THE MISSOURI WORKERS' COMPENSATION LEGAL ADVISOR SYSTEM: CAN IT BE RESURRECTED UNDER THE NEW LAW?

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I. INTRODUCTION

In 2005 Missouri's elected officials enacted sweeping changes to the Workers' Compensation Act.[1] In doing so, disparities were created in the way *pro se* cases were adjudicated as compared to cases in which claimants were represented by counsel.

The following hypothetical demonstrates the differences between the "Old Legal Advisor System" and the new settlement system under the 2005 Act. Suppose that John Driver is a thirty year old high school graduate. Since high school he has worked for U-Buildit Hardware and Lumber Company in Swamper City, Missouri, as a delivery driver. As part of the job he often lifted over one hundred pounds and had to climb in and out of the delivery truck. On June 30, 2005, he lifted a bundle of roofing shingles and felt a pop in his lower back. He immediately had severe pain in his right leg, causing him to vomit. He was unable to get back into his truck. His foreman called an ambulance, and John was taken to the hospital. He was found to have a large acute herniated disc at the L5-S1 level of his lower back. He underwent a spinal fusion the next day. In June 2006, John was released by his doctor. At that time, the doctor placed permanent restrictions on him, prohibiting him from lifting more than twenty-five pounds, engaging in repetitive bending or stooping, or climbing ladders or stairs. John still had pain in his left leg that required ongoing pain medication. The doctor rated him at five-percent disability of the body as a whole and released him back to work.[2] Of course,

1. S.B. 1 & 130, 93d Gen. Assem., 1st Sess. (Mo. 2005).
2. A rating is a term of art used in the Missouri workers' compensation system. It basically means the loss of use of a particular body part caused by an injury. Ratings are typically performed by physicians, but the adjudicator generally has the power to set a value of disability separate and apart from a physician's opinion. *See*, for example, Sifferman v. Sears Roebuck, 906 S.W.2d 823 (Mo. Ct. App. 1995). Under the Act, the body is divided into parts with set values for the total loss of use of that body part. For example, the arm at the wrist is worth 175 weeks or units of disability. If the claimant lost the total use of his or her hand, the claimant would be entitled to 175 times two thirds

he could no longer work as a delivery driver, and he was terminated by his employer. At the time of the accident John had been making $450.00 per week. He was paid temporary total disability benefits (TTD) by the employer's workers' compensation insurance carrier at the rate of $200.00 per week for the year that he was off work. Most medical bills were paid by the employer's workers compensation carrier, Ace Workers' Compensation Insurance Company (Ace). However, John has been receiving bills from the emergency room physicians group for $3,500.00 and from the Swamper Radiology group for $1,500.00. These bills were for services rendered on the date of the accident. He turned these over to the insurance company, but Ace refused to pay because it claimed that these bills were unauthorized.

In July 2006, the adjuster from Ace contacted John and offered him a settlement based on a rating of five-percent of the body as a whole at the rate of $200.00 per week for a total of $4,000.00 dollars. The adjuster did not offer anything else. John was desperate for cash since he was no longer employed and was not receiving TTD payments, and he needed his pain medication refilled but could not afford it. He accepted the offer. The adjuster called her attorney, Sharon Esquire, and told her to prepare the settlement documents and secure the approval of the settlement by the Missouri Division of Workers' Compensation (Division).

Under both the new and old Workers' Compensation Acts this scenario raises several problems. First, the rate of disability is wrong. John was paid at the rate of $200.00 per week. The correct rate under both Acts would have been $300.00 per week, which is two-thirds of $450.00 per week.[3] He was underpaid TTD benefits of $5,200.00 (52 weeks x $100.00 per week). Further, since the employer sent him to the emergency room, John was entitled to have the emergency room and the radiology bills paid by Ace under both Acts. This comes to an additional $5,000.00 that he was owed. He was also entitled to have his medications provided for because the doctor prescribed ongoing medications. Finally, the rating of five-percent of the body as whole was woefully inadequate. Under the norms of the system, he should have received in the neighborhood of thirty-percent of the body as a whole. Further, before

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of the claimant's average weekly wage. If the claimant lost 5% of the use of the hand, the value would be calculated at .05 times 175 times two thirds of the claimant's average weekly wage. If the claimant made $300.00 per week and lost 10% of the use of the hand the value would be 10% of 175 or 17.5 times two thirds of $300.00 or $200.00 for a total of $3500.00. (.10 x 175 x $300 x 2/3 = $3500.00). An injury to the back is considered to be a body as a whole injury which has a maximum value for permanent partial disability of 400 weeks. Therefore, a 5% rating would be twenty weeks of disability (.05 x 400 = 20). *See* MO. REV. STAT § 287.190 (2005).

3. *See* sources cited *supra* note 1.

settling he may have wanted to get a second opinion from an alternative physician regarding his condition and treatment.

Under the *pro se* settlement system that existed prior to the 2005 Act, the following would most likely have taken place: A settlement conference would have been held before a Legal Advisor or Administrative Law Judge (hereinafter Judge or ALJ). John and Ace's attorney, Sharon Esquire, would have appeared at the conference. The Judge would have informed John that he was entitled to certain benefits under the Act. The first of these would have been medical benefits. The Judge then would have asked whether all of John's medical bills had been paid. John would have said: "No. I am receiving bills from the emergency room and the radiologist." The Judge would have asked Sharon Esquire about these bills and she would have responded that the bills were unauthorized. After discussing the matter, the Judge would most likely have told Sharon Esquire that the bills must be paid since the foreman had sent John to the emergency room. Also, during this conversation the Judge would have inquired as to whether John required additional pain medication. This issue would have been discussed and the parties, under the Judge's direction, would have likely compromised on some figure, or the issue of future medication costs would have been left open for later determination. In this case, let us assume that the parties agreed to five years of payment at the rate of $100.00 per month ($6,000.00).

The next benefit that would have been available to John under the pre-2005 Act was payment for his time off work. The Judge would have explained that John was entitled to two-thirds of his average weekly wage, tax free, for the time he missed work. The Judge would have asked John if he was making $300.00 per week and John would have answered that he had been earning $450.00 each week. The Judge then might have asked for a wage statement or other documentation of John's wages. At some point, the Judge would have determined that the correct wage rate was $450.00 and that John was entitled to an additional $100.00 per week for the year he was unable to work per his doctor's orders.

Next, the Judge would have inquired as to whether John was ready to settle the case. The Judge would have told John that he did not have to settle at that time; and also would have told John that were he to settle he would receive no further benefits, and he would not be compensated for any further medical treatments other than the medicine the employer had agreed to pay for. The Judge would have also told John that if he wanted to go back and get a second opinion that he should request to do so.

The Judge would have then asked John if he was having any problems. The Judge would have also asked for a rating of John's injuries, if any, and would have reviewed John's medical records. If John had decided to settle the

Judge would have told Sharon Esquire that a settlement based on five-percent of his body as a whole was too low and the Judge would have made a settlement recommendation of thirty-percent as a whole. Lastly, the Judge would have explained that the recommendation was not binding on either party. However, the case would probably have settled based upon the Judge's recommendation.

Under the old system, instead of walking away with $4,000.00, John would have received $6,000.00 for additional pain medication, $5,200.00 for underpayment of temporary benefits and $36,000.00 for permanent partial disability, plus an agreement from Ace to pay all outstanding medical bills.

Under the present system, in some venues, John would sign a stipulation for a compromised settlement together with a form stating that he understood his rights; after all, the doctor said that he was fully healed and that his disability was five-percent of the body as a whole. The stipulation and form would be submitted to the Judge, and the settlement would be approved *pro forma.* John would lose over $43,000.00 in benefits and would be responsible for unpaid medical bills. Under the current system, John's rights simply would not be protected because no one would have been looking out for his interests.

Historically, approximately forty to sixty percent of Missouri workers' compensation cases are handled by the claimant *pro se*.[4] Prior to 2005, the Division provided a Legal Advisor to meet with claimants to explain the system's medical and financial benefits and assist them in understanding their rights. Under the 2005 Act, the position of Legal Advisor was eliminated. Additionally, the Ethics Counsel for the Missouri Supreme Court has ruled that it is no longer ethical for the Legal Advisor to provide many of the services that were traditionally available to claimants.[5] As a result, unrepresented claimants no longer receive the benefits which were provided under the old system.

Since 2005, there has been approximately a fifteen percent reduction in the monetary value of *pro se* settlements.[6] The State Auditor has gone so far as to argue that *pro se* claimants are now at a disadvantage and has recommended that these services be provided by other attorneys within the Department of Labor.[7] This paper examines whether the old "Legal Advisor System" can be re-implemented under the new Act and concludes that, to a

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4. DUNCAN S. BALLANTYNE, REVISITING WORKERS' COMPENSATION IN MISSOURI: ADMINISTRATIVE INVENTORY (2003) supports the 60% figure. Scott Lauck, *Pro Se Claimants Feel Brunt of Workers' Compensation Reforms*, MO. LAW. WKLY., Dec. 11, 2006 provides the 40% figure.
5. *See* Section III *infra*.
6. *See* Section V *infra*.
7. *Id.*

great extent, it can. This paper further concludes that because of the proven inequities of the new system, a modified version of the old system should be reinstated. In reaching these conclusions, this paper reviews the history of the workers' compensation system, the 2005 legislative changes, the opinions of the Ethics Counsel, and the functioning of similar systems in other states. In particular, the ethics opinions are re-examined in light of the historical rights and responsibilities of the Missouri workers' compensation system and this paper examines how those opinions mesh with workers' compensation statutory law and case law.

