

AARON ALLISON TALKS ABOUT WORKERS' COMPENSATION VERSUS "OPT OUT" OR "NONSUBSCRIPTION" BENEFIT PLANS



Recently *Perspectives* talked to Austin-based attorney, Aaron Allison, about his views on Workers' Compensation and so-called "opt out" or "nonsubscription" employee injury benefit plans:

Allison, 45, is a Democrat and member of the Texas Democrat party. A second generation personal injury attorney, his father was a highly-regarded specialist under the Texas workers' compensation laws which were radically changed in 1991. Allison notes that his father, and virtually every other PI lawyer left the specialty, and he estimates that there are only about 30 full-time PI lawyers in Texas who represent injured workers in the WC claims system, partly because one third of all employers are "nonsubscribers".

Are you aware of the criticism escalating about "nonsub" plans?

"Yes, and I'm not sure why. If you compare the injured employee plan in regards to expediency, medical service, quality of service and quality of outcomes, the "nonsub" plans devastate the WC system which is bureaucratic, time consuming, takes too long for the injured worker to obtain the attention of a specialist and diagnostic testing for the injury. And most of the time, insurers will deny or dispute the injury more than in the "nonsub" system.

Some of the critics of "nonsub" claim that the 1991 reforms "fixed" the well-documented problems in the Texas WC system.

The '91 reforms weren't written for the benefit of the injured worker. They were written for the benefit of the insurance companies. The insurance company now has carte blanche to deny a WC case at will, and it takes 6 – 9 months to get a WC judge to review it. Insurance carriers deny (WC) claims all the time, particularly when they are looking at expensive surgery.

Are there other differences you see between WC and "nonsub" plans?

(Under WC) there are no lump sum settlement and no money for impairment, and on the latter, (under WC) there's nothing to what an injured worker would receive in a "nonsub" case. Plus, "nonsub" is a far easier body of law, far quicker for compensation for the injured worker when the employer is found to be negligent and the compensation (in those situations) is far better than under the WC system.

What kind of employer or industry is a good candidate for "nonsub?"

I tell every employer, "Become nonsub." The only benefit for an employer for WC is the Exclusive Remedy provision, that the employer can't be sued no matter how negligent unless the employee dies on the job. The premium for WC is high because of the bar for lawsuits, so construction and heavy industry, where there is a chance of catastrophe, they'll carry WC so they can't be sued for negligence.

There seems to be growing interest at the Federal level, by the Department of Labor, and some members of Congress, to federalize or regulate Workers' Comp and/or benefits for injured workers. What's your view?

If the state of Texas, with the bureaucracy we have here (is an example,) at the federal level, I don't think it would work. There already is federal WC for federal workers through the DOL, and I have only ever met

one lawyer who knows how to operate under it. So, no, it should be left up to the individual states and their legislators. Bureaucracy at the federal level would be worse.

DC is a long way away and there are 49 other states. One system fits all, regulated by the federal government, will not bring a benefit to the injured worker in Texas.

Critics also suggest that large companies are taking advantage of “nonsub” just to cut costs.

“Nonsub” is better for all businesses, particularly small businesses.

You’ve had very positive things to say about “nonsub.” Where does it fall short or could it be improved?

The requirement for reporting an injury within 24 hours is a big problem, particularly for a certain type of injury. For example, in retail stocking, one guy drops a box on a colleague. It hurts but he works through the day just thinking it’s a bruise but the next day, he’s lost range of motion, and his shoulder is stiff. He goes to the doctor, has an MRI and has a torn rotator cuff and needs arthroscopic surgery, but now it’s more than 24 hours, so his employer gets to say, we’re going to use the 24 hour rule to get out of it.

Employers self-fund these plans so they have all the control and they will shut down the whole plan if they want. Under WC, there’s a dispute resolution plan, and if the judge decides they were on the job (when injured,) the employer is on the hook.

I’m not saying it should be 30 days (like WC.) That would open the door too far (for fraud and abuse.) But currently, it’s not fair.

Are you saying that all companies try to game the “nonsub” system by taking advantage of the 24 hour reporting rule?

No. There are some companies, one in particular, when I see they are handling a case, I am relieved, because I’m dealing with people who understand the process and who make it far easy for me and my client. I may not agree with them every time, but the process of getting cases resolved has worked out for years now.

So are you saying WC is better than “nonsub?”

No. Because under WC, denials are just huge, at least 50% in my experience, where in the “nonsub” arena, it’s about one out of four or five (claims that are denied.)

NPR and ProPublica have teamed up to write extensively about “nonsub” plans, and Workers’ Comp, and they are adamantly opposed to “nonsub” plans. Comments?

I listen to NPR every morning, and I’m a member of the Austin affiliate. On a deserted island, I would have NPR and PBS, but instead of attacking “nonsub” and the leading pioneer in the field, it would be more informative to do an in-depth study of WC here in Texas. If they knew what I know, working 60 hours a week in WC law, they wouldn’t be nearly as critical of “nonsub” (and more critical of WC.) People saying “nonsub” is bad are pitching for the workers’ comp insurance companies.

Insurers want everyone to be forced to be (their) subscriber. And there’s a huge group in Texas who will tell you WC is great, that it works, but that’s political smoke. If they knew the system as well as I know

both systems..... The reality on the street for the working man, WC in Texas is a train wreck. That's the first thing I tell every client when I meet with them, it's how I begin every single WC case.

You said your business, you have a thriving and prestigious law office, is a "nonsub" employer. Why?

Because the chance of negligence or omission of doing something (for my employees) is zero. Why should I be burdened with an insurance benefit which isn't needed? Employers should be permitted to decide whether they want to have the exclusive remedy or whether they're willing to make the financial and risk decision of what they want and if they're willing to be sued. It's especially (a) better (choice) for small businesses.

Texas out of all the states did one thing properly in allowing the employer to opt out (of mandatory WC.)

And you're sure you're a Democrat?

Life long.