Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XXXVIII, October 2012

Monty Hall

By Keith Devlin*

Ed. Note: Our daily adjudicator task is to analyze the law, apply it to the facts, and render a decision. This article challenges assumptions that may affect analysis between alternatives, and evokes thought about how we react when facts are changed by circumstance.

A few weeks ago I did one of my occasional "Math Guy" segments on NPR's *Weekend Edition*. The topic that I discussed was probability. Among the examples we discussed was the famous - or should I say infamous - Monty Hall Problem. Predictably, our discussion generated a mountain of email, both to me and to the producer, as listeners wrote to say that the answer I gave was wrong. (It wasn't.) The following week, I went back on the show to provide a further explanation. But as I knew from having written about this puzzler in newspapers and books on a number of occasions, and having used it as an example for many years in university probability classes, no amount of explanation can convince someone who has just met the problem for the first time and is sure that they are right - and hence that you are wrong - that it is in fact the other way round.

Here, for the benefit of readers who have not previously encountered this puzzler, is what the fuss is all about. In the 1960s, there was a popular weekly US television quiz show called *Let's Make a Deal*. Each week, at a certain point in the program, the host, Monty Hall, would present the contestant with three doors. Behind one door was a substantial prize; behind the others there was nothing. Monty asked the contestant to pick a door. Clearly, the chance of the contestant choosing the door with the prize was 1 in 3. So far so good.

Now comes the twist. Instead of simply opening the chosen door to reveal what lay behind, Monty would open one of the two doors the contestant had not chosen, revealing that it did not hide the prize. (Since Monty knew where the prize was, he could always do this.) He then offered the contestant the opportunity of either sticking with their original choice of door, or else switching it for the other unopened door. The question now is, does it make any difference to the contestant's chances of winning to switch, or might they just as well stick with the door they have already chosen?

When they first meet this problem, most people think that it makes no difference if they switch. They reason like this: "There are two unopened doors. The prize is behind one of them. The probability that it is behind the one I picked is 1/2, the probability that it is behind the one I didn't is also 1/2, so it makes no difference if I switch."

Surprising though it seems at first, this reasoning is wrong. Switching actually DOUBLES the contestant's chance of winning. The odds go up from the original 1/3 for the chosen door, to 2/3 that the OTHER unopened door hides the prize. There are several ways to explain what is going on here. Here is what I think is the simplest account.

Suppose the doors are labeled A, B, and C. Let's assume the contestant initially picks door A. The probability that the prize is behind door A is 1/3. That means that the probability it is behind one of the other two doors (B or C) is 2/3. Monty now opens one of the doors B and C to reveal that there is no prize there. Let's suppose he opens door C. Notice that he can always do this because he knows where the prize is located. (This piece of information is crucial, and is the key to the entire puzzle.) The contestant now has two relevant pieces of information:

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1. The probability that the prize is behind door B or C (i.e., not behind door A) is 2/3.
2. The prize is not behind door C.

Combining these two pieces of information yields the conclusion that the probability that the prize is behind door B is 2/3. Hence the contestant would be wise to switch from the original choice of door A (probability of winning 1/3) to door B (probability 2/3).

Now, experience tells me that if you haven't come across this problem before, there is a probability of at most 1 in 3 that the above explanation convinces you. So let me say a bit more for the benefit of the remaining 2/3 who believe I am just one sandwich short of a picnic (as one NPR listener delightfully put it).

The instinct that compels people to reject the above explanation is, I think, a deep rooted sense that probabilities are fixed. Since each door began with a 1/3 chance of hiding the prize, that does not change when Monty opens one door. But it is simply not true that events do not change probabilities. It is because the acquisition of information changes the probabilities associated with different choices that we often seek information prior to making an important decision. Acquiring more information about our options can reduce the number of possibilities and narrow the odds.

Oddly enough, people who are convinced that Monty's action cannot change odds seem happy to go on to say that when it comes to making the switch or stick choice, the odds in favor of their previously chosen door are now 1/2, not the 1/3 they were at first. They usually justify this by saying that after Monty has opened his door, the contestant faces a new and quite different decision, independent of the initial choice of door. This reasoning is fallacious, but I'll pass on pursuing this inconsistency here.

If Monty opened his door randomly, then indeed his action does not help the contestant, for whom it makes no difference to switch or to stick. But Monty's action is not random. He knows where the prize is, and acts on that knowledge. That injects a crucial piece of information into the situation. Information that the wise contestant can take advantage of to improve his or her odds of winning the grand prize. By opening his door, Monty is saying to the contestant

> There are two doors you did not choose, and the probability that the prize is behind one of them is 2/3. I'll help you by using my knowledge of where the prize is to open one of those two doors to show you that it does not hide the prize. You can now take advantage of this additional information. Your choice of door A has a chance of 1 in 3 of being the winner. I have not changed that. But by eliminating door C, I have shown you that the probability that door B hides the prize is 2 in 3.

Still not convinced? Some people who have trouble with the above explanation find it gets clearer when the problem is generalized to 100 doors. You choose one door. You will agree, I think, that you are likely to lose. The chances are highly likely (in fact 99/100) that the prize is behind one of the 99 remaining doors. Monty now opens 98 or those and none of them hides the prize. There are now just two remaining possibilities: either your initial choice was right or else the prize is behind the remaining door that you did not choose and Monty did not open. Now, you began by being pretty sure you had little chance of being right - just 1/100 in fact. Are you now saying that Monty's action of opening 98 doors to reveal no prize (carefully avoiding opening the door that hides the prize, if it is behind one of those 99) has increased to 1/2 your odds of winning with your original choice? Surely not. In which case, the odds are high - 99/100 to be exact - that the prize lies behind that one unchosen door that Monty did not open. You should *definitely* switch. You'd be crazy not to!

Okay, one last attempt at an explanation; back to the three door version now. When Monty has opened one of the three doors and shown you there is no prize behind, and then offers you the opportunity to switch, he is in effect offering you a TWO-FOR-ONE switch. You originally picked door A. He is now saying "Would you like to swap door A for TWO doors, B and C ... Oh, and by the way, before you make this two-for-one swap I'll open one of those two doors for you (one without a prize behind it)." In effect, then, when Monty opens door C, the attractive 2/3 odds that the prize is behind door B or C are shifted to door B alone.

So much for the explanations. Far more fascinating than the mathematics, to my mind, is the psychology that goes along with the problem. Not only do many people get the wrong answer initially (believing that switching makes no difference), but a substantial proportion of them are unable to escape from their initial confusion and grasp any of the different explanations that are available (some of which I gave above).

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On those occasions when I have entered into some correspondence with readers or listeners, I have always prefaced my explanations and comments by observing that this problem is notoriously problematic, that it has been used for years as a standard example in university probability courses to demonstrate how easily we can be misled about probabilities, and that it is important to pay attention to every aspect of the way Monty presents the challenge. Nevertheless, I regularly encounter people who are unable to break free of their initial conception of the problem, and thus unable to follow any of the explanations of the correct answer.

Indeed, some individuals I have encountered are so convinced that their (faulty) reasoning is correct that when you try to explain where they are going wrong, they become passionate, sometimes angry, and occasionally even abusive. Abusive over a math problem? Why is it that some people feel that their ability to compute a game show probability is something so important that they become passionately attached to their reasoning, and resist all attempts to explain what is going on? On a human level, what exactly is going on here?