II. HISTORY OF THE MISSOURI WORKERS' COMPENSATION LAW

Presently, to a large degree, the same interest groups, trial lawyers, organized labor groups and Associated Industries, are at work today as when the Missouri Workers' Compensation Law was first enacted. These groups have had varying amounts of influence over the workers' compensation law throughout the years. They have shifted alliances to serve their constituencies.

Missouri was slow to adopt a workers' compensation law. In 1910, Governor Herbert Hadley appointed a commission to study a workmen's compensation measure and report back to the General Assembly, which it did in 1911. The General Assembly then appointed its own commission to study the matter. In 1913, two bills, one proposed by employers and another proposed by laborers and others, were presented to the General Assembly. Neither bill passed. Then, in 1915, the state senate appointed a committee which proposed a bill that was defeated by a coalition of damage-suit lawyers, employers, and the building trades unions. A voluntary commission was formed in 1916 to study the issues. This commission had representatives from all interest groups. Its proposal failed in 1917.

Two more bills were proposed in 1919. One bill, which was proposed by labor interests, called for a state insurance fund. The other bill, proposed by employers, called for private insurance. The labor interests switched support to the employer version and it passed the General Assembly in 1919. However, this bill was defeated at a referendum due to the opposition of damage-suit lawyers and the Building Trades Union. A bill again was passed by the General Assembly in 1921 but was later rejected by the voters. An act introduced by initiative petition was also rejected in 1924. Finally, in 1925, a bill passed out of the Legislature. Again damage lawyers and the Building

Trades Union tried to defeat the act at referendum, but in 1926 it passed by a vote of 561,000 to 251,000.[8]

The problem with getting any form of worker's compensation legislation passed was a result of interest group biases. Most supported the concept, but wanted the legislation to reflect their own terms and incentives. Employers were not opposed, so long as the payments to the injured workers were limited. Skilled and unionized workers wanted larger benefits. Insurance companies wanted private insurance so as to expand their business. A state-run insurance program, generally favored by employees, was rejected by agricultural interests and the insurance lobby.[9] In 1923, Associated Industries of Missouri said that employers' liability had reached a crisis point with some insurance companies leaving Missouri.[10] Yet it worked feverishly to defeat a labor proposal calling for a state insurance fund in 1924.[11] Finally, a compromise was reached by the two political parties, the press, farm groups, labor and management. While the damage-suit lawyers fought the bill, they were soundly defeated. Ultimately, the Building Trades Union dropped its demand for a state insurance fund and supported the measure.[12] Apparently, Associated Industries had been led to believe that defeat of state insurance and adoption of workers' compensation insurance would result in reductions of twenty to twenty-five percent in insurance rates. In actuality, a reduction of only seven percent resulted in many industries seeing a greater increase in rates.[13] The position of Associated Industries is important because that group has been, and continues to be, a "player" in workers' compensation legislation and has always been interested in keeping their costs to a minimum.[14]

At its inception, a three member Worker's Compensation Commission (hereinafter "the Commission") was authorized to administer the Act. Trials on disputed claims were heard by individual commissioners or, under certain circumstances, by the entire commission. Aggrieved parties could appeal these awards in the circuit court. The number of claims quickly overwhelmed this system, and the Legislature amended the statute to allow for the

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8. Robert L. Howard, Judicial Review of Findings and Awards of the Missouri Workmen's Compensation Commission (unpublished manuscript, on file with the University of Missouri at Columbia Law School Library).
9. Shawn Everett Kantor & Price V. Fishback, *Coalition Formation and the Adoption of Workers' Compensation: The Case of Missouri, 1911 to 1926*, *in* THE REGULATED ECONOMY: A HISTORICAL APPROACH TO POLITICAL ECONOMY, 292 (Claudia Dale Goldin & Gary D. Libecap ed., 1994).
10. *Id.* at 274.
11. *Id.* at 275.
12. *Id.* at 276.
13. Frederick W. MacKenzie, *Missouri Employers Get a Lesson in Commercial Insurance Tactics*, 17 AM. LAB. LEGIS. REV. 23, 23–5 (1927).
14. *See* Section III *infra.*

commission to appoint referees to hear cases. The referees' decisions were subject to appeal to the entire commission.

In 1945, the current Missouri Constitution was enacted and the workers' compensation commission was incorporated into the Department of Labor. This created the Division and other labor divisions under the general supervision of the Industrial Commission.[15]

Alternative dispute resolution techniques have played a crucial part in the operation of the Missouri compensation system since its adoption. As early as the first year of its enactment, the position of the Division as the administering agency was to encourage compromised claims. It did this through the issuance of informal rulings and letters. Legal advisers were hired to explain the system and rights to the parties. In the Commission's first report to the Legislature it stated:

> The method of the Commission has been to encourage and assist the parties in agreeing upon the compensation payable under the law. It has given assistance by correspondence and informal rulings and has provided for legal advisers at St. Louis, Kansas City and Jefferson City. If these fail, a conference is held before one or more commissioners and formal hearings are only necessary when no agreement can be reached by such means.[16]

In 1931, the Commission defined the parameters of the Legal Advisor's duties: "The Commission maintains at its St. Louis and Kansas City offices legal advisors whose duties are to aid injured employees by giving them information concerning their rights under the compensation law and advising them as to the mode of procedure."[17] The Commission believed that it was providing invaluable help to both employees and employers.[18]

From the earliest years, the Missouri workers' compensation system was paternalistic. Alroy S. Phillips, the first chairman of the Commission, wrote that it was the spirit of the law which required encouraging employers and employees to settle their cases without the use of formal hearings. Regarding private insurance he wrote:

> The character of the insurance provided determines to a large degree the success with which workmen's compensation works to the advantage of the

15. *See generally*, R. Robert Cohn, *History of Workmen's Compensation Law*, 15 V.A.M.S. 17, 25–30 (1965).
16. Missouri Workmen's Compensation Commission (hereinafter MWCC), FIRST ANNUAL REPORT OF THE MISSOURI WORKMEN'S COMPENSATION COMMISSION 7 (1928).
17. MWCC, FOURTH ANNUAL REPORT 8 (1931).
18. *Id.* at 10.

> injured employee and his dependents, to industry and to the community. We expect to see that the insurance companies do their duty. An insurance company which disputes its claims and does not do its full duty under the law should not be permitted to do business in the state. If we find any company not doing its duty, we expect to do our part in driving it out.[19]

From the very beginning, the Commission took upon itself the responsibility of fostering settlements. One early commentator stated: "[T]his matter of fostering settlement is, in some respects, the most significant functioning of the commission."[20] The Commission expressed its paternalistic attitude as follows: "The Commission feels more and more a responsibility to see that each injured man or woman whose recourse is under the Compensation Law gets exactly what is coming to them under the law."[21] This was accomplished by a representative of the Commission meeting with every injured worker with a "permanent disability of consequence" anywhere in the state.[22]

Clearly, from the beginning and certainly within the first decade, the Missouri Workers' Compensation Act was administered in a paternalistic fashion. The Commission gave out information and assisted employees, and by the end of the first decade it was actively seeking to insure that injured workers received any and all benefits to which they were entitled. By the 1960's, the Missouri Supreme Court had given its tacit approval of the system. In *Hoffmeister v. Tod*,[23] establishing its support, the court listed the compensation procedure which included an inquiry by a Legal Advisor relating to the payment of medical benefits, temporary disability benefits, and

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19. Alroy S. Phillips, *Missouri: The Newest Workmen's Compensation State*, 17 AM. LAB. LEGIS. REV. 20, 21 (1927).
20. Howard, *supra* note 8, at 20. He further stated: "By no means the least important function of the Missouri Workmen's Compensation Commission is that of acting in an advisory capacity to injured employees and effecting settlements between them and their employers."
21. MWCC, ELEVENTH ANNUAL REPORT 6 (1939).
22. *Id.*
23. Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961).

the amount of permanent benefits, among other aid.[24]This procedure was virtually the same as outlined above in John's hypothetical case.[25]

24. *Id.* at 7–8. The court stated:

