I spent Saturday evening in Naples, Florida, attending a black tie affair with several hundred people, virtually all of them lawyers and their spouses. It was the Ninth Annual Induction Dinner of the College of Workers’ Compensation Lawyers. The CWCL, established to “honor those attorneys who have distinguished themselves in their practice in the field of workers’ compensation”, consists of some of the finest legal experts in our nation, and they were this evening adding approximately two dozen new inductees to their ranks. It was an evening of honor and excitement, as these people were being recognized by their peers as being the best; at the very pinnacle of their careers.

And I was their Keynote Speaker. Poor bastards.

I’m not really sure what I was doing there. I am, after all, the “Jerry Springer” of workers’ comp. My blog musings are normally the digital equivalent of a television studio with bodyguards and poor ignorant people beating the crap out of each other. As I told the audience that evening, by comparison, on an educational and intellectual level I am not much better than a juggling monkey. They did, however, give me the microphone, and I was determined to make the best of it.

I had been asked to speak on a hot topic of the day, with the suggestion that Exclusive Remedy would be a good subject for the evening. Now, being known for a quirky, non-PC sense of humor, I had to confess to the audience that try as I might, I could not find a way to make Exclusive Remedy funny. It is serious business it would seem. So I shared my serious thoughts on the subject with the group.

There has been a great deal of speculation about the future of Exclusive Remedy (ER). It is the foundational cornerstone of the “Grand Bargain” established more than 100 years ago. For those unaware, the provision simply means that workers’ compensation protections will be provided via a “no-fault” system covering compensable injuries or illness, but will be offered on the basis it is the “exclusive remedy” for these claims. Workers lose the right to pursue negligence claims as well as pain and suffering awards. It is a system that has worked for the majority of injured workers over the last 100 years.

Many people believe that perceived threats to ER are simply that; perceived. They do not believe that it and the industry it supports are in peril. Some people believe the opposite, expecting workers’ comp (I use WC and ER somewhat interchangeably, as without Exclusive Remedy, there will be no workers’ compensation) to fail in a series of epic court decisions or mass attrition for some version of Opt Out or other solution. I, on the other hand, tend to think that ER may be in potential danger, but not from some major decision or sudden event. No, I think if workers’ comp is in trouble, its demise will occur over a vast period of time, suffering more of a “death by a thousand cuts” rather than one fatal blow.

That fate does not have to be, if our industry is simply willing to recognize that it does not exist in the same economic and societal realities that existed 100 years ago when it was created. We need to adapt and change with the times. The threats we perceive as external are really not so. The true threats to Exclusive Remedy and workers’ compensation today are emanating from within our own industry. They are the result of our own failures and shortcomings. The court cases and trend to Opt Out we often refer to
are simply the results of stimuli we have created.

I have written previously that I believe three areas are the primary cause of concern:

1. The assignation of guilt, or blame, in a no-fault system.
2. The erosion of benefits provided injured workers' to the point they are no longer adequately protected by the system.
3. Increasing burdens on employers now responsible for co-morbidity and social issues not of their making.

You may read more detail on those points here. I will not burden you with that in this article.

Workers' compensation has become an extremely complex machine, and has on some levels become a dehumanizing process. Consolidation of claim offices means less face to face contact in the claims process. Adjusters are receiving less training while seeing increased caseloads. At the same time we have seen an explosion of hundreds or even thousands of specialty vendors, some performing functions formerly performed by adjusters. We have essentially outsourced a significant part of the claims management process.

Workers' compensation was formed to serve only two entities; the employer and their injured workers. We must ask ourselves today, with so many complex legislative scenarios and vendors serving the industry; has that situation reversed? Does the machine exist for the employer and injured worker, or do they now exist for the machine?

I suspect the key to preserving and protecting Exclusive Remedy for another 100 years lies within the correct and honest answer to that question.

I also spoke to the audience about my push to reform the industry under the banner of "Workers' Recovery". I recommended they read the articles I wrote when paired with industry titan and College Fellow John Burton for a Point-Counterpoint series within the IAIABC Journal (published last week. More on that tomorrow). Being paired for a published debate with Burton was indeed a tremendous honor; probably one of the highlights of my professional career. Although to be honest, just as with the CWCL dinner, I had no idea what I was doing there. The juggling monkey must not have been available.

And finally, I had pointed out early in my CWCL presentation that, while many people think I am just a blogger paid via the written word, I am actually a businessman who just happens to enjoy writing. My business experience has given me what I think is a truly unique opportunity, in that for over 15 years I have run a website and information services system that serves millions of people a year, from all sectors of workers' compensation. I have engaged in extensive conversation with some of the thousands of injured workers who have used our Discussion Forums. Our main customers are TPA's, Carriers and self insured businesses. I have spoken to countless attorneys and doctors, along with other legal and medical professionals, and have spoken with vendors from just about every conceivable area of the industry. It has been an education I could not have paid for, and has given me a unique insight into perceptions and process from all sides of the industry. The opinions I publish in my blog are often the result of this ongoing dialogue.

I then told the audience that, in my opinion, there was one segment of our industry that collectively had this same advantage as I. That is, of course, the people who practice law within the workers' compensation industry. Collectively they are one of the few groups that communicate with all players across the board, and can, as a community, work to facilitate some of the changes we need to see within workers' comp. They have access and influence with workers, businesses, carriers, TPA's, legislators, vendors and more. They are uniquely positioned to work for the improvement of our industry.

In that process, of course, they can insure that Exclusive Remedy does not become an elusive reality. They can help alter the path away from a potential death by a thousand cuts, and insure that Workers' Compensation remains healthy and viable for all it was intended to serve for another 100 years and beyond.

And that, it turns out, is no laughing matter.