First, it has to be said that the game scenario is a very cunning one, cleverly designed to lead the unsuspecting player astray. It gives the impression that, after Monty has opened one door, the contestant is being offered a choice between two doors, each of which is equally likely to lead to the prize. That would be the case if nothing had occurred to give the contestant new information. But Monty's opening of a door does yield new information. That new information is primarily about the two doors not chosen. Hence the two unopened doors that the contestant faces at the end are not equally likely. They have different histories. And those different histories lead to different probabilities.

That explains why very smart people, including many good mathematicians when they first encounter the problem, are misled. But why the passion with which many continue to hold on to their false conclusion? I have not encountered such a reaction when I have corrected students' mistakes in algebra or calculus.

I think the reason the Monty Hall problem raises people's ire is because a basic ability to estimate likelihoods of events is important in everyday life. We make (loose, and generally non-numeric) probability estimates all the time. Our ability to do this says something about our rationality - our capacity to live a successful life - and hence can become a matter of pride, something to be defended.

The human brain did not evolve to calculate mathematical probabilities, but it did evolve to ensure our survival. A highly successful survival strategy throughout human evolutionary history, and today, is to base decisions on the immediate past and on the evidence immediately to hand. If that movement in the undergrowth looks as though it might be caused by a hungry tiger, the smart move is to make a hasty retreat. Regardless of the fact that you haven't seen a tiger in that vicinity for several years, or that when you saw a similar rustle yesterday it turned out to be a gazelle. Again, if a certain company stock has been rising steadily for the past week, we may be tempted to buy, regardless of its stormy performance over the previous year. By presenting contestants with an actual situation in which a choice has to be made, Monty Hall tacitly encouraged people to use their everyday reasoning strategies, not the mathematical reasoning that in this case is required to get you to the right answer.

Monty Hall contestants are, therefore, likely to ignore the first part of the challenge and concentrate on the task facing them after Monty has opened the door. They see the task as choosing between two doors - period. And for choosing between two doors, with no additional circumstances, the probabilities are 1/2 for each. In the case of the Monty Hall problem, however, the outcome is that a normally successful human decision making strategy leads you astray.

Finally, just to see how well you have done on this teaser, suppose you are playing a seven door version of the game. You choose three doors. Monty now opens three of the remaining doors to show you that there is no prize behind it. He then says, "Would you like to stick with the three doors you have chosen, or would you prefer to swap them for the one other door I have not opened?" What do you do? Do you stick with your three doors or do you make the 3 for 1 swap he is offering?

Mathematician Keith Devlin is the Executive Director of the Human-Sciences and Technologies Advanced Research Institute (H-STAR) at Stanford University and The Math Guy on NPR's Weekend Edition. His most recent books are *Mathematics Education for a New Era: Video Games as a Medium for Learning* (AK Peters/CRC Press), *The Man of Numbers: Fibonacci's Arithmetic Revolution* (Walker & Co), and an e-book short *Leonardo and Steve: The Young Genius Who Beat Apple to Market by 800 Years*. *Devlin's Angle* is a monthly column sponsored by the Mathematical Association of America.

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President's Message

By Hon. Ellen Lorenzen, President, NAWCJ

I hope you have read Mr. Devlin's article, "Monty Hall," because this month I write in reaction to it. I had to read the article three times before I could figure out why it troubled me and how I could apply its lesson to my work.

I was not troubled by the fact that I got the problem wrong. I learned a long time ago that, while I reason about as well as the next person, I stop trying to use logic when faced by a "word" problem in math. One college quarter of linear algebra and one quarter of learning (I use the word "learning" loosely; how much I learned is debatable) how to write computer code for problems in statistics and biometry taught me that trying to apply mathematical philosophy to problem solving is an art form and I am not an artist. After three readings, I managed to understand why Mr. Devlin's probability calculation was correct (the contestant really did have a 2/3 chance of winning if (s)he changed her/his initial selection once Monty announced his choice of doors and not a 50/50 chance), so that was no longer an issue for me.

I must then, have been, bothered by Mr. Devlin's explanation of why people refused to alter their thinking about the problem. Yet I accepted Mr. Devlin's discussion of the psychology behind the difficulty people have in understanding why the correct answer is 2/3, not 50/50, without difficulty. I found Mr. Devlin's discussion touched on a theory of decision making that has been discussed by several authors and by a past speaker we had at one of our Colleges. Lately I have been working my way through one of the "hot" publications on this topic. Daniel Kahneman, a Nobel prize winning economist who is a psychologist by profession, provided an in-depth explanation of the current research into our thinking process in his popular work, Thinking, Fast and Slow, in 2011 (Farrar, Straus & Giroux, LLC.). In his book, Dr. Kahneman described the part of our logical brain that makes decisions very quickly based on a process acquired a hundred thousand years ago designed to save us from being eaten by a tiger and compared it with the part of our logical brain that makes decisions slowly. Full disclosure: I only managed to make it through the introduction and first chapter of his book before I had to return it to the library but I plan to check it back out as soon as the library will let me. It is very easy to read and very interesting but it is not one of those books you can skim quickly. Mr. Devlin identifies the psychological aspect of the Monty Hall problem as our natural tendency to make use of quick thinking to arrive at the answer to probability questions and then become reluctant, even resentful, if we have to recalculate. I had no problem with Mr. Devlin's explanation about the way we think and how that leads us to answer the probability question incorrectly because I found he and Dr. Kahneman to be quite persuasive and they have a lot of research to back up their opinions.

I finally realized where I was bothered by Mr. Devlin. He understands that people have difficulty changing their answer even when provided with three different mathematical approaches which should help them understand their error. And he points out that people seem to not just refuse to change their minds but get resentful about the very thought that they might be wrong. What troubled me was that I did not find Mr. Devlin's conclusions about why that might be so very compelling. So I felt compelled to try to figure out why I might not want to spend time understanding my error in a fairly simple math problem because I feel it is important in my professional life to get the right answer to complicated, non-mathematical problems, mostly right the first time.

I offer you my thoughts. It seemed to me Mr. Devlin's concluded that people get angry about their failure to solve the Monty Hall problem the first time because the decision to make correct probability calculations is important in everyday life and we all just have difficulty changing our minds once we make them up about something important. That conclusion just did not resonate with me and I reread the article again to learn where I began to think, "Wait a minute." I got to Mr. Devlin's statement that the Monty Hall problem is "cunning," designed to be misleading, and identified that as the moment when my brain stopped thinking logically and slowly so that it could calculate and understand and started thinking emotionally and quickly, so that logic and calculation were ignored. I realized that, once I knew Monty intentionally withheld information critical to my making a decision that was more probably correct (the information being that he, Monty, always knew the right door to pick and intentionally gave the contestant the option of opening a door Monty knew was the wrong one), I began focusing on the fact that Monty Hall, who seemed so nice and helpful, was in reality a deceiver. Monty let the player believe that Monty was just guessing too when Monty always knew the door he selected could not possibly be the right door.

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I do not know about you but I resent it when someone intentionally misleads me and I tend to shift my focus to the source of my resentment and overlook the real problem before me, even when someone such as Mr. Devlin (who is in reality a nice person) is trying to help me solve it and especially when the deceiver, by the very act of deception, is actually offering me something that could be helpful. So, Mr. Devlin can explain why my reasoning was faulty once, twice and three times but I am not listening because I want only to focus on his first statement: Monte was a deceiver.