> In many cases, when the Division at Jefferson City receives a Report of Injury it sets a conference before the nearest 'Legal Adviser'; it fills in portions of a blank form entitled 'Report of Free Legal Aid' and sends this to the Legal Adviser. . . . The testimony of Vernon W. Meyer, the Referee in Charge at St. Louis, giving the reasons for setting such conferences, is apropos: . . . if it appears from the medical report that the man has sustained any permanent injury or an eye injury of any consequence, or if it appears that there was extensive lost time or if it appears that the Compensation rate is in dispute or if it appears that the employee questions the adequacy of that which is being provided him, either in the way of treatment or Compensation, we set that case for a conference in the St. Louis office, we have a conference set before a Legal Advisor. . . . [T]he parties appear, by counsel or otherwise, no formal claim having been filed, and they discuss the matter; the employer is expected to produce a current medical report. The Legal Adviser is there to advise both parties impartially, and specifically to inform the employee of his rights; he also seeks to promote a voluntary agreement between the parties, either on a rating of permanent partial disability (in which event the matter remains open for the period during which a claim may be filed) or upon an amount to be paid in full settlement and compromise, which forecloses further proceedings. Such conferences are reset if it appears that the disability cannot yet be fully evaluated. The Legal Adviser may not force a settlement, but he may veto one. Among the many questions which arise and are discussed at these conferences, with varying frequency and often with divergent views, are the following: the extent of disability, including its duration if temporary, and its proper rating if permanent; the evaluation of medical reports; questions of 'multiple injuries' and their effect on the body 'as a whole'; the consideration of back injuries, head injuries, etc., which are not and cannot be arbitrarily 'scheduled' (§ 287.190) at so many weeks of compensation; whether there has been an accident and a compensable injury as defined by the law; the consideration of occupational disease as opposed to accidental injury; whether the bar of limitations has run; whether notice was properly given; whether the claim is one which permits resort to a claim under the 'Second Injury Fund' (§ 287.220); the wage rate of the employee with possible evaluation of extras or services furnished, and the rate of compensation; whether there is a healing period; disfiguration (§ 287.190); and hernia cases, on which there are specific statutory requirements of proof (§ 287.195). If no agreement is arrived at, the matter is reset or the claimant is advised to file a claim and proceed to a hearing; the Division offers to assist in this. If a final settlement is arrived at, the Legal Adviser endorses at the bottom of the form provided him the amounts already paid, the medical furnished, and the terms of the settlement, and he takes or sends this form immediately to a Referee; the latter, with the parties before him, questions them and if he approves, he dictates the final settlement in accordance with a form which universally recites a dispute or disputes and the compromise thereof. Settlements thus recommended by the Legal Adviser are approved in the great majority of cases.

25. *See* Section I *supra.*

III. REASONS FOR CHANGING THE LAW

After the 2004 elections, the Republican Party took control of the Governor's office as well as the Missouri House and Senate. Senate Bill 1 was introduced to change the workers' compensation system. As outlined above, the bill resulted in drastic changes to the Missouri workers' compensation system. The specific reasons for the changes were not clear but it seemed that the prevailing attitude among businesses was that they did not feel they were being treated fairly by the system. For example, The *St. Louis Post-Dispatch* cited Steve Jenkins, a Lebanon, Missouri business leader, when he said judges were telling claimants to hire lawyers and the judges were approving settlements weighted against employers. Jenkins said: "They assume the employer has deep pockets."[26] Jim Kistler, executive director of Associated Industries of Missouri, said the changes were necessary to bring balance to the system. According to Kistler, the system had become "too skewed in favor of the workers. The judges and law advisers . . . were often advocating settlements that were too generous for workers."[27] Or possibly the changes were sought because, as Steve Larsen, a St. Louis claimant's lawyer told Missouri Lawyers Weekly, "'[a] *pro se* person appearing in front of a first-rate legal adviser, not paying a [twenty-five] percent attorney's fee, could in many cases do better than represented employees.'"[28]

Sarah Rittman, of the Ethics Counsel for the Missouri Supreme Court, further fueled the debate over the propriety of the Legal Advisor system when she addressed the annual meeting of Legal Advisors and Administrative Law Judges on November 3, 2005. In her written report, she set out what she believed to be the role of the judge in dealing with *pro se* litigants.[29] She opined that judges should generally follow Rule 2 from the Missouri codification of the Code of Judicial Conduct. In following Rule 2 she cited *State v. Eggers*[30] and Judicial Commission Opinions 26 and 51 as support. She believed that *pro se* litigants should be treated no differently than represented

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26. Terry Ganey, *Mending Workers' Compensation*, ST. LOUIS POST-DISPATCH, January 26, 2005, *available at* 2005 WLNR 1066029.
27. Jo Mannies, *No More Free Legal Help From State*, ST. LOUIS POST-DISPATCH, December 27, 2005, available at 2005 WLNR 21059109.
28. Scott Lauck, *Missouri Pro Se Claimants Feel Brunt of Workers' Compensation Reforms*, MISSOURI LAWYERS WEEKLY, Dec. 11, 2006, *available at* 2006 WLNR 24709762.
29. The ethics counsel gave a series of opinions. Copies of those opinions are in possession of the author. Since references to specific portions of the report are made in the text, no further citations will be made.
30. State v. Eggers, 51 S.W.3d 927 (Mo. Ct. App. 2001).

litigants. She said that a judge should make clear his or her role and that the judge was not acting as the claimant's attorney. However, she did say that the judge was free to veto a settlement if the settlement was not in accordance with the "rights of the parties," but this veto should be done through a written decision. She related that a specific recommendation as to disabilities could not be made by the judge.[31]

Her report went on to address specific questions submitted prior to the meeting. She stated that it was appropriate for an ALJ to give an opinion as to the value of the case when requested by both of the parties. She explained that an ALJ could advise the claimant to consult an attorney, but could not recommend a particular attorney. She did not believe that section 287.390 of the Missouri statutes required giving a *pro se* claimant assistance in order to fully understand the claimant's rights. The assistance could only be given if requested by both parties. She stated "I see nothing in the statutes that would require or authorize the ALJ to explain the employee's PPD benefits." If a case settled without a provision of disfigurement, she suggested that an ALJ should reject the settlement and then assess the disfigurement as part of a new settlement or as an addendum to the original settlement. She did not believe an ALJ was authorized to explain the employee's rights. She went on to explain that "if a settlement is inconsistent with the employee's or employer's rights, the ALJ should not approve it. If the settlement is not approved because it is not in accordance with both parties' rights, their agreements will

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31. She specifically said:

> As a general rule . . . [ALJs and LAs] should look to Supreme Court Rule 2, the Code of Judicial Conduct, for guidance, where applicable . . . [not all portions will apply]. Rule 2 provides assistance in determining whether an attorney who is a quasi judicial officer has engaged in misconduct under Rule 4, the Rules of Professional Conduct by engaging in conduct prejudicial to the administration of justice.
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> The Statues make clear that workers' compensation ALJs must be attorneys and that they must act impartially. As a result, Rule 2 and its interpretations are helpful. As Judicial Commission Opinions 26 and 51 make clear, a judge should not advise a party, unless the judge is instructed to by statutes or other law. *State v. Eggers* makes it clear that "judicial impartiality, judicial economy and fairness to all parties" require that pro se litigants be treated the same as other litigants.
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> An ALJ is an attorney dealing with an unrepresented person. Under Rule 4–4.3, the ALJ should make sure that the unrepresented person understands the ALJs role. As stated in the comment to Rule 4–4.3, the ALJ should not advise the person, other than advising to obtain counsel.
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> An ALJ can reject a settlement because it is not in accordance with the rights of the parties without advising the parties about their rights. Ideally, there would be a written order rejecting the settlement which would say that the settlement was not in accordance with, for example, the employee's TTD rights, without advising what exactly, the employee should receive.

have to change." More specifically Rittman stated "[t]he ALJ should not 'discuss' rights or benefits with the employee."

The Ethics Counsel also found impermissible many of the things that an ALJ had previously done by routine. According to the Ethics Counsel, the Legal Advisor could not advise the claimant that an offer was too low or that there was a claim against the Second Injury Fund, the ALJ could not advise the claimant to pursue a permanent total disability claim as opposed to a permanent partial disability settlement, an ALJ could not advise the claimant to use a Social Security Addendum as provided by section 287.259 of the Missouri statutes, nor could an ALJ advise a claimant of the necessity of a Medicare set aside agreement. Furthermore, Rittman related that the ALJ could not advise as to the value of disfigurement or that a lump sum settlement was not taxable. Additionally, the ALJ could not provide information about additional benefits such as mileage or reimbursement for potential future medical treatments. Finally, no information regarding the statute of limitations could be given to the claimant. In the Ethics Counsel's reasoning, an ALJ could not directly provide any of this information to the claimant. However, it could be provided through brochures and other public information compiled by the Division. If the information is so provided, it should be provided routinely to all parties and not on a case by case basis.

After this meeting Ed Kohner, Chief ALJ in the St. Louis office, and Sarah Rittman of the Ethics Counsel conducted a series of question and answer correspondence. In the correspondence Kohner opined: one, that it was generally proper for a judge to answer questions propounded by the claimant if the employer-insurer's counsel agreed; two, that the judge could recommend that the claimant consult with any attorney as long as it was done in such a way that the judge was not conveying the message that the settlement offer was a bad deal; three, that the judge could inform the claimant of rights under the Second Injury Fund and other rights if the judge followed a pre-arranged script; four, that the judge, upon agreement of the parties, could give an opinion on how a settlement would affect the employee's rights under the Second Injury Fund; and five, that the judge could inform the claimant of the existence of the statute of limitations and ask the defense lawyer of the employer's position regarding the statute of limitations. Rittman related that in each of these situations the judge should make clear that he or she was not representing the claimant. If a claimant had additional questions, the claimant

should either seek Division literature, if available, or the services of an attorney.[32]

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32. Specifically she answered the questions as follows:

> Question 1. I am reluctant to make a blanket statement that an ALJ can answer any question about workers' rights and benefits that the parties expressly agree to ask the ALJ. However, no particular question that would be out of bounds occurs to me. Therefore, I believe that it is safe to say that an ALJ may generally answer such questions, but I can't go so far as to say the ALJ may always answer such questions.
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> Question 2. I believe it is permissible for an ALJ to recommend that either party consult an attorney. Although I realize it is probably extremely rare that an employer would appear pro se. A recommendation would be particularly appropriate if the party is asking questions about rights or for advice about decisions. However, a recommendation to consult an attorney should not be made at a time or in a manner designed to subtly convey to the party that the ALJ believes the party is making a bad decision about settlement, etc.

