WAS NOT DONE ON CONSTITUTIONAL GROUNDS  
ALTHOUGH THIS WAS MENTIONED THROUGHOUT THE  
ARGUMENTS.**



# **NEW MEXICO**

**RODRIGUEZ VS BRAND W. DAIRY (2016)  
EXCLUSION OF FARMWORKERS' FROM WORKER'S  
COMPENSATION  
EQUAL PROTECTION**

# UTAH

**INJURED WORKERS' ASSOC OF UTAH VS STATE (2016)  
RESTRICTIONS ON ATTORNEY FEES VIOLATES  
SEPARATION OF POWERS AS THIS IS DUTY OF COURTS  
NOT LEGISLATURE**

# ARIZONA

**GRAMMATICO VS INDUSTRIAL COMMISSION (2005)  
STATUTE ALLOWING FOR DENIAL OF CLAIM IF WORKER  
FAILED POST-INJURY DRUG TEST.  
NO FAULT SYSTEM CANNOT REQUIRE EMPLOYEES TO  
PROVE THEY DID NOT CONTRIBUTE TO INJURY**

# ALABAMA

**CLOWER VS CVS CAREMARK (2017)  
CIRCUIT COURT DECISION FOUND ATTORNEY FEE CAPS  
VIOLATED DUE PROCESS AND FAILURE TO ESCALATE  
PPD BENEFITS OVER TIME UNDERMINED GRAND  
BARGAIN. DUE TO LACK OF SEVERABILITY, ENTIRE  
STATUTE FOUND UNCONSTITUTIONAL.  
STAYED AND SETTLED BEFORE APPEAL.**

# KANSAS

**PARDO VS UNITED PARCEL SERVICE (PENDING BEFORE  
SUPREME COURT)**

**AMA 6<sup>TH</sup> EDITION UNDERMINES GRAND BARGAIN  
BECAUSE IT RESULTS IN LOWER PPD AWARDS.**

# CALIFORNIA

**KING VS COMP PARTNERS (PENDING BEFORE SUPREME COURT)**

**DOES UTILIZATION REVIEW PHYSICIAN OWE A ‘DUTY OF CARE’ TO INJURED WORKER? MALPRACTICE?**

**LOWER COURTS SAID YES.**

**UNDERMINES EXCLUSIVE REMEDY AND DISRUPTS UTILIZATION REVIEW PROCESS.**

# PLAINTIFF BAR IS ORGANIZED



WORKERS' INJURY  
LAW & ADVOCACY GROUP®

ABOUT WILG

PROFESSIONAL RESOURCES

SECTIONS

COMMITTEES

CL

## CONSTITUTIONAL CHALLENGE SUMMIT

### Details

WORKERS' INJURY LAW  
& ADVOCACY GROUP®

APRIL 17, 2018

**CHERRY BLOSSOM TRIP**

BOARD MEETING/LOBBY DAY

APRIL 18, 2018

**CHECKS & BALANCES**

ADVANCING A CONSTITUTIONALLY SOUND  
WORKERS' COMPENSATION SYSTEM



# WLG SUMMIT

8:00-10:00 AM	<p><b>Academic Underpinning</b></p> <p>Panel Discussion: Emily Spieler, Robert Williams &amp; Gail Evans Moderated by Judson Pierce</p> <ul style="list-style-type: none"><li>• The History of Constitutional Challenges to Workers' Compensation</li><li>• Constitutional Vulnerabilities in Workers' Compensation</li></ul>
10:00-10:30 AM	Break
10:30 AM-12:00 PM	<p><b>Examples from the Trenches</b></p> <p>Panel Discussion: Geoff Bichler, Vince Quatrini, Bob Burke, Jinx Dabney &amp; Thomas Baumann - Moderated by Charles Davoli</p> <ul style="list-style-type: none"><li>• Laying Factual Foundations</li><li>• What Worked Well</li><li>• What Would You Do Differently</li><li>• Briefing Suggestions</li><li>• Oral Argument Suggestions</li><li>• Others</li></ul>



# WLG SUMMIT

12:30-2:00 PM	<b>State Updates</b> Moderated by Michael Gruber & Amie Peters <ul style="list-style-type: none"><li>• Working Lunch- states delegates discuss areas they think their systems are vulnerable for constitutional challenge</li></ul>
2:00-2:30 PM	Break
2:30-4:30 PM	<ul style="list-style-type: none"><li>• <b>Attorney Fees</b> - Moderator Jinks Dabney</li><li>• <b>Equal Protection &amp; Due Process</b> -Moderated by Bob Burke</li><li>• <b>Unconstitutional Delegation of Authority</b> (AMA Guides/Medical Treatment Guidelines) - Moderated by Vince Quatrini, Catherine Surbeck &amp; Thomas Baumann</li></ul>
4:30-5:00 PM	Final Discussions / Program Concludes

# **AREAS OF FOCUS**

**REDUCTION OF BENEFITS**

**LIMITS BASED ON AGE**

**DIFFERENT CLASSES TREATED DIFFERENTLY  
PRESUMPTIONS?**

# **FINANCIAL IMPACT**

**OVER \$1 BILLION INCREASE IN LIABILITIES IN FLORIDA**

**DOUBLE DIGIT RATE INCREASES IN FLORIDA AND PENNSYLVANIA.**

# **MASSACHUSETTS SELF INSURANCE**

## **MALDEN MILLS CASE**

**SELF INSURED EMPLOYER INSOLVENT, BOND INSUFFICIENT.**

**COURT OF APPEALS HELD ACE MUST DROP DOWN BELOW SIR AND PAY ANY CLAIMS**

**MASS LAW INDICATES “REINSURANCE” IS A FORM OF THE SELF-INSURANCE GUARANTEE TO PAY BENEFITS.**

**QUESTIONS**