Why do I write about this? Why did I read the article three times, finally understanding the correct answer to a probability problem, and still feel troubled about it? I think it is because I, as a judge, am faced with the Monte Hall problem all the time. I hear witnesses who do not, through intent or through ignorance or misunderstanding, provide me with all the facts that are relevant to a logically correct solution. I review medical conclusions based on only fragments of data without being told what assumptions the examiners made in arriving at their conclusions. I listen to arguments that outline only the holdings of cases without providing me any of the reasoning. I think that it is inevitable that I will sometimes reach a conclusion that misses the mark because a Monte Hall-like individual, through design or carelessness, offered me an option that was wrong. I can only hope to recognize and avoid the Monte Hall trap identified by Mr. Devlin, the trap of allowing someone else's action guide my decision without actually opening all the doors myself. And I hope that I can avoid the other trap that Mr. Devlin showed me, the trap of refusing to reconsider my conclusion once the error in my thinking has been pointed out to me. And lastly, I hope I can avoid the trap that I found for myself: becoming so focused on the person who misled me that I cannot see the correct path to follow even if that deceiving soul is the one pointing it out to me. I always wondered what went wrong in a case when I read an appellate ruling that said, "Reversed and remanded. Appellee conceded error was made by the lower court in its ruling." Now I know, the trial judge confronted the Monte Hall problem without realizing it. As always, I appreciate your comments. Contact me at Ellen_Lorenzen@DOAH.state.fl.us.

"Second Fridays" Free Educational Programs from the NAWCJ

October 12, 2012

Sanford Silverman, M.D. is a pain management physician. He will present perspectives on pain management with focus on the challenges of the growing evidence regarding opiod medications.

November 9, 2012

Alex Cuello, Esq. will present his perspective on guardianships and the challenges to workers' compensation professionals when working with injured workers who are unable to attend to their own best interest.

Make plans today to tune-in

All Second Fridays presentations are free. To join at 12:00 Eastern time, email judgelangham@yahoo.com for details.

The "Corporate Jester" Perspective on "Monte Hall"

By: David Riveness*

We invited some readers to take part in an experiment based on the 1960s popular US television quiz show "Let's Make a Deal." In that show, the program's host, Monty Hall, would present the contestant with three doors. Behind one door was a substantial prize; behind the others there was nothing.

In our experiment, we asked you to imagine playing a seven door version of the game. You get to initially choose three doors. After making your choice, Monty (who knows where the prize is) opens three of the remaining doors to show you that the prize was not behind any of them. He then says, "Would you like to stick with the three doors you originally picked, or would you prefer to swap them for the one other door I have not opened?" We then asked you two questions:

Question 1: Should you stick with your original three doors or make the swap Monty is offering, etc?

Question 2: How confident are you with your answer to question 1?

At the time we sent this newsletter out, the majority of you, 79%, said you would keep your original three doors and 13% said it didn't matter if you switched or not - a total of **92%**. In addition, 81% of those same people responded that they felt "**Confident. It would be difficult to talk me into changing my answer**" or "**Extremely confident. I don't believe I could be talked into changing my answer**."

As you may have gathered, those among the 92% were completely incorrect. The correct answer is to switch doors, even though it doesn't make intuitive sense for most people. To understand why [read Monte Hall, by Keith Devlin]. What we find interesting about this experiment is not necessarily the confidence people had in their initial answers but the confidence they had in judging that it would be difficult to be talked into changing that answer - **before being presented with any alternative perspectives!**

Our favorite open response comment was from the participant who wrote "***I cannot think of an argument that would convince me to change"*** and indicated they were extremely confident. Of course a person who is extremely confident can't think of an argument that would convince them to change their position or they wouldn't be that confident! The real issue is whether, in the real world, that level of confidence stops people from **actively searching for** potential perspectives that, if found and reflected upon, **might** convince one to change their position.

We think the experiment illustrates something interesting happening in many organizations. Leaders at all levels sometimes make decisions or hold assumptions without weighing them against alternative viewpoints because they have already reached a conclusion about the validity of those alternative viewpoints - **without knowing anything about them.**

Under that paradigm, leaders often cease to actively look for perspectives that are contrary to those they are **most** confident in - creating huge potential for ongoing blind spots. A Jester's work is critical because it is the most confidently held viewpoints, conclusions or paradigms (potentially harboring unilluminated blind spots) that most easily can become the unexamined status quo.

If you are one of the 91% shaking your head wondering how you could have possibly been wrong (and maybe still thinking that we are wrong [read Monte Hall, by Keith Devlin] for an explanation of why it is in your interest to trade your three doors for the one door. The article addresses a more simple 3 door problem but the insight will easily transfer to our seven door version.

By the way, if you thought we were crazy before you read the explanation, you are not alone. When a version of this problem and the solution appeared in Parade, approximately 10,000 readers, including nearly 1,000 with Ph.D.s, wrote to the magazine claiming the published solution was wrong.

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* David Riveness, author of the insightful and entertaining book, The Secret Life of the Corporate Jester: A Fresh Perspective on Organizational Leadership, Culture and Behavior, reveals how to adopt and apply jester perspectives within an organization.

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"Corporate Jester" from Page 7.

True jestership is not about wearing colorful costumes and entertaining others with jokes, but is, instead, a unique perspective into organizational dynamics. Authentic jesters have the rare ability to uncover and successfully address blind spots in thinking and action that negatively affect companies, organizations, and individuals.

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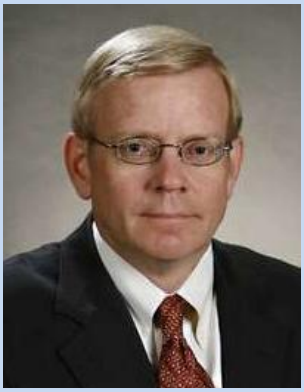
Judiciary College 2012 attracted the largest and most geographically diverse group in the history of the NAWCJ

Tom Stine (Nebraska) and Jonathan Weatherby (Kentucky) take a break from the classroom at Judiciary College 2012

What a Private Detective Sees, and then at Once Communicates in a Telephone Call to Employer, is Admissible as a "Present Sense Impression"



By: Hon. David Torrey*

The Commonwealth Court has held that what a private detective views, and then at once communicates over the phone to an employer, is admissible. *Bell Beverage v. UCBR*, __ A.3d __ (Pa. Commw. 2012) [Pa. Commw. No. 1856 C.D. 2011, filed July 26, 2012, McCullough, J.]. Such a statement constitutes a "present sense impression," an exception to the hearsay rule. As a result, the employer could, at an unemployment compensation hearing, testify with regard to what he was told by the private detective, so as to further justify the termination, for willful misconduct, of an unemployment compensation claimant.

A worker, Falu, was employed by Bell Beverage as a warehouse worker and helper. Falu had a coworker, Puglia. Employer, Mr. Steve Bell, became suspicious that Puglia and his helper (seemingly not Falu) were involved in heavy pilfering of inventory when they were out delivering beverage products. As a result, Bell retained a private investigator to follow its delivery trucks. In the course of doing so, Bell decided "to put claimant [Falu] on the truck with Puglia to see if claimant was also involved."