In a later letter to Judge Kohner she stated:

> Questions 1 and 2. I believe it is appropriate for the ALJ to inquire about whether the employee is aware of the employee's rights under the second injury fund. Preferably this inquiry would be through a script that is used uniformly in all cases, but tailored for the individual case only to the extent that it does not cover topics that are irrelevant to the matter before the ALJ. Although it may also be possible for such a script to include a historical explanation of the creation of the Second Injury Fund (SIF), it would be important to avoid allowing such an explanation to evolve into a discussion of the SIF in terms of a particular employee. It would be preferable if a brochure or other document explaining the SIF were provided by the Division. Ultimately, if the employee expresses lack of awareness of the SIF rights, the ALJ's option will be to refuse to approve the settlement until the employee expresses awareness of these rights. The ALJ could recommend that the employee consult information supplied by the Division or an attorney.
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> Question 3. If both parties agree, I believe it is permissible for the ALJ to explain the ALJs views on how the settlement will impact the employee's SIF right. The ALJ should make it clear that these are only the individual ALJ's views, that the views are no guarantee of how an SIF claim would be decided, and another ALJ's or private attorney's views could differ. However, by providing these views, the ALJ may impact whether the ALJ will be able to hear matters in relation to the SIF claim by this employee.
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> Question 4. A script explaining the thresholds and the possible applicability of permanent partial disability and permanent total disability, as opposed to applying the statutes to the individual case might be permissible. As with the explanation about the SIF, it would be preferable if the information came from the Division rather than the ALJ.

Regarding statue of limitations she said:

> I also believe that it would be better to simply state that there are time limits on when a claim can be filed, without regard to the ALJ's legal analysis of whether the statute is close. I believe that it is fine to ask the employer's attorney what the employer's position is on when the statute will run. I'm not saying that the employer's attorney has an ethical duty to answer the question. I believe that, regardless of whether the employer's attorney answers the question, the ALJ should follow up by telling the employee that they should contact an attorney or Division publications (if available) if they want further information abut the time limits. I believe it is important to avoid

IV. SPECIFIC CHANGES IN THE LAW

Senate Bills 1 and 150 made three basic procedural changes to the workers' compensation law. First, the Legal Advisor position was eliminated. While additional Administrative Law Judge positions were created, there were not enough positions created to ensure all Legal Advisors had continued employment. Indeed, there was no guarantee that any Legal Advisor would be appointed to an ALJ position. Second, the ALJ was no longer employed indefinitely during good behavior but was subject to appointment for a term with reviews by a review panel. Reappointment was not guaranteed. The third procedural change was the granting of the veto power to ALJs regarding settlements.

Some commentators believe that the first two changes have had a significant effect on the construction of the third change.[33] This may be so, but the third change may be analyzed neutrally without the judicial independence component.

V. INEQUITIES OF THE NEW SYSTEM

Several authorities made early predictions that the elimination of the Legal Advisor position would have significant consequences for unrepresented workers. In an op-ed piece published in the *Kansas City Star*, Hugh McVey, president of the Missouri AFL-CIO, stated that the law had the effect of "[d]eny[ing], in practice, any assistance for injured workers who have to fight the insurance companies on claims."[34] Mark Moreland, on behalf of the Missouri Trial Lawyers Association, a pro-claimant group, told the *Daily Record*, that "one of the most disturbing hidden provisions of the bill, which has gone unnoticed, is a measure that eliminates Legal Advisors within the state government, and would leave unrepresented claimants to fend for themselves."[35] In an editorial, the *St. Louis Post-Dispatch* lamented the passing of Legal Advisors.[36] According to the *Post*, the Legal Advisor would

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giving the employee the impression that the employee can look to the ALJ or opposing counsel for advice.

33. Interview with Hon. Jack Knowlan, retired ALJ, in Cape Girardaeu, Mo. (Feb. 25, 2009).
34. Hugh McVey, *Workers Compensation Crisis Seems Fabricated*, KANSAS CITY STAR, Mar. 22, 2005, at D12.
35. Mike Nixon, *Some Missouri Lawyers Find Worker Compensation Bill Misguided*, DAILY RECORD, Mar. 22, 2005, *available at* 2005 WLNR 25770412.
36. Editorial, *Weakening the Safety Net*, ST. LOUIS POST-DISPATCH, Jan. 3, 2006, at C6, *available at* 2006 WLNR 114646.

make sure the claimant had been treated fairly and was ready to settle. The paper noted "[t]he average worker knows as much about the workers' comp law as he does about brain surgery. With Legal Advisors gone, the worker will be on his own."[37] The newspaper concluded that this change would help create more business for lawyers on both sides–which "costs everyone more."[38]

After about a year, it became apparent that the predictions of the critics were true, and the settlement values of *pro se* cases were dropping significantly. This was first reported in an article in the *Missouri Lawyers Weekly* and later in an audit by the State Auditor. Scott Lauck of *Missouri Lawyers Weekly* published the results of a study comparing the value of Temporary Total Disability Benefits (TTD), Permanent Partial Disability Benefits (PPD) and medical costs (MC) for both represented and *pro se* claimants for the years immediately preceding and immediately following the implementation of the new Act. Claimants chose to represent themselves in approximately forty-percent of the cases.[39] Lauck's study found that the total PPD settlement amount dropped three-percent in the year following the new Act. TTD benefits remained static and MC rose eight-percent. For *pro se* claimants PPD benefits fell sixteen-percent, TTD benefits fell five-percent and MC rose seven-percent. As for represented workers, PPD benefits rose two-percent, TTD benefits rose three-percent and MC rose nine-percent.[40]

Various reasons were given for the decline in *pro se* values. Chief Administrative Law Judge Timothy Wilson of Joplin, Missouri felt the changes were due to the method in which judges reviewed cases–that is, that they no longer reviewed the reasonableness of the settlement.[41] Michael Moroni, Workers' Compensation Committee Chair for the Missouri Bar Association, attributed the changes to "muzzling" of the Legal Advisors.[42] Gary Marble of Associated Industries, an employer group, and Steve Larsen, a claimant's attorney, also pointed to the Legal Advisor change.[43] The Missouri Department of Labor attributed the change to yearly fluctuations.[44]

The State Auditor was blunt in her assessment of the Act and the resulting consequences to *pro se* employees. She stated that injured workers

37. *Id.*
38. *Id.*
39. *Id.*
40. Lauck, *supra* note 28.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*

were no longer given guidance to ensure that they received a fair settlement.[45] She explored the reasons given for this change and concluded:

> The 2005 changes to the law eliminated the Legal Advisor positions, which eliminated a claimant's ability to obtain guidance from DOLIR [Department of Labor and Industrial Relations]. In addition, the Legal Ethics Counsel's interpretation of the 2005 law deemed it unethical for ALJs to provide limited legal guidance to claimants. As a result, unrepresented injured workers have been placed at a disadvantage, and have experienced a significant decline in the average PPD settlement awarded. By creating a situation where an attorney significantly increases benefit payments, attorney involvement is

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45. SUSAN MONTEE, LABOR AND INDUSTRIAL RELATIONS: WORKERS' COMPENSATION SYSTEM, 13–14 (Missouri State Auditors Report No. 2008–57 (2008)). The auditor stated:

> Injured workers are no longer provided guidance by ALJs or division staff to help ensure they obtain fair settlements. ALJs and division staff are only allowed to notify claimants of the types of benefits available, the right to an attorney, and ensure the settlement is voluntary and not unduly influenced, according to ALJs contacted. Prior to Senate Bill 1, state law allowed the department's Legal Advisors and ALJs to provide limited guidance to injured workers to help ensure unrepresented claimants received a fair settlement. A 2003 WCRI report on Missouri's workers' compensation system cited the division's practice of providing this guidance as a safeguard for workers, particularly in a system, such as Missouri's, which allows the employer/insurer to select the treating physician.
>
> ALJs no longer provide such guidance because of the Missouri Supreme Court Legal Ethics Counsel's interpretation of the 2005 legislation. The Legal Ethics Counsel concluded it was unethical for ALJs to provide any legal advice to claimants, and violation of such policy would impact the ALJ's law license. If state law gave ALJs authority to provide limited legal advice, or if someone other than the ALJ provided the guidance, no ethical concerns would exist, according to the Legal Ethics Counsel. Without the division providing a minimal level of guidance to ensure fair settlements, the Missouri Association of Trial Attorneys and labor representatives contacted believe claimants have been placed at a disadvantage. Discussions with ALJs disclosed injured workers without ALJ advice and/or legal representation have been offered lower settlements as a result of the law change. This is consistent with division data that shows the average PPD settlement paid to unrepresented claimants decreased an average of 14.3 percent since the new law's effective date in August 2005. The same data shows settlements for represented claimants have increased by an average of 9.6 percent since the effective date of the new law.
>
> As discussed above, division personnel have been limited in the help they can give to injured workers. However, state regulations state the purpose of the division is to insure timely and adequate benefits, and to provide assistance to injured workers.
>
> Historically, Missouri has been a high attorney involvement state, according to a WCRI report issued in 2003, because Missouri's system has created a situation where an attorney can provide significant value, according to a WCRI representative. According to ALJs and attorney groups contacted, the elimination of guidance to claimants has increased attorney involvement, or will create additional attorney involvement in the future. However, division data is inconclusive regarding the increase in attorney involvement as a result of the 2005 legislative changes.

