



George Aaron

# Alternate legal universes



Personal injury, workers' compensation and Social Security disability claims. Do you need a hug?

During their careers, very few lawyers have toiled in all three of the legal salt mines: personal injury, workers' compensation and Social Security disability claims. For much of my legal career I've been involved in all three, although now my practice is limited to procuring California workers' compensation, Social Security Disability Insurance (SSDI) and/or Supplemental Security Income (SSI) benefits for my clients. What is most fascinating is that although all three

practice areas involve helping claimants get monetary recompense/benefits for their impairments, injuries or medical conditions, they are literally alternate legal universes for the practitioner. Strangely, those differences are all-too-often counter-intuitive to the legal mind of attorneys experienced in only one (or even two) of the three practice areas. Highlighting the differences will vastly improve the learning curve of attorneys unfamiliar with any one of the three practice fields.

## **The tort and workers' comp systems**

Most trial lawyers – plaintiffs' attorneys – are primarily familiar with the civil tort liability system. It evolved via the common law and liability is based on negligence. As fault is a major consideration in most bodily injury tort claims, a moral dimension informs the issue of liability. Thus, members of the negligence trial bar have been known to

*See Aaron, Next Page*

wax eloquently on the positive good for society that comes from bringing wealthy and powerful wrongdoers to the bar of Lady Justice. According to injury-victims' rights advocate Ralph Nader, Esq., "The civil justice system provides our society with its moral and ethical fiber."

In my experience, few trial lawyers have even a rudimentary understanding of the workers' compensation system, an administrative-law legal field seldom taught in law schools. The reason for rampant ignorance and misinformation when it comes to "the comp system" is the tendency of non-work-comp lawyers to ineluctably conflate principles of tort law (a required first-year course in all law schools) and civil procedural common law (again, a non-elective course in every law school) with those of workers' compensation, a self-contained administrative law system, which varies greatly from state to state.

The historical origins of these two discrete legal systems goes far to spotlight their differences. Our tort system is essentially an Anglo-American adversarial fault-based legal construct that evolved over centuries from the medieval trespass, battery and conversion disputes between English lords, while workers' compensation (formerly "workman's compensation"; the nomenclature only became gender neutral in the '70s) is basically a non-fault social-welfare benefits delivery system originally meant to ameliorate the loss of life and limb suffered by heavy-industry factory laborers in late nineteenth century Central Europe.

Workers' compensation came to California in 1911, the height of the U.S. Progressive Era, and its mandate is found in the California constitution. In 1913 a grand compact between business interests and labor was achieved, which made it compulsory for all California employers to obtain workers' compensation insurance coverage, in exchange for employer immunity from most bodily injury civil tort actions by injured employees (the exclusive remedy rule, codified at Labor Code section 3602). Workers' compensation is wholly a creature of statute, and

hence the statutory scheme can be drastically changed overnight by the stroke of a pen, as it was in 2004 when Governor Arnold Schwarzenegger signed into law a comprehensive reform, reverberating to the present day.

Workers' compensation benefits are adjudged in hearings before administrative law judges. Indemnity "benefits" — not "compensatory damages," a common law term of art — for permanent disability are paid out according to schedules and complicated formulas adjusting a physician's "raw" impairment rating (expressed as a percentage from one to 100 percent) for age and occupation, ultimately as determined by a "rater" at the Disability Evaluation Unit annexed to the Workers' Compensation Appeals Board (WCAB), which includes the trial-level courts and the appellate-level seven Commissioners who adjudicate administrative appeals of decisions from the workers' compensation judges. Appeals beyond the administrative level go to the California appellate court system.

Conceptually, the workers' compensation system is geared to return injured workers to work — it is not a "make-whole" compensatory system — therefore, indemnity payouts are purposefully ungenerous. Specified injuries to specific body parts are assigned a certain percentage which can be plugged into a "money chart" that lists the permanent disability payout for a stated percentage for injuries during a certain time period. Thus, a 10 percent permanent disability rating for a 2013 injury pays out \$6,975.50 over 30.25 weeks, assuming the injured worker is at the maximum indemnity rate of \$230/week. This harkens back to published tables from the late 19th century in Britain and Germany listing specific body parts and the corresponding one-time indemnity payment.

An injured worker's indemnity-benefit award is therefore to be contradistinguished from a Superior Court's civil judgment to an injury-victim plaintiff for "full damages" as ascertained by jurors acting as "the conscience of the community" in rendering their verdict; instead, it is more of a social-insurance fixed-sum

payout based on somewhat arbitrary political calculation by legislative and regulatory actors. Hence, different states have surprisingly widely divergent indemnity dollar values assigned for injury to any single specific body part, with California unfortunately at the low end of the national spectrum.