As detailed below, the private detectives advised Bell over the phone that Puglia would go to his residence and remove product. Falu, meanwhile, would stay in the truck. As this scenario was unfolding, Bell called Falu and asked what he was doing at the time. According to Bell, Falu lied, and indicated that he and Puglia were at places other than Puglia's home.

Bell then fired Falu for theft and conspiracy. Falu sought unemployment compensation benefits, but the Referee agreed with the employer that he had committed willful misconduct.

In the course of denying benefits, the Referee relied upon what Mr. Bell had stated he learned from the private detective. The Board of Review, however, considered the Referee to have relied upon hearsay, and stated that it was "constrained" to award benefits. This was so because the employer had the burden of proof of showing willful misconduct, and its proofs were hearsay. (It is to be noted that Falu was not at the unemployment compensation hearing; the *Walker* rule, however, precludes the unemployment authorities from relying upon even *non-objected to* hearsay.)

After a remand to allow the claimant to appear, the Appeal Board sustained its ruling that what Bell heard over the phone was hearsay, upon which a finding could not be based.

As foreshadowed above, however, the Commonwealth Court has reversed. According to the Court, Rule 803 of the Pennsylvania Rules of Evidence applied. That rule is titled, "Hearsay exceptions; availability of declarant immaterial." One of those exceptions is "for present sense impression." A present sense impression is "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter…." *Slip opinion* at 6-7. According to the court, what Bell overheard on the phone from the private detective met this test: "The observations conveyed by Corsaro [the P.I.] over the telephone to Frank Bell were reliable because they were contemporaneously made as the event was unfolding." And, of course, the private detective had been potentially available, but this fact was irrelevant to the analysis. This was so because the hearsay exception under consideration "provides that the availability of the declarant is immaterial…."

Judge Pellegrini, notably, dissented. He further commented upon the rationale for the hearsay exception, to wit, that such statements should be admissible because of (1) the "relative immediacy of the declaration," and (2) the assurance that, because of the immediacy, "that there will have been little opportunity for reflection or calculated misstatement."

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Here, however, this assurance did not exist: "Because those hired to procure evidence have a financial incentive and the opportunity to reflect and make calculated misstatements, I would hold that a statement made by a private investigator[,] or anyone paid to obtain evidence[,] over the telephone does not fall within Pa R.E. 803(1)."

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The complete opinion of the Court in *Bell Beverage v. UCBR* is here: http://law.justia.com/cases/pennsylvania/commonwealth-court/2012/1856-c-d-2011.html

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*Dave Torrey is the President-Elect of the National Association of Workers' Compensation Judiciary. He is the creator and author of the four-volume treatise *Pennsylvania Workers' Compensation: Law & Practice* (West 3rd ed. 2008), and is a Workers' Compensation Judge for Allegheny County, Pennsylvania. He was appointed to his position during the Casey Administration. He is also a member of the Department of Labor & Industry WCJ Rules Committee. Since 1996, Dave has also been an Adjunct Professor of Law at the University of Pittsburgh School of Law, and he has been a preceptor in the school's Student Externship Program. He has published several law review articles dealing with workers' compensation topics, and he lectures frequently on the subject.

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The foregoing originally appeared in the Pennsylvania Bar Association Workers' Compensation Law Section Newsletter, September 2012 and is reprinted here with permission.

Upcoming Conferences:

Oregon Workers Compensation Educational Conference, November 13 and 14, 2012, Salem Conference Center, Salem, Oregon.
http://www.cbs.state.or.us/external/wcd/communications/ed_conference/ed_conf_reg_web.pdf

2012 Tennessee Workers' Compensation Conference, November 29-30, 2012, Nashville, Tennessee.
http://www.mleesmith.com/tn-comp-12

Cumberland School of Law, 26th Annual Workers' Compensation Seminar, November 9, 2012, Birmingham Marriott, Birmingham, Alabama.
http://cumberland.samford.edu/files/cle/Workers'%20Comp%20Online.pdf

WCRI Annual Conference, Boston Marriott, Cambridge, Massachusetts.
http://www.wcrinet.org/conference.html

2012 San Diego Workers' Compensation and Employment Law Seminar, November 1, 2012, Westin San Diego, San Diego, California.
http://thingstodo.utsandiego.com/san_diego_ca/events/show/267820266-2012-san-diego-workers-compensation-employment-law-seminar

These programs are not sponsored or endorsed by the NAWCJ, but are noted here for information.

House Sub-Committee Amends and Passes HR 1063 SMART Act

By: Rafael Gonzales*

On September 11, 2012, the US House of Representatives, Committee on Energy and Commerce, Subcommittee on Health met and voted on several proposed bills, including on amendments proposed to HR 1063, the Strengthening Medicare and Repaying Taxpayers Act (SMART). After limited debate on the matter, the committee approved the amendments proposed by Rep. Murphy of Pennsylvania. As a result, the SMART Act, which will next be voted upon by the full Committee on Energy and Commerce before going on to the House Committee on Ways and Means, includes the following terms and conditions.

CMS Website to Provide Final Statement of Reimbursement Amount

Instead of the previously proposed 65 days the Secretary had to respond to a request with a statement of reimbursement amount, which constituted the conditional payment subject to recovery related to such settlement, judgment, award or other payment, the bill proposes to allow the claimant or applicable plan to notify the Secretary 120 days before the expected date of settlement, judgment, award, or other payment, and obtain a statement of reimbursement amount from a website the Secretary will make available. If settlement, judgment, award or other payment is made during such period, then the last statement of reimbursement amount downloaded during such period shall constitute the final conditional amount subject to recovery related to such settlement, judgment, award, or other payment. Gone is the previous proposal where if the Secretary failed to provide such a statement of reimbursement amount within 30 days, the claimant or applicable plan was no longer obligated to make payment for any item or service related to the request, unless the Secretary demonstrated that the failure was justified due to exceptional circumstances.

Secretary to Produce Annual Threshold Exceptions for Reimbursements

Other than changing the entity responsible for producing annual threshold exceptions, the bill continues to propose that not later than November 15 before each year, the Secretary shall calculate and publish a single threshold amount for settlements, judgments, awards or other payments for conditional payment obligations arising from each of liability insurance (including self-insurance), workers' compensation laws or plans, and no fault insurance for that year. Each such annual single threshold amount for a year shall equal the expected average cost of collection incurred by the United States (including payments made to contractors) for a conditional payment from each of liability insurance (including self-insurance), workers' compensation laws or plans, and no fault insurance.

$1,000 Mandatory Insurer Reporting Penalty Now Optional

Regarding the $1,000 mandatory insurer reporting penalty, the bill again proposes to replace “shall be subject” with “may be subject” to a civil money penalty of up to $1,000 for each day of noncompliance. The previously proposed language that “severity of each such penalty shall be based on the knowing, willful, and repeated nature of the violation” is gone. Instead, the bill indicates that the Secretary will publish a notice in the Federal Register soliciting proposals for the specification of practices for which sanctions will not be imposed, including for good faith efforts to identify a beneficiary. After considering the proposals submitted, the Secretary, in consultation with the Attorney General, shall publish in the Federal Register proposed specified practices for which such sanctions will not be imposed. After considering any public comments, the Secretary shall issue final rules specifying such practices.

Continued, Page12.

"SMART Act," from page 11.