> expected to increase, resulting in slower resolution of cases, and increased system costs for both the employer and employee. By providing limited legal guidance to injured workers, the department can help ensure timely and equitable settlements are attainable without claimants hiring legal representation.[46]

Based upon these findings the auditor recommended that the Department of Labor and Industrial Relations (DOLIR)[47] "[e]xpand the role of the attorneys within the [D]ivision, other than the ALJs, to provide limited legal guidance to help ensure timely and fair settlements to injured workers."

The DOLIR responded that

> [t]he Department believes that publication of additional brochures explaining the rights of the injured employees and employers and providing an explanation of what to expect at the settlement conference would be beneficial to all stakeholders. The publication of brochures would accomplish the recommendation made by the State Auditor which is to ultimately ensure that an injured employee receives a settlement in accordance with the law.[48]

The DOLIR rejected the limited legal guidance recommendation in a lengthy reply. The denial was grounded on six basic reasons.

First, it argued that the General Assembly abolished the practice to do away with "any hint of bias toward either group." Workers compensation proceedings are civil matters and hence there is no right to be represented by a lawyer as in a criminal case. Further, the DOLIR should comply with the legislative direction and not reinstate the practice of legal guidance.[49]

The second argument was based upon the criteria of section 287.390.1 of the Missouri statutes. The DOLIR noted that the ALJ could ask questions to make sure that the settlement was not the result of undue influence or fraud, that the employee understood their rights and benefits and that the settlement was voluntary. But at the same time the ALJ must weigh the evidence impartially under section 287.800.2.[50] The ALJ also "must remain impartial in responding to inquires" from either party.[51] The DOLIR concluded: "[I]t

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46. *Id.* at 15.
47. The Division of Workers' Compensation is an entity within the Department of Labor and Industrial Relations.
48. SUSAN MONTEE, LABOR AND INDUSTRIAL RELATIONS: WORKERS' COMPENSATION SYSTEM 31 (Sept. 2008), http://auditor.mo.gov/press/2008–57.pdf.
49. *Id.*
50. *Id.*
51. *Id.*

would be difficult and certainly unethical, if not illegal, for the Department's attorneys to exhibit bias toward the unrepresented employee by offering 'limited legal guidance' while ignoring the employer/insurer in the process."[52]

The third argument was that the DOLIR's attorneys represent the Department and as such cannot represent claimants. They may not invade the province of ALJs as set forth in section 287.390. Further, since Department lawyers routinely give advice to ALJs in cases pending before them, they would have a conflict if they had to also give advice to employees.

The fourth reason was that the legislature eliminated the position of the Legal Advisors as well as their advising function. The DOLIR felt that "the General Assembly made a well reasoned policy determination that Legal Advisors serving as judge, jury, and advocate was rife with conflicts."[53] In making that judgment the General Assembly listened to the "outcry" of employers that they were not only paying into a "fund" but "also paying for Legal Advisors to advise claimants on how to get more out of the fund."[54] The DOLIR did not feel that it was proper to reinstate a program that the legislature had abolished "because of its obvious conflicts."[55]

The fifth reason given was in response to the criticism that some cases take too long to get through the decision-making process.[56] The DOLIR noted that sometimes cases are complicated and that ALJs should try to accommodate all parties.[57] Expediency should sometimes yield to the process of reaching "fair, reasoned, and thorough decision making."[58]

Finally, in the sixth reason, the DOLIR responded that they were already giving out information through information specialists, dispute resolution services, brochures and power point presentations.[59] It also disagreed that state regulations justified the provision of attorneys to give guidance to unrepresented claimants.[60]

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52. *Id.* at 32.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 32–33.
57. *Id.* at 33.
58. *Id.*
59. *Id.*
60. *Id.* at 33–34. The sixth reason follows verbatim in order to give its full flavor.

> Sixth, claimants are not wholly without resources to allow them to gain a greater understanding of workers' compensation law. In an effort to educate stakeholders on the changes made to the workers' compensation law effective August 28, 2005, the Department: developed PowerPoint presentations; published a brochure called "How the changes in the workers' compensation law affect you"; and participated in numerous presentations throughout the state; and the Department's website has extensive information on Workers' Compensation.

The auditor's office responded that the audit presented evidence which suggested that the employees were at a disadvantage under the old law. The auditor recognized conflicts but felt that they were justified in insuring that "unrepresented claimants were not taken advantage of." The auditor made clear that its recommendation was not to have ALJs giving legal advice, but at the same time it would be beneficial to both unrepresented employees and the system itself for someone in the DOLIR, with legal knowledge, to give an independent evaluation of whether the settlement offer they have received is reasonable. The auditor's final comment was: "State law does not specifically state the [D]ivision cannot designate staff for this purpose."

VI. THE OLD SYSTEM MAY BE BROUGHT BACK

Opponents of the pre-2005 system make three basic arguments against bringing the old system back and keeping the new system in place. The first is that the statutory changes prohibit a return to the old system. The next is that ethical opinions preclude the ALJ, as a judicial officer, from taking part in conduct that prevailed under the old system. Finally, the purported legislative intent behind doing away with the old system must be respected. Each of these arguments is rebuttable. Upon close examination the statutory argument fails because strictly construed, the language of the statute now gives the *pro se* employee more protections. The second argument fails because it is contrary to the Missouri Supreme Court opinion in the *Tod* case, and the precedent cited by the Ethics Counsel is inapplicable. Further, the Ethics

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It is important to note that the General Assembly retained the introductory language in § 287.642 RSMo that requires the Department to "create in all area offices a public information program to assist all parties involved with an injury or claim under this chapter." As a consequence, the Department maintains a dedicated employee and employer toll free number as a service to all stakeholders. Information Specialists respond to questions presented by the stakeholders and the Department's attorneys assist in explaining or clarifying the statutory provisions so that accurate information is disseminated. The Department also provides training to the Information Specialists and other Department personnel. In addition, the Department has a Dispute Management Unit tasked with providing assistance with issues such as basic compensability, temporary total disability benefits and payment of medical bills.
8 CSR 50–1.010 provides in pertinent part that the Division administers the workers' compensation law "to insure injured employees receive prompt and adequate medical treatment, payment of benefits of wage loss, compensation for permanent disability and physical rehabilitation for the severely injured by providing assistance to injured workers, to include filing of claims and conducting hearings to resolve disputes between employers and employees relating to Workers' Compensation benefits." A reading of this regulation does not support the concept of Department attorneys' providing limited legal guidance. As indicated above, the Division has published brochures and provides assistance to stakeholders who contact the Division.

Counsel opinions, as they stand, do not ultimately prohibit ALJs from conducting proceedings as they did under the old system. Finally, there is no clear exposition of the legislature's intent. To the extent that opponents rely upon DOLIR's interpretation found in its response to the auditor's report, the reliance is misplaced. DOLIR's interpretation of the legislature's intent is nothing more than an opinion and is not binding. It is not law and may be disregarded by subsequent administrations.

A. STATUTORY CHANGES "STRICTLY CONSTRUED" REQUIRE MORE PROTECTIONS

When the first workers' compensation act was approved by voters in 1926 it expressed a policy of liberal statutory construction. It stated: "All of the provisions of this act shall be liberally construed with a view to the public welfare."[61] Liberal construction remained the law until Senate Bills 1 and 130. In 2005, the Republican controlled legislature[62] amended the section to read: "[C]ourts shall construe the provisions of this chapter strictly."[63] Appellate Judge Gary Lynch of the Missouri Court of Appeals, Southern District, recently defined strict construction:

> [A] strict construction of a statute presumes nothing that is not expressed. The rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner, but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. Moreover, a strict construction confines the operation of the statute to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. The clear, plain, obvious, or natural import

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61. "Workmen's Compensation," 1927 Mo. Laws 522.

62. It can be argued that the reason for the change was more of a response to the prevailing attitudes concerning the term "liberal" than true concern about the standard of review. The word "liberal" was vilified by the political right. *See*, for example, Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 521 (2002). In fact it became such a bad term that "progressive" was used instead. Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, n.3 (2004) ("[P]artisan politics has given the "L" word (liberal) a bad name."). SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY 1974–2008 271 (2008) ("Bush [41] also substituted 'liberal' for 'communist,' then shortened it to 'the L-word' (an epithet possibly first used by Reagan), uttered as if the term 'liberal' reeked of the outhouse."). At least one scholar has found the use of "the L-word" for "liberal" was part of the conservative movement's deliberate use of vocabulary that used such terms as "'welfare queen,' 'interest group,' 'innocent white victim,' and 'culture of poverty'" to attack their opponents on the political left. Richard Delgado, *Si Se Puede, But Who Gets the Gravy*, 11 MICH. J. RACE & L. 9, 16 (2005).

