



Bernie Hauder has been practicing law since 1985. If you're talking to business people or attorneys in Texas about disputes or defense in workers' compensation or nonsubscription, Hauder's name will come up. He has extensive experience in commercial litigation, particularly in the construction and oil and gas industries. Hauder is established as one of the "go to" lawyers for the areas of commercial litigation, nonsubscription, insurance bad faith defense, premises liability, life, health and disability disputes, ERISA litigation, wrongful death and a [number of other specialties](#). At a recent conference, Hauder commented that more and more plaintiffs' attorneys are telling him they would rather sue a nonsubscriber employer than a traditional workers' compensation employer. We asked him to elaborate.

ARAWC Perspectives: You said that plaintiffs' attorneys have confided in you that they would prefer to represent an injured employee in a suit against a nonsubscriber employer than an employer that maintains traditional workers compensation insurance coverage. Why is that?

Bernie Hauder: It's simple. First, nonsubscription provides more opportunities for employees that are not available to employees of subscribers. Attorneys for employees of nonsubscriber employers have expressed to me that they believe they can obtain better results for their clients than they can for those employees working for subscribers. Employees of nonsubscribers can pursue areas of compensation they cannot get under workers' compensation. This is because under the Texas law, the statutory workers' compensation benefits are the "exclusive" remedy for employees of subscribers. The amount the statutes say the employee will recover in wage benefits for the work-related injury is what the employee will get, and that's it. This affects the employee of the subscriber in two ways. First, it does not matter how much pain, suffering or mental anguish the injured employee might experience or if the employee is disfigured in the work accident. If this same employer was a nonsubscriber, the employee has the opportunity or the potential to obtain, whether from a judge, jury or arbitrator, an award of damages for pain, suffering and disfigurement, as well as loss of consortium and any other special damages the employee can establish. Under nonsubscription, the same employees have the potential to recover money damages for pain and suffering and the scarring. The employee also has the ability, if applicable, to recover exemplary damages for the employer's gross negligence for any work-injury the employee may suffer.

There is also the difference in how much the employee can recover in wage-related benefits. In general under the workers' compensation laws, there are five types of wage-related benefits – temporary, impairment, supplemental, life-time and death benefits for which an injured employee may qualify or be entitled to. Temporary benefits are paid at 70% of the employee's pre-injury average weekly wage (AWW) for the later of 104 weeks or until the employee reaches maximum medical improvement (MMI). At that time, the employee may qualify for impairment benefits or supplemental benefits. Under certain limited circumstances, the employee may qualify for lifetime benefits. Other than lifetime benefits, the absolute limit for wage benefits under Texas workers' compensation is 401 weeks. After

that, the employee receives nothing. This same employee has the ability to recover from the nonsubscriber employer lost wages at 100% for as long as the employee is unable to work. In addition, the employee can recover for loss of “earning capacity” if the employee can establish the work-injury prevented the employee from obtaining higher paying jobs or advancing in his or her job, field or specialty. The subscriber employee has no opportunity to recover for such loss.

Furthermore, a work-related injury may render an employee unable to return to the same job he was performing prior to the injury, but not result in an impairment rating sufficient to qualify the employee for wage benefits beyond 104 weeks. If the employer cannot accommodate the employee, the employee can be terminated, and the workers’ compensation system provides no further monetary relief for such employee. If this same employee works for a nonsubscriber, the employee has the opportunity to recover these additional types of “damages” resulting from the work-injury.

As for medical benefits, workers’ compensation and nonsubscription benefits are similar. Like the subscriber, the responsible nonsubscription employer provides medical benefits for treatment of the injuries the employee sustains at work. The goal under both systems is to get the injured worker back to work. Most attorneys for injured employees of responsible nonsubscribers appreciate the fact the employer is paying for their client’s medical treatment. In addition, if the only complaints an employee of a subscriber has are about medical benefits he or she is or is not receiving, the employee will have a difficult time finding an attorney to take his or her case, as there is nothing for the attorney to obtain in the way of fees. And finally, attorneys’ fees in workers’ compensation cases are limited to 25 percent of monetary amounts awarded, where in nonsubscription cases, it’s a matter of contract between the employee and the attorney, which typically is between one-third to 50 percent of the award.

AP: It is all about sources and amount of funds, both for the employee and the attorney?

BH: No, it’s broader than that. Under workers’ compensation, the employee generally gets to choose his or her doctor, and some employees make very poor and uninformed choices. Why? They’re not specialists. They generally have no knowledge of, experience with, prior history or relationships with the variety of medical providers and specialists who treat the various types of work-related injuries. I’ve seen an injured employee of a subscriber choose to have wrist surgery with what I believe was an inexperienced surgeon, where the surgeon was a friend of a friend of the employee. The surgery turned out badly and hand “clawed” and the employee lost partial use of it. There was no further coverage or compensation for the employee under workers’ compensation. Most responsible nonsubscriber employers either have knowledge and experience with medical providers or they will hire a company that has knowledge and experience with a variety of medical providers and specialists. One of the criticisms plaintiffs’ lawyers used to make to me, but do less and less, is that nonsubscription plans pick doctors who will push to get employees back to work as quickly as possible. My answer is, yes, that’s right. That’s good for the employee and the employer.

AP: You mentioned ERISA benefit plans. What’s the advantage to the employee or a plaintiff’s attorney? Is there one?

BH: There are more opportunities to protect employees’ rights. Under ERISA plans, if a plan makes a benefit decision that the employee disagrees with, the employee can challenge the decision. First, the employee has administrative remedies under the Plan. The employee has the right to file with the plan an appeal of the plan’s decision and submit any additional evidence the employee feels is beneficial to

the employee or establishes the employee's position. The plan must then consider the original evidence, along with any additional evidence, along with the employee's arguments. The plan then can either reverse its prior decision and award the employee benefits or can affirm its earlier decision and issue what's called an "adverse benefit determination." If the employee is not satisfied with this decision, the employee can file a lawsuit in federal court challenging the plan's decision on the employee's claim for benefits. There is no jury trial, but federal judges take very seriously the importance of protecting the employee's rights. The federal judge then determines if the plan acted properly in arriving at its decision on the employee's claim. The plan is not the final decision-maker. Rather, the federal judge, after reviewing the evidence, makes the final decision. And remember, recoveries available under federal law are in addition to recoveries available for any employer negligence under state law, as described above.

AP: Are there other differences in workplaces between traditional workers' compensation and nonsubscription that you've seen?

BH: I have had a number of clients move from workers' comp to nonsubscription. What I have seen on several occasions is this switch causes the employer to focus on making their workplaces safer because of the liability nonsubscribing employers must assume through the loss of exclusive remedy protection. They get personally involved, and they stay committed to continual improvement in workplace safety.

AP: Any last comments?

BH: I'll just share what a prominent plaintiffs' attorney told me this past year. He said he truly believes in Texas nonsubscription, and he would take a nonsubscription case anytime over a workers' compensation case. He said he believes an employee of a nonsubscriber has a better chance of recovering for "all" of the effects of a work-related injury than does an employee of a subscriber. He said the workers' comp laws are outdated and generally provide unsatisfactory and inadequate relief to the injured worker. He believes nonsubscription allows his employee-clients the opportunity to obtain complete "compensation" and relief for work-related injuries, both in the amount of recovery and the types of recovery they can receive. He said with nonsubscription, the trier of fact has to consider and his clients have the opportunity to recover "all" of the damages sustained as a result of the work-related injury, not just those few statutorily defined benefits.