Social Security and Health Identification Numbers Now Optional

The bill also retains the prior proposal that the Secretary will modify the reporting requirements so that an applicable plan in complying with such requirements is permitted, but not required, to access or report to the Secretary beneficiary social security account numbers or health identification claim numbers.

Three Year Statute of Limitations for Conditional Payments Reimbursement

Last, the bill once again proposes a statute of limitations by indicating that an action may not be brought by the United States with respect to payment owed unless the complaint is filed not later than 3 years after the date of the receipt of notice of a settlement, judgment, award, or other payment made.

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* Rafael is currently Director of Medicare Compliance and Post Settlement Administration at Gould & Lamb, LLC in Bradenton, Florida. As Director, he oversees Gould & Lamb's national and international Medicare compliance efforts, including post-settlement self-administration and professional administration services of MSA and SNT funds. Since 1993, Rafael has published numerous articles, book chapters, and books, including his series on Workers' Compensation, Permanent Total Disability, Social Security Disability, and Medicare Set Asides. Since 2000, he has also taught workers' compensation and social security disability, and Medicare/Medicaid law at the FSU College of Law, Stetson University College of Law, USF Department of Vocational Rehabilitation, USF Department of Occupational Medicine, USF College of Public Health, and the University of Tampa.

Did you know?

The National Association of Workers' Compensation Judiciary has undertaken a study of procedural distinctions among the various jurisdictions. Under the leadership of President-Elect David Torrey of Pennsylvania's Department of Labor and Industry, a survey has been prepared and published. This will be the initial step in gathering comparative data regarding the processes in the various jurisdictions. It is hoped that the results from this survey will provide a foundation from which the NAWCJ can build and publish a database comparing various jurisdictions. The survey was provided to attendees at the 2012 Judiciary College in Orlando, and is reprinted on pages 19-22 of this edition. Please take a few moments to complete the survey and then send it to us by email, facsimile or mail. The NAWCJ thanks you for your support and participation.

States that have responded:

Florida Kentucky Vermont

Interesting Quotes:

"Pleadings are supposed to be a road map – but not of all the roads in the world – but only how to get from Point A to Point B. Was this a road map? I think not, unless it be by Pablo Picasso" National Trust Co. v. Furbacher, [1994] O.J. No. 2385 at para. 15 (Gen Div.), per Farley J.

"The court cannot determine the substance, in any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant's motion is accordingly denied for being incomprehensible." In re King, Case No. 05-56485-C, Feb. 21, 2006.

South Carolina Supreme Court Calls for Change in Determination of Mental Injury Compensability

By: Hon. David Langham

In Bentley v. Spartanburg County, (Opinion No. 27140, July 2012), a police officer sought workers compensation benefits for mental injury following an incident in which he shot a man, who had threatened him with an umbrella. The South Carolina Court affirmed the Workers' Compensation Commission conclusion that mental stress in this context was not compensable under the South Carolina statute. The Court began by noting that South Carolina's law "is liberally construed toward the end of providing coverage rather than denying coverage in order to further the beneficial purposes for which it was designed," and that "Any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." Citations omitted. With this foundational context, the Court reviewed the denial of compensability in this instance, despite the presumption of providing coverage.

The Court analyzed section 42-1-16- of the South Carolina Code and concluded that the standard which this section establishes is akin to a "heart attack standard:"

> Mental or nervous disorders resulting from either physical or emotional stimuli are equally compensable provided the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. (Citation omitted).

The Commissioner had concluded that the deputies' shooting and killing of a civilian who "raised his umbrella in an 'offensive posture'" and who "threatened to take Appellant's gun and kill him" was not compensable. The Commissioner denial was premised on the conclusion that deputy sheriffs are trained to use deadly force, and this sheriff "admitted he knew he would sometimes be required to use deadly force" in his employment. The Court concluded that the facts of this case, and South Carolina's law supported affirming of the Commissioners conclusion.

So, as with heart attack claims, mental disorders are compensable in South Carolina if "induced by unexpected strain or overexertion in the performance of his duties of employment, or by *unusual and extraordinary* conditions in employment," but if suffered "as a consequence of ordinary exertion that is required in performance of employment duties in an ordinary and usual manner, and without any untoward event, it is not compensable."

The Court then expounds on the history and evolution of mental worker's compensation injuries:

> Some context regarding the evolution of mental damages in workers' compensation will illuminate the framework which necessarily binds this Court in resolving this case. As set forth by Professor Larson in his treatise on workers' compensation, work-related injuries fall into three categories: 1) mental stimulus causing physical injuries (mental-physical injuries), 2) physical stimulus causing mental injuries (physical-mental injuries), and 3) mental stimulus causing mental injuries (mental-mental injuries). Arthur Larson, *Larson's Workers' Compensation Law* § 56.06[3] (2011). Historically, given the suspicion surrounding mental injuries, courts and legislatures refused to award compensation for mental injuries, or if they did, required that covered mental injuries be accompanied by a physical manifestation. *See id.* at § 56.06[1][b]. A majority of states now recognize the compensability of purely mental-mental injuries, injuries without accompanying physical manifestation, although a large number of states, including South Carolina, place heightened restrictions on recovery by requiring that the precipitating stressor be unusual and extraordinary compared with normal working conditions. (footnote text: "Larson indicated that at least 29 states now recognize mental-mental injuries. Larson, *supra*, at § 56.06[3].") . *Id.* at § 56.06[3]; *Stokes v. First Nat'l Bank*, 306 S.C. 46, 410 S.E.2d 248 (1991); *Davis v. Workmen's Comp. Appeal Bd.*, 751 A.2d 168, 170 (Pa. 2000) (denying workers' compensation to police officer suffering from PSTD because encountering traumatic events was normal for a police officer).

The Court, although it affirmed the Commissioner's conclusion that this incident is not compensable, signaled its reluctance, noting "we are *constrained* to decide this case according to the standard mandated by the General Assembly."

Continued, Page 14

South Carolina, from Page 13.

It continued with its "opinion that this standard should be updated to account for the scientific and technological progress in medicine and psychology."

> Historically, a lack of understanding about mental-mental injuries fueled the negative reaction toward allowing recovery. The traditional justifications for imposing barriers to recovery were that claims for mental-mental injuries were easier to falsify than claims for physical injuries, and any recovery for mental anguish damages must be limited with bright line rules lest the courts be flooded with litigation. *See* Frances C. Slusarz, *Work Place Stress Claims Resulting from September 11th*, 18 Lab. Law. 137 (Fall 2002); Jon L. Gillum, Note, *Fear of Disease in Another Person: Assessing the Merits of an Emerging Tort Claim*, 79 Tex. L. Rev. 227 (Nov. 2000). However, those in favor of allowing broader recovery point out that advances in medical science have made it easier for medical professionals to diagnose and verify the validity of mental injuries, enabling courts to weed out fraudulent claims. *See Towns v. Anderson*, 579 P.2d 1163 (1978) (finding that "the medical profession has made tremendous advances in diagnosing and evaluating emotional and mental injuries. While psychiatry and psychology may not be exact sciences, they can now provide sufficiently reliable information concerning causation and treatment of psychic injuries, to provide a jury with an intelligent basis for evaluating a particular claim."); *Eckenrode v. Life of Am. Ins. Co.*, 470 F.2d 1, 3 (7th Cir. 1972) (citation omitted) (stating that mental anguish can be diagnosed and verified by health professionals). In addition, proponents note that claims of physical injury, especially in relation to damages for pain and suffering, can be as susceptible to fraud as mental-mental injuries, rendering it illogical to allow recovery for one while denying it for the other. *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813, 821 (Cal. 1980) (noting the rule requiring mental injury be accompanied by physical injuries "encourages extravagant pleading and distorted testimony" by claimants trying to fit their emotional anguish claims into the physical injury framework). We agree with these proponents for reform.