63. MO. REV. STAT. §287.800 (2005).

> of the language should be used, and the statutes should not be applied to situations or parties not fairly or clearly within its provisions.[64]

Statutory changes must be analyzed with Judge Lynch's definition in mind. The governing statute regarding the approval of compromise settlements is section 287.390.1 under both the new and the old laws. Under the old law the language read:

> [N]or shall any agreement of settlement or compromise of any dispute or claim for compensation under this chapter be valid until approved by an Administrative Law Judge or the Commission, nor shall an administrative law judge or the Commission approve any settlement which is not in accordance with the rights of the parties as given in this chapter.[65]

The 2005 act added the following language to the section:

> An administrative law judge, or the Commission, shall approve a settlement agreement as valid and enforceable as long as the settlement is not the result of undue influence or fraud, the employee fully understands his or her rights and benefits, and voluntarily agrees to accept the terms of the agreement.[66]

According to Judge Lynch, strict construction is, to a large extent, a problem of definition; therefore the definitions of key terms are controlling when considering the section's meaning. What are the definitions of "the rights of the parties," "undue influence," "fraud," "benefits," and "voluntarily accept?" What is the definition of "fully understand?" In strictly construing the Act, the definitions of these terms are critical because the Act means what it says.

"Rights" are those things that are "due to a person by just claim, legal guarantee, or moral principle."[67] Or put another way, rights are things "to which one has a just claim."[68] The statute legally guarantees medical treatment and both temporary and permanent disability payments to claimants–these become rights by definition.

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64. Allcorn v. Tap Enterprises, 277 S.W.3d 823 (S.D. Mo. 2009) (Internal quotes and citations omitted).
65. MO. REV. STAT. § 287.390 (2000).
66. MO. REV. STAT. § 287.390 (2005).
67. BLACK'S LAW DICTIONARY 1347 (8th ed. 2004).
68. Merriam-Webster Online, http://www.merriam-webster.com/dictionary/right (last visited Oct. 5, 2009).

Benefits are advantages, privileges, profits or gains.[69] They are things that promote well-being or are useful aids.[70] Benefits under the statute could be considered to include such items as medical treatment or disability payments. If benefits provide useful aides or promote well-being, then a major benefit is to understand that you are not being taken advantage of.

Undue influence is an elusive concept. It is generally used in setting aside wills and beneficiary contracts. The recent case of *Miller v. Dunn*[71] defined undue influence as "using a dishonest motive to substitute one's will for another, or overt persuasion, force or coercion." Coercion in turn can be shown by "the exploitation of another's special vulnerability," and active procurement in the execution of the instrument.[72] In determining whether there is undue influence, the court looks to the person's age, physical and mental condition and "the absence of competent and bona fide independent advice."[73] It is not necessary that there be a confidential relationship to claim undue influence. The above hypothetical involving John's on-the-job injury smacks of undue influence. The adjuster took advantage of his desperate financial condition and physical pain to entice him to accept what most would feel to be a very unfair offer. The new system aids in furthering undue influence because it takes away the ALJ's function of providing competent and independent advice to the unrepresented claimant.

Fraud is also an elusive concept. *Black's Law Dictionary* defines it as

> a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment . . . [or] a misrepresentation, concealment of material fact, or misrepresentation made to induce another person to act to his or her detriment . . . [or] unconscionable dealing; esp., in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.[74]

Missouri courts have been reluctant to give a more detailed definition of fraud because various definitions apply in many different circumstances. In the Restatement of Restitution, fraud is defined as "a misrepresentation, concealment, or non-disclosure."[75] As applied to a court of equity, fraud

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69. BLACK'S LAW DICTIONARY 166 (8th ed. 2004).
70. Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/benefits (last visited Oct. 5, 2009).
71. Miller v. Dunn, 184 S.W.3d 122, 125 (E.D. Mo. 2006).
72. *Id.*
73. *Id.* (quoting Farnsworth v. Farnsworth, 728 S.W.2d 223, 227 (Mo. Ct. App. 1986)).
74. BLACK'S LAW DICTIONARY 685 (8th ed. 2004).
75. RESTATEMENT (FIRST) OF RESTITUTION § 8 (1937).

means "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, confidence . . . or by which an undue unconscientious advantage is taken of another."[76] Another court has said that fraud will be presumed from an unconscionably low price at a sheriff's sale when it "shocks the conscience."[77] Did the adjuster commit fraud in John's case? Did her actions shock the conscience? These are hard questions, but certainly the employer wants to avoid a later civil suit to set aside the settlement based upon constructive fraud.[78] A *pro forma* system of automatic settlement approval does not benefit either party in connection with the lingering concerns of fraudulent behavior during the litigation process.

"Voluntarily," according to *Black's Law Dictionary*, means "[i]ntentionally; without coercion." "Voluntary" means: "1. Done by design or intention (voluntary act). 2. Unconstrained by interference; not impelled by outside interference (voluntary statement)." "Accept" is defined as "assent such that a contract is formed."[79] Looking again to John's case, can his purported acceptance of the offer really be considered "voluntary" because of his dire straights? Did John have the ability to form a valid contract? Again, these are hard questions, but they could be raised as part of a suit to set aside the award.

The phrase "fully understands" is also illusory. While it is used extensively in the law, its definition is never fully given to the extent that it is easily understood or easily applied. "Fully" has different meanings–it can mean completely or entirely or it can mean satisfactorily such as "to be fully persuaded of the truth of a proposition."[80] "Understand" means to "perceive and comprehend the significance of" something.[81] Based upon these definitions, the phrase "fully understands" can be given two interpretations. The first is that the employee must completely comprehend the significance of his or her rights and benefits. The second is that the employee must satisfactorily comprehend the significance of his or her rights and benefits. It seems that the second definition requiring that the claimant satisfactorily comprehend his rights and benefits best fits the requirement of "clear, plain, obvious or natural import of the language"[82] of the statute. It would be

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76. Nelson v. Emmert, 105 S.W.3d 563, 566 n.5 (Mo. Ct. App. 2003).
77. Van Graafieland v. Wright, 228 S.W. 465, 469 (Mo. 1920).
78. This is a recognized cause of action in Missouri. *See* Burger v. Bridgestone/Firestone, Inc., 902 S.W.2d 308 (Mo. Ct. App. 1995); Ley v. St. Louis County, 710 S.W.2d 493 (Mo. Ct. App. 1986); Trokey v. U.S. Cartridge Co., 222 S.W.2d 496 (Mo. Ct. App. 1949).
79. BLACK'S LAW DICTIONARY (8th ed. 2004).
80. WEBSTER'S REVISED UNABRIDGED DICTIONARY (1996).
81. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006).
82. Allcorn v. Tap Enter., 277 S.W.3d 823, 828 (S.D. Mo. 2009).

impossible for the claimant to completely comprehend the rights and benefits available. The Missouri Supreme Court recognized as much in a partnership case when it said "[t]his statement . . . must not be construed as meaning that each of the partners must fully understand all of the legal incidents which follow upon partnership existence. Such a requirement would practically limit partnerships to those created by carefully drawn written articles or to those between attorneys at law."[83] Did John fully understand his rights and benefits? No. Did signing a statement that he understood his rights and benefits allow him to understand them? No. Would someone explaining to him these rights and benefits help him to understand his rights and benefits? Yes.

Contrary to the assertions made by the DOLIR and others, the statute does not do away with the power of the ALJ to veto settlements. It actually reinforces that power as shown by the statutory analysis. The statute still contains the requirement that the settlement be within the rights of the parties. While it says that the ALJ shall approve the settlement that does not mean that the ALJ must approve any settlement. The ALJ may not approve the settlement if it is the result of undue influence or fraud. Nor may the ALJ approve the settlement if the claimant does not fully understand the rights and benefits available or if the settlement was not voluntary. In any of these situations under the terms of the statute the ALJ must veto the settlement.

To fulfill the requirements of section 287.390.1, some sort of hearing must be held. A simple written form, for example, like a traffic ticket, will not suffice. Fraud and undue influence are fact-driven determinations for the ALJ to decide. There is no way for the ALJ to make this determination from a sheet of paper which says that the claimant has not been unduly influenced or defrauded. Further, a determination of whether the claimant understands the rights and benefits available itself requires a hearing to develop that issue. While expert knowledge of the Act by the claimant is not required, the ALJ must still be convinced that the claimant satisfactorily comprehends the significance of the rights and benefits at issue. In the criminal context, the court must find that when a defendant accepts a guilty plea, he fully understands the issues at stake, i.e. the range of punishment, promises made, the elements of the crime, etc. The court does this by first informing the defendant of the rights and asking if the defendant understands the rights. If the defendant answers "yes" a sufficient foundation for the acceptance of the plea is formed. If the answer is "no" remedial measures are taken before the plea is accepted.[84] Since significant rights are at issue in both workers'

83. Schneider v. Schneider, 146 S.W.2d 584, 588 (Mo. 1940).
84. *See generally*, Jones v. State, 829 S.W.2d 47 (Mo. Ct. App. 1992).

compensation and criminal matters, similar systems in exploring knowledge of those rights should also be useful.

B. ETHICAL RULES DO NOT PROHIBIT THE REINTRODUCTION OF THE SYSTEM

The misconception that the ethical opinions of the Ethics Counsel somehow muzzle the ALJ is incorrect and will be summarily disposed of in this discussion. According to the Ethics Counsel, without reference to whether its position is correct or not,[85] the ALJ may do the following:

1. Reject a settlement if not within the rights of the parties.
2. Reject a claim and then assess disfigurement.
3. Give an assessment of the case's value if requested by both parties.
4. Advise the claimant to consult with an attorney, but not a specific attorney, and not at a time as to suggest that the party is getting a bad deal.
5. Tell the parties that the settlement is not within rights such as TTD without explaining the law.
6. Answer questions if parties agree.
7. Follow a general script listing rights and benefits.[86]
8. Direct the parties to appropriate Division materials explaining rights and benefits.

