Comments from the Defense Bar regarding the appellate process pursuant to 21 V.S.A. Sec. 670

Dear Sherri: I am attaching a number of comments regarding the above identified statute from various members of the defense bar with concerns relating to that provision.

From: Robert G. Cain [mailto:RCain@pfclaw.com]
Sent: Saturday, January 23, 2016 11:02 PM
To: vtbar_Workers_Compensation
Subject: Re: [vtbar_workers_compensation] Fw: Last Year's Lighten the Load Draft Bill as of April 14 2015

Bob--

The proposed statutory change is good social policy, despite the fact that it will hit me in the pocket book, just like it will all the Claimant's' attorneys who have weighed in so far. It makes absolutely no sense, from a social policy perspective, to give either the claimant or the employer two bites at the apple before appealing. The Department of Labor, like many other state departments, is imbued with "special expertise" in its area. Why should either side be able to effectively treat the proceedings before the "expert" Department of Labor as a sham and get another free shot in the Superior Court?

The "right to a jury trial" is a red herring---there is nothing in the WC system that inherently gives either party the right to a "de novo" second trial. The right to a second "de novo" trial is most often used, in practice, to coerce the winner before the DOL to pay something to avoid the expense of a second trial.

I represent both claimants and defendants in WC matters. Although I haven't agreed with all of the DOL's decisions in my cases, I do respect the DOL's special expertise in this area. Under the proposed statutory change, if the DOL commits an error of law, or renders a decision based upon insufficient evidence, the parties have a right to appeal-- the same right that is accorded to dissatisfied parties in civil actions.

There is already an extremely uneven playing field between employers and employees in the WC arena, in favor of employees-- the list goes on and on, from one-sided awards of attorneys fees to evidentiary presumptions.

I can think of no legitimate reason, other than my own personal self interest in preserving a system that enhances my income, to oppose the proposed statutory change that cuts out unnecessary, duplicative litigation, while at the same time preserves the right to appeal both errors of law and fact.

If I'm a lawyer representing either claimants or defendants in WC matters, I'd say keep the status quo because it will enhance my practice revenues; if I'm a legislator or Supreme Court Justice more concerned with good social policy and the just and efficient administration of justice, I'd say it's a no- brainer to eliminate a right to a second, duplicative trial of the facts of a case.

Bob

On Jan 21, 2016, at 8:47 AM, Bob Paolini <BPaolini@vtbar.org> wrote:
I'm sharing this with the section to invite comments, if any, on sections 12 and 13. The court has asked to meet with me to discuss these "lighten the load" proposals. I'd like your input. Thank you.

Robert M. Paolini, Esq.
Executive Director
Vermont Bar Association
35-37 Court St.
P.O. Box 100
Montpelier, VT 05601-0100
v 802-223-2020
f 802-223-1573
c 802-760-7471
bpaolini@vtbar.org
www.vtbar.org

-----Original Message-----
From: David A. Berman [mailto:dab@mc-fitz.com]
Sent: Wednesday, February 17, 2016 4:45 PM
To: Eric A. Johnson; Corina N. Schaffner-Fegard; Keith J. Kasper (kjk@mc-fitz.com)
Cc: jrf@mc-fitz.com
Subject: Re: Legislative bills

The following is submitted on behalf of Eric Johnson, Jason Ferreira, Craig Matanle, Rob Reagan, and myself. We are in agreement with the position as set out by Bob Cain, below. In addition, we submit the following:

First, the Constitution does not mandate a right to appeal to a jury trial in an administrative hearing such as workers' compensation. This is evidenced by the fact that it appears Vermont is one of only 5 states where a party may appeal an agency adjudication for a jury trial. Claims under the Vermont Workers' Compensation Act are not common law claims protected by the Seventh Amendment. They are statutory claims.

Second, from an efficiency standpoint, the elimination of re-trying cases already heard by the administrative agency that specializes in the applicable area of law is a significant improvement. The superior courts would not be dealing with appeals, which have essentially become automatic, particularly by attorneys representing injured workers.

Third, to address the argument that the Department of Labor staff is overworked and understaffed, this is a point we can all agree on. However, a significant reason for this is that claims that are not fully ripe for adjudication or are possibly weak on the merits, are still pushed forward by counsel for injured workers because of the safety net that exists with the right to appeal. There is no risk in not fully developing a case or in pursuing a case at a formal hearing because if the decision is unfavorable, the injured worker may appeal that decision, and is by no means limited by the evidence that had been set forth to the Department of Labor. In fact, the injured worker may offer new evidence, and new experts, and re-litigate the same case, now

prepared and developed because of the safety net that exists. Removing this right for a de novo appeal will positively impact not only the efficiency in the court system, but reduce the work load of the overworked and under staffed employees of the Department of Labor. Without the safety net of the appeal, only fully ripe and developed cases will be pursued through the formal hearing process. Yes, it will certainly change the nature of the hearings before the Department. It will change them for the better, as the decision will actually have some significance.

Fourth, to address the argument that this will require parties to have attorneys at the Department of Labor, it is extremely rare that cases go to a formal hearing involving an unrepresented injured worker. And in contrast to the argument that the staff at the Department of Labor are not advocates for injured workers, they are not, and should not be, advocates for anyone. They are adjudicating these claims and disputes. They are neutral. However, they go out of their way to advise injured workers of their rights to an attorney, providing a packet summarizing the workers' compensation process, and providing information with appropriate attorneys to contact. They also caution injured workers that a formal hearing is a legal proceeding and that retaining an attorney is highly recommended.

The proposed statutory change would improve efficiency in Superior Court, and at the Department of Labor. It would give the Department of Labor formal hearing decisions significance. It would preclude frivolous or unsubstantiated claims, and remove the strategy of pursuing claims with the belief the defendant will offer settlement money knowing that not only does the formal hearing carry expenses and risk, but that even if the defendant succeeds at the formal hearing, those expenses and risks only increase. It is egregious that an attorney for an injured worker can pursue a formal hearing on a claim that is simply not supported by the law or evidence, lose the formal hearing, appeal to Superior Court, prepare a case with merit and sufficient evidence, succeed before a jury, and then collect attorneys' fees and costs from the work done at the Department of Labor level. It significantly undermines the legitimacy of the formal hearing process. It undermines the significance of the adjudication of a workers' compensation dispute by the state agency that specializes solely in workers' compensation issues and is best suited to decide these cases.

Eric,

Bill Blake, Jenn Moore, Justin Sluka and myself all agree with Bob Cain's comments and the points raised in Robert Reagan's email, both copied below.

Personally, I never thought that a de novo trial of a WC claim in Superior Court was a good use of judicial resources when the Department of Labor had trained staff with specialized knowledge and adequate resources to try these cases.

Let me know if we can be of any assistance.

Andy

ELLIS BOXER & BLAKE PLLC ATTORNEYS

Andrew C. Boxer, Esq.

Ellis Boxer & Blake PLLC
24 Summer Hill Street
P.O. Box 948
Springfield, VT 05156-0948
802-885-2141
acboxer@ellisboxer.com