The Court's endorsement of these conclusions regarding the advances of psychiatric and psychological science does not clarify whether these conclusions were a matter of record in this proceeding or were the result of the Court's research and fact-finding.

From whatever basis in fact, the Court stated their conclusion that change in South Carolina's statute and compensability standard would not "result in a flood of litigation given the safeguards" built into the workers' compensation law. They conceded, however, that "California's experience has shown that liberalizing mental-mental recovery too broadly could indeed unintentionally unleash a flood of litigation that raises costs, burdens the courts, and unduly interferes with the hiring and firing of workers." (Citations omitted). The Court cautioned therefore, based upon their analysis of California decisional law, that

> South Carolina has not and should not allow recovery based on a claimant's subjective perception of stress as California did in 1982. *Id*. However, removing the requirement that the employment condition be unusual and extraordinary in order to recover is not the same as what was done in California, and would not result in a flood of litigation given the safeguards already built into section 42-1-160.

It remains unclear what empirical basis the Court has for its conclusions regarding the ultimate effects of statutory change. As the workers' compensation world witnesses statutory reform after reform across the nation, the appearance of unintended and unpredicted consequences of each seems to consistently surprise. Whether the appropriate action is reform or not, the Court's interpretation is certainly instructive on the subject of statutory construction.

Quote this:

Human progress is neither automatic nor inevitable... Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals.

Martin Luther King, Jr.

University Study Calls for Expanding Use of Prescription Drug Monitoring Programs

By Michael Whiteley, Eastern Bureau Chief

The PDMP Center of Excellence at Brandeis University is calling for a major expansion of state prescription drug monitoring programs (PDMPs) that would allow workers' compensation regulators and third-party payers to access the data and include drugs the states currently aren't tracking.

The PDMP Center, which launched in February 2010, on Friday released a white paper financed by the Pew Charitable Trusts. It calls for 35 "best practices" to help states cut down on the abuse of opioid painkillers and recommends that PDMPs expand their scope beyond the U.S. Drug Enforcement Administration's five schedules for controlled substances.

A PDMP is a database that allows doctors to check to see whether a patient has been prescribed drugs from another physician. The DEA ranks all controlled substances by potential for abuse. Schedule I drugs, for example, have no medical purpose and are banned. Schedule II drugs are considered to have a high potential for abuse and can cause severe psychological or physical dependence. Schedule V drugs have the lowest potential for abuse and are generally used to treat coughs or diarrhea or for analgesic purposes.

Although 49 states have passed legislation to establish PDMPs and 40 of them are up and running, only five of them require doctors to use the databases, the center said. The report also includes that many states limit drugs recorded in the PDMPs to only a few of the DEA's schedules.

The center stopped short of calling for laws to require doctors to consult the databases, but said mandates deserve further study. Legislation passed this year in Kentucky, Massachusetts, New Hampshire, New York and Tennessee will require doctors to check the databases before prescribing some controlled substances. "Our focus was on making the information available so that every state – all the stakeholders – can study the problems," John Eadie, the center's director, said in an interview on Monday. "We feel that law enforcement can and should be using these PDMPs, and they should also be available to third-party payers."

The center recommended that the state PDMPs:

- Collect data on all drugs being abused, regardless of whether they have been included on the DEA's schedules. The DEA, for example, lists benzodiazepine as a Schedule IV depressant, although the drug is mixed with opioids to create "drug cocktails." Ephedrine and pseudoephedrine, key ingredients of methamphetamine, are unscheduled in most states, the center said.
- Collect positive identification from the person picking up prescriptions for controlled substances. A study of Massachusetts' PDMP showed that the person dropping off or picking up a prescription for controlled substances was not the patient 38% of the time.
- Collect data on how the prescriptions are paid for – including all cash transactions. The center said only 13 states now require pharmacists to record and update methods of payment.
- Require "serialized" prescription forms to prevent doctor-shoppers from using counterfeit prescriptions. Only New York and Texas currently impose the requirement, although Texas requires serialized prescriptions only for Schedule II drugs.
- Adopt the latest reporting standards for PDMP data established by the American Society for Automation in Pharmacy (ASAP). As of February, five states were using the 2005 version of the ASAP, five were using the 2007 version, 13 were using the 2010 version and the remaining 17 were using older versions.

Continued, Page 16

"University Study," from Page 15

- Speed up reporting requirements for the nation's pharmacies. While Oklahoma now requires "real-time" reporting when pharmacies dispense controlled substances, only New York has enacted similar legislation. The center said most states require data to be entered once a week or once every two weeks.
- Link data on individual patients and doctors to include such items as disciplinary action taken against doctors and Medicaid payments to patients.
- Supply unsolicited reports on frequent drug users to doctors and law enforcement agencies. The Center said California, New York and Texas, which supply the reports, have lower than average death rates from unintended opioid overdoses.
- Broaden access for the PDMPs to law enforcement, workers' compensation regulators and third-party payers, including the nation's pharmacy benefit managers (PBMs).

Only Washington State supplies PDMP data to its workers' compensation regulators. Chris Baumgartner, director of Washington's Prescription Drug Monitoring Program, said the state launched its system last year and began providing monthly reports to the Washington Department of Labor & Industries earlier this year. Baumgartner said the state agency also is allowed to request information on specific injured workers.

Eadie said Washington records, which include Medicaid data, flagged a recipient who bought one controlled substance using Medicaid and purchased a second with cash the same day.

"We are advocating the use of data from a wide range of sources, including third-party payers. There's been some movement in that direction in recent years," Eadie said.

Joe Paduda, president of the pharmacy benefit management consortium CompPharma, said New York's PDMP expansion, called the Internet System for Tracking Over-Prescribing (I-STOP) Act, allows both pharmacies and PBMs to check data on patients receiving controlled substances. He said the legislation, signed into law by Gov. Andrew Cuomo in August, allows access by companies under contract to pharmacies. "PBMs should be collecting pharmacy data for claimants in a variety of states, because the PDMPs
currently don't have interstate operations, Paduda said. "The PBMs do." But Paduda said the Center of Excellence should have included a national mandate that doctors consult the databases.

The American Medical Association, which did not return a telephone call Monday, has opposed mandates in the past. "PDMPs are like a lot of public policy things. They don't start out very formally, use is not required and the things are underfunded," Paduda said. "As time goes on, people realize that requiring people to do things is the only way to get things done."

Kentucky passed legislation last session that requires doctors to access the Kentucky All-Schedule Prescription Electronic Reporting System (KASPER) before prescribing Schedule II drugs and all Schedule III drugs containing hydrocone. Eadie said the number of times doctors accessed the database jumped from 2,900 a day to 19,500 times per day beginning last month.

International insurance broker Lockton Companies reported last month that opioid abuse is having a significant impact on the nation's workers' compensation system. Lockton estimated that 55% to 86% of all workers' compensation claimants receive opioids for chronic pain relief. The broker said drugs account for 19% of all workers' compensation medical costs, and opioids account for a fourth of the money spent on drugs in the workers' compensation system.