### Social Security benefits

The Social Security Administration (SSA) provides disability benefits for individuals below age 65 through two programs: the Social Security Disability Insurance (SSDI) program, authorized under Title 2 of the Social Security Act, providing benefits to disabled workers, dependents, and surviving spouses and the Supplemental Security Income (SSI) program, authorized under Title 16 of the Social Security Act, providing benefits for disabled individuals with limited incomes and assets. SSDI covers disabled workers who have paid into the Social Security trust fund; SSI disability is best described as a federal welfare/social safety net program for impoverished and disabled individuals.

Parenthetically, sometimes a claimant can have both an SSDI and an SSI claim, known as a concurrent claim. In summary, a billionaire who meets the medical criteria for disability can receive SSDI benefits, as it is a form of insurance wherein the "premiums" are paid via a federal payroll tax (FICA); SSI claimants, on the other hand, may have been unemployed for much or all of their life and yet collect SSI benefits if they meet the medical criteria for disability — which is the same for both programs — and they additionally meet the income and asset limitations.

Social Security disability law consists of a surprisingly fearsome panoply of statutes, regulations, administrative rulings and federal decisional law and is administered by a massive bureaucracy:

- Claims are initially processed and administered by the SSA bureaucracy (62,000 employees in 2007, per Wikipedia), with local SSA "field offices" in large cities of every state (over 1,300 nationwide).

*See Aaron, Next Page*



I doubt any field of law can beat California workers' comp when it comes to try-to-top-this *mishugas*. We all have horror stories galore. I once saw a workers' comp journal cover featuring a woman wildly grimacing while pulling her hair out from both sides of her head — the perfect meme for the comp system. If one buttonholes longtime workers' compensation attorneys and judges, most will admit the system is dysfunctional.

### Settlement

Bodily injury liability claims are valued for settlement purposes by discounting from an expected jury verdict range and projected verdict median, and based on evidence adduced by the respective parties regarding liability (comparative fault/contributory negligence) and damages. Liability insurers have an apposite term of art for this risk-measuring concept: "exposure." One can find jury verdict and settlement reports from all over the country, which serve as rough guides and benchmarks used to answer the big question: "What's it worth?" Nonetheless, the claims valuation process for most midsize-to-large injury claims will always be more art than science, as there are simply too many variables in any given claim.

California workers' compensation has two very different types of settlements (California Code of Regulations, Title 8, § 10165.5 — Notice of Options Following Permanent Disability Rating): (1) a stipulated Findings and Award (F & A), which is for permanent disability benefits only, is paid off biweekly over time, and reflects the sum expected to be awarded applicant after a trial for permanent disability, and (2) a Compromise and Release (C & R), which is a full and final global lump-sum settlement of all benefits, and usually can only be made when a claimant-applicant no longer works for the employer s/he was employed at when injured. Since a C & R includes a sum reflecting expected lifetime medical care, often it is for significantly more money than a stipulated F & A. Any settlement must be approved by a judge for adequacy and fairness before it is effective.

There are no settlements per se of SSDI/SSI claims: they are either accepted or denied by the SSA. Unlike workers' compensation, where disability can be rated from one percent to 100 percent, the federal disability claims system is binary: the claimant is basically either totally disabled, usually permanently (once in a while one sees a "closed period claim," wherein the claimant is totally disabled for more than a year but eventually can return to the workplace) or is not disabled. However, ALJs sometimes will play Monty Hall on Let's Make a Deal and offer, mid-hearing or post-hearing, to issue a fully favorable decision if a claimant amends his onset date to a later one than originally claimed.

### Attorney fees

Unlike the contingent-fee system with its negotiated rates and costs advanced by the plaintiff's attorney, workers' compensation fees are highly regulated and always set by a judge, never by contract, usually around 15 percent of the settlement or award, and are paid directly to the attorney by the defendant's insurer. It is relatively rare for the attorneys to advance costs, although it happens from time-to-time on larger cases, but nonetheless almost never more than several thousand dollars in even catastrophic injury cases.

In SSDI/SSI claims, attorneys can contract with a client to have a fee agreement accepting a 25 percent contingent fee on retroactive benefits collected, with a current cap of \$6,000, or they can file a fee petition, which includes an itemized "straight time" *quantum meruit* breakdown. Most attorney-representatives use a "two-tier fee agreement," combining the two fee-approval systems, as in some cases a contingency fee may not be allowed (such as when there was a prior representative on the case) or the fee-cap makes a \$6,000 fee in a protracted, hard-fought case inadequate. SSDI/SSI fees are usually paid directly by the SSA to the lawyer.