According to the Ethics Counsel, the ALJ may do most of the things that were always done with the only real exception being that the ALJ can not assign a value to the case without asking the parties first. Therefore, the "mini-trial"[87] that was held at each conference can no longer be held without both parties' consent. However, if the offer is not for enough money to cover the claimant's costs, the ALJ can still reject it for not being within the rights of the parties. Instead of saying, "you should get twenty-five-percent," the ALJ will be

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85. Pursuant to Mo. S. Ct. Rule 5.30 advisory opinions such as those given by the Ethics Counsel in this matter are not binding.

86. The Cape Girardeau Office of the Division currently gives a talk each hour in the waiting room in which a claimant's rights are outlined. This is better than no talk at all, but giving each individual a talk as he or she appears in front of an ALJ would be better. Division rules have now changed to require *pro se* claimants to appear at various docket locations in the county or county next to the county in which they worked when injured. Generally, this saves on travel expenses for the claimant, but it makes it much more difficult to give a speech to them as a group because there is generally no waiting area except a hallway in the courthouse.

87. Telephone interview with Julie Petraborg, defense attorney, in St. Louis, Mo. (Jan. 13, 2009).

restricted to saying that "five percent is too low, and I am not going to approve it, because it is not in accordance with the parties' rights."

All that being said, why is it unethical for the ALJ to continue doing what ALJs and Legal Advisors had been permitted to do for many years previously? The Ethics Counsel bases its decision on Supreme Court Rule 2, the Code of Judicial Conduct; Rule 4, the Rules of Professional Conduct; *State v. Eggers*;[88] and Judicial Advisory Opinions 26 and 51. Notably, the Ethics Counsel does not cite or rely on *Hoffmeister v.Tod*. It is the view of this paper that the Counsel relies on precedent that is clearly distinguishable and ignores precedent nearly on point. *State v. Eggers* has limited applicability relative to the matter under observation. The issue in *Eggers* was limited to whether a *pro se* appeal should be dismissed because it did not comply with the Rules of Appellate Procedure. The court found that it should be dismissed, and in doing so, the court cited the long-held principle that *pro se* appellate litigants must follow the same rules as attorneys in appellate practice. Nowhere in the decision did the court discuss duties imposed on a judge comparable to those imposed by section 287.390.1 of the Missouri statutes.

Opinions 26 and 51 discuss whether probate courts are allowed to advise people with respect to applications for refusal of letters and allow their clerks to prepare the applications and orders. Initially, in Opinion 26, this was determined to be engaging in the practice of law and was prohibited by Supreme Court Rule 2 Canon 5 and section 476.290. In Opinion 51, it was ruled that since the legislature had amended the Probate Code to allow the clerk under the direction of the probate judge to complete such applications the holding in Opinion 26 was no longer valid. Opinion 51 ruled that although the final determination of what constituted the practice of law was up to the Supreme Court of Missouri, the legislature could enact laws touching on the practice of law as long as it did not "unreasonably encroach" on the Missouri Supreme Court's prerogatives. Like the *Eggers* case, these opinions are distinguishable. The opinions deal with Probate Courts and not the Division.

On another level, the rulings in Opinions 26 and 51 actually lend support to the old Legal Advisor system. Opinion 51 overruled Opinion 26 because changes in the statute enacted after Opinion 26 specifically allowed the judge and clerk of the Probate Court to assist heirs with filing refusal of letters. The statutory authority for judicial assistance in the Probate Code is akin to the mandate of section 287.390 which, as discussed above, imposes positive duties upon the ALJ approving settlements to ensure that the settlements are within the rights of the parties and not the result of undue influence or fraud. Because

88. State v. Eggers, 51 S.W.3d 927 (Mo. Ct. App. 2001).

the Act and the Probate Code both contain statutory requirements that require active judicial intervention in assisting *pro se* litigants, Opinion 51 supports assistance by an ALJ to a *pro se* claimant.

Finally, neither Opinion 26 nor 51 address the situation in which the Supreme Court of Missouri has specifically approved a system of assisting *pro se* litigants. While not directly on point, the most applicable case is *Hoffmeister v. Tod*. While that case dealt with the issue of unauthorized practice of law by a lay employee union representative under the court's inherent power to regulate the practice, in *dicta* it certainly supported the old Legal Advisor system. It is hard to argue that the case has no bearing on the present debate over the propriety of the old Legal Advisor system when the court addressed the procedure as follows: "Our Bar, generally, is reasonably familiar with the nature of proceedings before our Division of Workmen's Compensation, and we shall not outline them in detail."[89] And the court goes on to list the procedure throughout the next portion of its discussion. It seems reasonable to conclude that since the issue in *Tod* pertained to the unauthorized practice of law, our high court would not have cited the Legal Advisor system with approval if the system constituted the unauthorized practice of law or in some other respect was ethically improper. By failing to address this compelling case, the Ethics Counsel failed to take into consideration the customs and usages of workers' compensation practice that have been in place since nearly the beginning of the system and that were also tacitly approved by the Missouri Supreme Court.

The Ethics Counsel also relied on the deletion of liberal construction and inclusion of strict construction in section 287.800, along with the addition of the language in subsection 2 of that section which states that "[Adjudicators] shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts."[90] However, this portion of the statute merely directs the adjudicators to be impartial. It does not add any requirement that was not already present. As long as the ALJ acts impartially and weighs the evidence, section 287.800 has no other bearing on what transpires in a conference before an ALJ. Under Rule 2.03, Canon 3B(8), of the Missouri Code of Judicial Conduct, the ALJ "must dispose of all matters promptly, efficiently and fairly."

Because both the statute and the Code require the adjudicator to be fair and impartial, the amendment of the statute really does not add any more duties than were previously imposed by the rule. Interestingly, the comment to the rule states that a judge "should encourage and seek to facilitate

89. Hoffmeister v. Tod, 349 S.W.2d 5, 7 (Mo. 1961).
90. MO. REV. STAT. § 287.800(2) (2005).

settlement, but the parties should not feel coerced into surrendering the right to have their controversy resolved by the courts."[91] Indeed, section B(7)(d) allows the judge, with the consent of the parties, to confer separately with them and their lawyers in an effort to mediate or settle matters.[92] These last two items again appear to authorize the past practices and certainly authorize "mediations."

Since mediations are authorized both by Court Rule[93] and statute[94] the practice of the ALJ (and the Legal Advisor under the old system) in giving a non-binding evaluation of the case is undoubtedly ethical. A long accepted form of mediation is an evaluative mediation. Indeed, the method of evaluative mediation is taught in mediation programs. Given that the Act presently requires ALJs to be instructed in mediation techniques,[95] it is incongruous to argue that a form of mediation required to be studied is somehow unethical to apply. If mediation is authorized, then all accepted forms of mediation should be ethical, unless the legislature specifically prohibits a particular form. It follows that because giving an opinion as to the settlement value of the case is a form of evaluative mediation, it is authorized by law. Because so authorized, it is inarguably ethical.[96]

C. THE DIVISION OF WORKERS' COMPENSATION IS NOT BOUND BY PRIOR DETERMINATIONS OF LEGISLATIVE INTENT

Missouri has no official legislative history. The intent of the legislature is revealed from examining the statute at issue. In the response to the State Auditor's report, the DOLIR gave several reasons for not following the auditor's recommendation for limited legal advice. Those reasons purport to follow the intention of the legislature. However, as will be discussed, they are misguided.

The first reason given by the DOLIR is that the legislature did away with the system to avoid the appearance of bias. This probably was the intention of certain legislators. Cynically, it may have been the intention of other legislators to place a claimant at a disadvantage. Irrespective of the possible reasons, the law still contains requirements that justify and demand a legal

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91. MO. SUP. CT. R. 2–2.03, Canon 3B(8) commentary.
92. *Id.* at Canon 3B(7)(d).
93. *Id.*; MO. SUP. CT. R. 2–2.03 Canon 3B(8); MO. SUP. CT. R. 4–2.4.
94. MO. REV. STAT. § 287.460 (2005); MO. REV. STAT. § 287.610.8 (2005) (training in mediation) and Shelton v. Missouri Baptist Medical Center, 42 S.W.3d 700, 702 (Mo. Ct. App. 2001) (case may be dismissed at a mediation).
95. MO. REV. STAT. § 287.610.5.8 (2005).
96. *See* COMM'N OF RET., REMOVAL AND DISCIPLINE OF THE STATE OF MO., OPINION 51 (Jan. 12, 1981).

advisor-type system, so it is really stretching the law to determine that the legislature has mandated the abolition of the system.