Leigh Ann Pusey, president and CEO of the American Insurance Association said in a response to the center's report that insurers spend $25 billion a year to pay for drug abuse by enrollees. "In virtually all states, PDMPs are weakly structured and administered, with an absence of mandatory reporting by physicians and pharmacists, and generally no access for third-party payers," Pusey said. "The problem is further exacerbated by relaxed reporting periods that do not effectively restrict doctor-shopping for multiple prescriptions," she said.

The foregoing two pages are reprinted from Workcompcentral.com. The National Association of Workers' Compensation Judiciary acknowledges and thanks Workcompcentral.com for their commitment to the education of and collegiality among the various adjudicators of workers' compensation disputes across the country. Their gracious and continual support of the NAWCJ is appreciated.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR OR $195 FOR 3 YEARS. IF 5 OR MORE APPLICANTS FROM THE SAME ORGANIZATION, AGENCY OR TRIBUNAL JOIN AT THE SAME TIME, ANNUAL DUES ARE REDUCED TO $60 PER YEAR PER APPLICANT.

NAME: _____ **DATE:** ____/____/____

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_____

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HOW DID YOU LEARN ABOUT NAWCJ? _____

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DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

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IN WHAT WAY WOULD YOU BE MOST INTERESTED IN SERVING THE NAWCJ:

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Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@wci360.com

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR ASSOCIATE MEMBERSHIP

THE NAWCJ ASSOCIATE MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. ASSOCIATE MEMBERSHIP DUES ARE $250 PER YEAR.

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Tallahassee, FL 32302
850.425.8156
Email: kathy@wci360.com

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2013 NAWCJ Judicial College August 18 through 21, 2013, in Orlando, Florida. If you are interested in sponsoring any of the following:

WELCOME LUNCHEON PRIME SPONSOR

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850.425.8186
Email: cathy@wci360.com

2012 Comparative Analysis Survey

The National Association of Workers' Compensation Judiciary is undertaking this survey in an attempt to discern and assimilate some of the procedural distinctions between various workers' compensation jurisdictions. We appreciate you taking a few minutes to compete this survey. Please provide the completed form by email to Judge David Langham at david_langham@doah.state.fl.us or to Judge Ellen Lorenzen at Ellen_lorenzen@doah.state.fl.us.

I. Rules of Evidence

a. Does your jurisdiction require the use of an evidence code or standards to determine the admissibility of evidence and the rendering of decisions in disputed claims? YES/NO
b. Are your decisions bound (?) by Evidentiary written standards/rules? YES/NO
c. If yes, are those standards codified in your statute or code? YES/NO
d. If not codified , are those standards included in your procedural rules? YES/NO
e. Are they the same statutory evidence code used by your jurisdiction? Constitutional Courts (part of the judicial branch of state government)? YES/NO

II. Rules of Procedure

a. Do you have written procedural rules for workers' compensation proceedings? YES/NO
b. Are they the same procedural rules used by your jurisdiction's Constitutional Courts? YES/NO
c. If not, are they rules specifically promulgated for only Workers' Compensation Proceedings? YES/NO
d. If not, are they rules promulgated for all State Administrative Proceedings? YES/NO

III. Expert Medical Testimony

a. How often is expert medical testimony presented in workers' compensation proceedings in your jurisdiction:
   i. Live testimony? _____%
   ii. Telephonically? _____%
   iii. By deposition? _____%
   iv. By written reports or forms? _____%
b. Are medical records afforded any presumption of admissibility as evidence if they are from:
   i. Authorized doctors? YES/NO
   ii. Independent Medical Examiners (IME) doctors? YES/NO
   iii. Unauthorized treating physicians? YES/NO
c. Does your jurisdiction have a "judge –appointed" tie-breaking doctor process when the medical opinions of the physicians are in disagreement? YES/NO

IV. Other Expert Testimony

a. How often is other expert testimony (vocational or occupational) presented in your jurisdiction?
   i. Live? _____%
   ii. Telephonically? _____%
   iii. By deposition? _____%
   iv. By written report or form? _____%
b. Is testimony by non-medical experts common in your jurisdiction? YES/NO

Continued, Page 20.

Survey, from Page 19.

V. Ethics Codes

a. Do you have written code of ethics for workers' compensation adjudicators ? YES/NO
b. Do you have written code of ethics for workers' compensation commissioners? YES/NO/NA
c. Are they the same ethics codes used by your jurisdiction's Constitutional Courts? YES/NO
d. If not, are these codes specifically promulgated for only workers' compensation proceedings? YES/NO
e. If not, are they rules promulgated for all State Administrative Proceedings? YES/NO

VI. Appointment and Duration of Tenure (Board Commissioners)

a. To be a Commissioner in your jurisdiction,
   i. Are you elected? YES/NO/NA
   ii. Are you appointed? YES/NO/NA
      1. If so, by whom? _____.
   iii. What is the duration of appointment? _____ years.
   iv. Can you be removed "for cause" prior to the term expiring YES/NO/NA
   v. Is there a limit of how many terms you may serve YES/NO/NA
      1. If so, how many terms _____
   vi. Is there a maximum age for Commissioners? YES/NO/NA
      1. If so, what is the maximum age? _____.
   vii. (Optional) Salary Range per year: $ _____ to $ _____.

VII. Appointment and Duration of Tenure (Judges)

a. To be a Judge in your jurisdiction,
   i. Are you elected? YES/NO
   ii. Are you appointed? YES/NO
      1. If so, by whom? _____.
   iii. What is the duration of appointment? _____ years.
   iv. Can you be removed "for cause" prior to the term expiring? YES/NO
   v. Is there a limit of how many terms you may serve YES/NO
      1. If so, how many terms _____ .
      2. If not, do you have to apply for reappointment? YES/NO
   vi. Is there a maximum age for Judges? YES/NO
      1. If so, what is the maximum age? _____.
   vii. (Optional) Salary Range per year: $ _____ to $ _____.

VIII. Exclusivity (Judges)

a. Do workers' compensation adjudicators in your jurisdiction also hear other kinds of cases?
   i. Civil cases? YES/NO
   ii. Other Administrative Law cases? YES/NO
   iii. Others? _____.
b. Are attorney's fees payable to worker's attorneys subject to approval by an adjudicator or commission? YES/NO

Continued, Page 21.

Survey, from Page 20.