### Knowledge fungibility

Lawyers practicing PI law are immersed in the seamless web of the

common law system and the procedures, practices and culture of the Superior Court. Thus, an organic interconnectedness of legal doctrine and practice avails between a business torts case and a personal injury damages action. A medical malpractice case is venued in the same courthouse as disputes in employment, real estate, entertainment and sports law; something that is all-too-apparent at our L.A. Superior Court law and motion cattle calls. Trying a corporate law dispute to verdict before a jury involves the same skill set, jury instructions, rules of court and often the same judges as trying an auto-crash personal injury case.

Attorneys who practice exclusively before the WCAB are cut off from the substantive and procedural legal world of their civil practice colleagues by the rather bold and dark seam demarcating the mostly no-fault compensation system from the metaphorical seamless web of the common law, viz., Article 14, Sec. 4 of our state constitution and the ever-changing California Labor Code. Unlike trial lawyers who handle personal injury cases and must be in touch with the sensibilities of lay judges — otherwise known as jurors — workers' comp attorneys work on a parochial legal island, inside a closed system cut off from lay notions of justice and fairness, quarantined from the greater legal world of the common law civil justice system. Because he lives his legal career in the bosom of a beadle-dome bubble, a veteran comp lawyer eventually becomes the ultimate legal expert described by Mahatma Gandhi, Esq.: He knows more and more about less and less until he knows everything about nothing.

Attorneys practicing SSDI/SSI law can handle cases anywhere in the country, because of the relative, though not total, uniformity of federal disability law (there are notable differences on select substantive-law issues between different federal circuits). Unfortunately, other than acquiring a formidable forensic-medicine knowledge base (I read hundreds of pages of medical reports, chart and progress notes on most days), this highly specialized legal domain provides

*See Aaron, Next Page*

few transferable practitioner skills applicable to other legal bailiwicks.

### Crossover issues

Every now and then, an injury victim may have two or even three viable concurrent claims, i.e., personal injury and/or workers' comp and/or SSDI/SSI. Generally the thorniest scenarios for a practitioner are the concurrent third-party/workers' compensation cases, which tend to feature a Rubik's Cube assortment of substantive-law issues and sub-issues, e.g., Prop. 51, subrogation/reimbursement and credit claims, overlaid on allocating and calculating damages under overlapping tort liability and workers' compensation law, plus concurrent jurisdiction issues. The only practitioners' handbook covering the complex and untidy confluence of tort and workers' compensation law is the CEB's *California Workers' Damages Practice, 2nd Ed.*, by Paul Peyrat. Unfortunately in my experience, the potential substantive law and procedural challenges in a concurrent third-party/workers' compensation situation are nonetheless best met by consulting a lawyer familiar with both practice fields.

### Attorney-attorney relations

[*Lex non favet votis delicatorum.*

"The law does not favor the wishes of the fastidious."]

Make no mistake, a jury trial against a tortfeasor in a big-injury case is a battle royal, thus effective trial lawyers are warriors. The most successful are alpha types: aggressive, confrontational, highly competitive and hard-charging risk-

takers. They tend to big egos and many are lone wolves at heart.

In sharp contrast, workers' comp attorneys are typically collegial and oftentimes collaborative in dealings with opposing counsel. Because we work with each other constantly, no matter how big or busy a WCAB courthouse is, the attorneys often treat each other more as if we were practicing in a one-courtroom cow town than a big-city courthouse. Defense attorneys usually get along better with applicants' attorneys than they do with their insurer-client claims examiners.

Over the years I've asked court reporters to compare deposition proceedings in bodily injury tort actions versus workers' compensation claims; they invariably regale me with over-the-top anecdotes of personal injury lawyers engaging in overheated verbal altercations and outright physical assaults.

SSDI/SSI attorneys don't deal with opposing counsel, because there isn't any (and happily perforce, nary the chance for ex parte mischief). As a whole, they are even more laid-back than the comp bar. Unlike the negligence trial bar (and even the comp bar), there is no pecking order to this most egalitarian attorney-group.

### Attorney-client relations

Seasoned injury lawyers know that there is an inverse correlation between how badly injured a client is and how often he contacts your office. The worse the injury, the less the client seems to care about the legal case. Thus, I have no problem ever giving my cell phone number to catastrophically injured clients,

because they seldom call me. Conversely, the small-injury clients want me (personally) to know what they had for breakfast (each day).

I've heard it said that a family law practice involves the highest degree of client emotion-venting, followed next by a workers' comp practice. Because of the emotions all-too-often attendant to the employer-employee relationship and the greater array of benefits, workers' comp clients tend to be much higher maintenance than SSDI/SSI clients.

### Strange Days: Hug me two times

"This is the strangest life I've ever known."

— Jim Morrison

When I was practicing personal-injury law, a client would hug me maybe once a year. In workers' comp, I'll get a hug maybe once every 4-6 months. In my SSDI/SSI practice, at least once a month is the norm.

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