Regarding bias, and as a justification for eliminating the Legal Advisor system, DOLIR maintained that the workers' compensation system was akin to the civil tort system. Since no particular assistance is afforded to the general accident victim, no help should be provided to the *pro se* industrial accident victim in the workers' compensation system.[97] Contrary to the assertion of DOLIR, the Act creates a system of adjudication that is not totally comparable to ordinary civil litigation. First, there is no jury under the Act. Second, most workers' compensation systems have a primary concern that settlements are fair while the civil justice tort system is usually not concerned with the fairness of settlements. The circuit court judge is happy to remove the case from the docket and cancel the jury to save the county money.[98] Many years ago, a Texas court recognized that a workers' compensation case was not just another lawsuit. A public interest was at stake which required safeguards to assure that the claimant was not subject to overreaching or "selling his birthright" for a bowl of soup.[99] Third, benefits are limited to a statutorily set maximum based on the injured body part and two-thirds of the claimant's average weekly wage up to a maximum compensation rate of 105% of the state average weekly wage. Typically, a civil plaintiff is entitled to receive his total lost wages and economic losses as well as pain and suffering and loss of consortium among other damages. Finally, a jury in a civil case may award such damages as it deems just in order to fully compensate the plaintiff.[100] Under workers' compensation, the claimant whose finger is cut off through his own carelessness is compensated the same as one whose finger is cut off because his boss ordered him to stick his hand into an unsafe machine.[101] Fourth, the Act is already a compromise by the various interest groups to take

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97. MONTEE, *supra* note 48, at 31. DOLIR stated: "At their heart, workers' compensation claims are civil actions. The fact that a venue other than circuit court has been chosen to resolve these disputes does not change their underlying nature."

98. David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law Policy and Practice, and Ten Years of the Pennsylvania Experience*, 16 WIDENER L.J. 199, 218–19 (2007). While due process rights apply to civil litigants there has not been a practice or custom developed to make sure that each accident victim is compensated irrespective of fault.

99. Morton v. Federal Underwriters Exchange, 173 S.W.2d 515, 517–18 (Tex. Civ. App. 1943). In this case, the court prohibited the enforcement of a settlement of $986.00 when more than $3,500.00 was awarded. The court recognized the wisdom of requiring court approval of a settlement especially when "an uneducated workman, totally incapacitated from his injuries and in serious need of funds was caused to sign [such a settlement agreement]."

100. *See* MO. REV. STAT. § 287.160–200 (2005).

101. In the case of carelessness, the jury would probably award nothing. In the second example the jury might award a huge verdict because of the conduct of the boss.

workers' compensation matters out of circuit court.[102] This is in keeping with the general trend of workers' compensation laws which remove industrial accidents from the civil justice system into its own specialized adjudicatory system.[103]

In its second reason the DOLIR concluded that "it would be difficult and certainly unethical, if not illegal, for the Department's attorneys to exhibit bias toward the unrepresented employee by offering 'limited legal guidance' while ignoring the employer/insurer in the process." While at first blush the argument seems to have merit, it misses the point. The old Legal Advisor System helped both parties during the process. The information was not limited to claimants because it was available to both parties. Information was freely given to either the claimant or the employer's attorney at conference settings.

The third reason, that using DOLIR lawyers to advise claimants would invade the province of the ALJ, is also misplaced. This concern is resolved very readily, since an ALJ should be permitted to perform the statutorily-mandated mediation function. Furthermore, an ALJ should be permitted to serve as part of the public information process which is also mandated by statute. If the ALJ performs the functions of the Legal Advisor as the ALJ had done in the past, there would be no need for other DOLIR attorneys to perform this task.

The fourth point has some validity which suggests that the ALJ should not act as either party's advocate. However, at the same time, there is a difference between providing information and vetoing claims, as required by statute, and being a party's advocate. After all, very few sporting events pass without someone maintaining that the officials were biased towards one team or player. Yet, that possible perception of bias does not call for the elimination of the official's function. As the sports official is charged with conducting a fair game, the ALJ is charged with the duty to veto claims and provide basic information.

The fifth reason, which suggests that the Division has PowerPoints and other documentation on its web site and otherwise provides information by which a claimant can be better informed is ludicrous. This published information is simply not accessible to the average claimant; therefore, the effectiveness of these publications is minimal. Additionally, a PowerPoint discussion or other electronic information is of marginal benefit to a claimant

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102. *See* Section II *supra.* It took over fifteen years in Missouri for the various interest groups to reach a compromise that would ultimately be approved by voters. Do not forget that the biggest opponents in Missouri of the Act were lawyers that handled industrial accidents in the civil justice system.

103. Torrey, *supra* note 98, at 219.

who is approached by a claims representative or an insurance company lawyer while the claimant is severely stressed or when the claimant is outside his comfort zone while at the Division office. Claimants cannot be expected to be familiar with the system and, moreover, they have often been disempowered as a result of their injury. These claimants need more than just a website; they "deserve the considered review of an impartial state official."[104]

Missouri was certainly not alone in requiring extra precautions in *pro-se* workers' compensation cases. A recent study shows that approximately half of the states require a special procedure to settle *pro se* cases.[105] These procedures range from supplying an "advocate" to represent the claimant in Maine, to appointing a lawyer in Louisiana, to requiring the presence of the claimant at an approval conference and asking more detailed questions of the *pro se* claimant than one represented by counsel.[106]

The Maine program is unique because it is implemented by statute with the purpose of "providing assistance to qualified employees who proceed to mediation and formal hearing."[107] The specific duties of the advocates are statutorily listed. Those duties include assisting employees in negotiations, acting as an information resource, assisting the employee in securing benefits under the act, communicating with insurance companies and medical providers on the claimant's behalf, assisting and advocating for the employee at mediations and hearings, and maintaining employee confidences.[108] The advocate may also present lump sum settlement proposals to the Workers' Compensation Board for approval.[109]

Arkansas provides a system similar to the old Missouri system. The Arkansas Workers' Compensation Commission provides a Legal Advisor Division whose purpose is to serve as "a dispute resolution system created to provide legal information and assistance to interested parties who have questions concerning the Arkansas Workers' Compensation Law."[110] Legal Advisors are attorneys that are familiar with substantive and procedural law "through which the parties must navigate during the claim's process."[111] Legal Advisors are specifically authorized to mediate cases in which the amount in controversy is less than $2,500.00, and may do so in higher amounts only if

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104. *Id.* at 447.
105. *Id.* at 467–69.
106. *Id.* at 273–75.
107. ME. REV. STAT. ANN. tit. 39–A, § 153–A(1) (2007).
108. *Id.* at § 153–A(4).
109. *Id.* at § 153–A(6)(C).
110. Arkansas Workers' Compensation Commission, http://www.awcc.state.ar.us/div.html (last visited Oct. 11, 2009).
111. *Id.*

the parties agree.[112] Because the Arkansas system is similar to the repealed Missouri system and has maintained success in achieving its purposes, there is reason to believe that the old Missouri system may be resurrected with similar success.

VII. CONCLUSION AND RECOMMENDATIONS

Both the Ethics Counsel and the author of this paper agree that the duty of an ALJ is to be fair and impartial; however, they disagree when it comes to accomplishing this duty. A system of adjudication which regularly permits insurers to take advantage of unrepresented claimants is hardly fair and impartial. The author proposes the following "modified Legal Advisor system" to help rectify this unfairness.

First, following the recommendation of the Ethics Counsel, the Division should prepare a small brochure listing the rights and benefits of the claimant under the Act. This brochure should then be mailed to each claimant, along with the applicable notices stating that a report of injury has been filed as well as all further docket notices. Realistically, this could be a short one or two page document written as simplistically, yet as completely as possible to ensure that the claimant recognizes and understands his rights. Such a small document would not significantly increase the costs of postage and this simple procedure would assure that every injured employee receives notice of his or her rights and benefits mandated pursuant to the Act.

Second, no *pro se* claim settlement may be approved by an ALJ without first discussing the settlement and its effects and repercussions with the claimant. Following the recommendations of the Ethics Counsel, the ALJ would essentially follow a script in which the rights and benefits of the claimant would be outlined and then the ALJ would be responsible for ascertaining if the claimant fully understood his rights as set forth. The ALJ would then be authorized[113] to give a simplistic, yet complete, answer to any questions that the claimant might set forth. The ALJ would also be authorized to answer any questions that the employer or employer's representative might have regarding the settlement or their rights. As to the requirements of wage rate, mileage, and medical treatment and expenses, the ALJ should be authorized by the director of the Division to specifically inquire about these items. Based upon the answers given, appropriate remedial measures should

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112. ARK. WORKERS' COMP. COMM'N. R. 099.26 (2001).

113. MO. REV. STAT. § 287.650 (2005) gives the Division the authority to make rules to carry out its functions. To the extent that the proposed changes are necessary to carry out the statutory mandates of the system, the Division has the authority to make rules mandating the changes.

be taken by the ALJ. Also, the director of the Division should make clear to ALJs that they have the duty and responsibility to veto claims that are not within the rights of the parties–including settlements that are outside the range of reasonableness for either the claimants or the employers.

Third, conference settings in which the claimant, the attorney for the insurance company, and the ALJ meet to discuss the case before a settlement should follow the same procedure followed for approving settlements. Further, the Division Director should adopt a policy approving evaluative mediations. Under such a policy the ALJ would unquestionably be authorized to give a non-binding evaluation of the worth of the case.

Undoubtedly, some will argue that this system remains biased against the employer and some will argue that the legislature did away with this system and therefore, this system should not be resurrected. To those statements, I would say that if the legislature wishes to have a system in which injured employees are taken advantage of, being mindful that such a system is in contravention of eighty years of Missouri pubic policy, then it should clearly and specifically say so and be prepared to bear the political consequences.