IX. Evaluation of Commissioners

a. Are Commissioners in your jurisdiction regularly evaluated? YES/NO
   i. By a state official? YES/NO
   ii. By a commission or panel? YES/NO
   iii. In some other way (please specify)? YES/NO

   _____.

b. Are there specific qualification or performance standards against which they are measured? YES/NO
   i. Are these statutory? YES/NO
   ii. Are these in rules? YES/NO
c. How often does evaluation occur? _____ .
d. Is evaluation only in conjunction with a reappointment process YES/NO

X. Evaluation of Judges

a. Are Judges in your jurisdiction regularly evaluated? YES/NO
   i. By a state official? YES/NO
   ii. By a commission or panel? YES/NO
   iii. In some other way (please specify)? YES/NO
b. Are there specific qualification or performance standards against which they are measured? YES/NO
   i. Are these statutory? YES/NO
   ii. Are these in rules? YES/NO
c. How often does evaluation occur? _____ .
d. Is evaluation only in conjunction with a reappointment process? YES/NO

XI. Compromise Settlements Procedures

a. Can an injured workers completely settle their entitlement to workers' compensation benefits in your jurisdiction? YES/NO
b. If yes, does settlement require judicial approval? YES/NO
c. If yes, does settlement require commissioner's approval? YES/NO
d. Is there any distinction made for approval between represented and unrepresented workers? YES/NO.
e. Do attorneys' fees payable or deducted out of settlement proceeds require approval? YES/NO
f. Do reimbursable costs deducted out of settlements proceeds require approval? YES/NO

XII. Fact Finding Power

a. Are adjudicators in your jurisdiction the ultimate finder of fact? YES/NO
   i. If not, who is? _____

XIII. Appellate Review Process

a. Do adjudicators in your jurisdiction author or draft:
   i. Proposed orders? YES/NO
   ii. Final orders? YES/NO
b. Are workers' compensation decisions in your jurisdiction reviewed by or appealed to:
   i. Commission or Review Board? YES/NO
   ii. Constitutional Court? YES/NO
   iii. How many potential levels of review are there? _____ .

Continued, Page 22.

XIV. Appellate Review Standards

a. Are workers' compensation decision/orders in your jurisdictions that are reviewed or appealed subject to:

i. Appellate deference *(decisions are affirmed if supported by competent substantial evidence)*? YES/NO

ii. De novo review? YES/NO

iii. Abuse of Discretion standard? YES/NO

Name *(optional)*: _____

Jurisdiction: _____

Phone (*optional)*: _____

E-mail *(optional:* _____

Comments/Suggestions: _____

_____

_____

_____

_____

_____

_____

THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

Law Student Writing Competition

Submissions are now being accepted for the 2012 College of Workers' Compensation Lawyers Law Student Writing Competition.

TOPIC: The scope of permissible topics is broad, i.e., any aspect of workers' compensation law. Students are encouraged to present:

- a public policy issue;
- a critique of a leading case or doctrine; or
- a comment on a statute or the need for a statutory modification.

ELIGIBILITY: All students currently enrolled in accredited law schools in the United States and all those recently graduated from them (graduation on or after May of 2012).

PRIZES:

First prize - $1,500, plus $1000 to winner's law school scholarship fund
Second prize - $1,000.00
Third prize - $500.00

The winner's article will also be considered for publication in the Workers' First Watch, The Workers' Injury Law and Advocacy Group (WILG) magazine, and the ABA Tort and Insurance Practice Section Law Journal. The winner will also be invited (expenses paid) to the Annual College Induction Dinner to be honored during the program.

Note to Law School Deans/Professors (extra incentive to distribute flyer/encourage entries): An additional $1,000 to the winning student's law school scholarship fund.

Continued, Page 24.

Announcing the College of Workers' Compensation Lawyers 2012 Annual Writing Contest for Law Students.

The Lex and Verum has been privileged to publish some exceptional essays by law students this year. The College of Workers' Compensation Lawyers conducts an annual essay contest.

The 2011 First Place essay, *Workers' Rights: Should Undocumented Mean Uncompensated*, was written by Amanda Jaret. Ms. Jaret was a third year law student at St. John's University School of Law when she produced this excellent article. It was republished in the July 2012 Lex and Verum. This article asserts that undocumented workers have been "massively exploited" by employers. Ms. Jaret addresses "one of the most challenging questions in worker's compensation, whether and to what extent undocumented workers may receive workers' compensation benefits."

Ms. Shelby Skeabeck authored *Cue The Lights: A Call to The Supreme Court And Congress to Shed Light on the Confusing Law in the DBA/Longshore Act Circuit Split. Ms. Skeabeck* was a third year law student at the Earle Mack School of Law at Drexel University in Philadelphia, Pennsylvania, when she produced this work. Ms. Skeabeck identifies conflict between the Defense Base Act and the Longshore Act. She argues that the Supreme Court should accept jurisdiction and rectify the conflict. She notes, however, that Congress and the Court are unresponsive to this conflict. This was republished in the June 2012 Lex and Verum.

Mr. Ian Hayes authored The Intoxication Defense and Addiction, placing third in the 2011 contest. It was republished in the May 2012 Lex and Verum. Mr. Hayes argues that "states should reconfigure the intoxication defense to give consideration to the unique role that addiction plays in some workers' lives." His review of the various standards adopted in the United States is informative and his arguments persuasive.

The College of Workers' Compensation Lawyers inducted its first class in March 2007.

> The College of Workers' Compensation Lawyers has been established to honor those attorneys who have distinguished themselves in their practice in the field of workers' compensation. Members have been nominated for the outstanding traits they have developed in their practice of twenty years, or longer, representing plaintiffs, defendants, serving as judges, or acting for the benefit of all in education, overseeing agencies and developing legislation. These individuals have convinced their peers, the bar, bench and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise and leadership. They have a commitment to fostering and furthering the objectives of the College and have shown significant evidence of scholarship, teaching, lecturing, and/or distinguished published writings on Workers' Compensation or related fields of law. In addition to these characteristics, a Fellow is expected to display the following traits in their day to day practice of workers' compensation and related fields:
>
> - A Fellow stands out to newer attorneys as a model of professionalism in deportment and advocacy;
> - A Fellow has earned the respect of the bench, opposing counsel and the community;
> - A Fellow displays civility in an adversarial relationship;
> - A Fellow avoids allowing ideological differences to affect civility in negotiations, litigation and other aspects of law practice;
> - A Fellow demonstrates an active interest in resolving issues;
> - A Fellow is a student of the law;
> - A Fellow has a thirst for knowledge in all areas of the law that affects their representation of their clients in Workers' Compensation or their duties in adjudicating cases brought before them;
> - A Fellow actively participates in the state, local and/or National Bar.

The College is now accepting submissions for the 2012 writing contest. Details are on the College website, http://www.cwclawyers.org/html/writing_contest.html, and on pages 24-25 of this edition.

The College of Workers' Compensation Lawyers 2012 Law Student Writing Competition Rules

1. Articles must be original from the applicant and limited to one entry. Articles must not presently be under consideration for any other publication or written as part of paid employment.
2. All articles are to be submitted in the following format:
   - Submitted by email (no author name in body of article, only in cover letter) to susan.wan@cwclawyers.org (Please reference "Writing Competition" in the subject line).
   - All articles are to be submitted by Jan. 15, 2013;
   - Double-spaced, on 8 ~ inch by 11 inch-paper, 1 inch margins;
   - Entries should be between 10 and 20 pages in length (including bottom of page footnotes);
   - Citations are to conform to "A Uniform System of Citation" (The Bluebook).
3. If published by the College, the articles become the property of the College. No submitted article may be published elsewhere until after announcement of the winners of the competition. Announcement of the winners will be made at least 30 days in advance of the Annual College Induction Dinner, Spring 2013.
4. Include a cover letter with your entry stating your name, mailing address and phone number (both school and permanent), name of school and year of graduation.
5. Applicant must be currently enrolled in an accredited law school or submit entry within 60 days of graduation.

Judging

The evaluation standards will be organization, quality of research, depth, originality of analysis, clarity of style and readability. The College reserves the right not to award and/or to reject any or all submissions.