Where does the time go? It is already June, yet it seems like the year just started. Over the next few months most of us will be very busy preparing, participating and presenting at various educational events and conferences. This very week, most, if not all, of the judges in Kentucky will be presenters at an annual seminar held in Louisville, and I know there are similar activities in many states over the coming few months. Good luck to each of you. I also look forward to participating in the upcoming judicial training in Tennessee.

Next, I recently attended a meeting of our conference committee regarding preparation for the 2015 NAWCJ Judiciary College to be held in Orlando, Florida. One item of particular interest will be the ability to download the college materials for use on a tablet or laptop in lieu of written materials. After registration, attendees will receive notification and download instructions. I recommend you download the materials prior to arrival in Orlando. Written materials will still be available upon request for those who want them.

Regarding the college, we are still in need of volunteers to participate in the annual E. Earle Zehmer Moot Court Competition. If you are going to attend the college, I encourage you to come a day early to participate in the event which is sponsored by the NAWCJ. If you would like to assist, you can contact Judge Tom Sculco at Thomas.Sculco@doah.state.fl.us, or Barbara Wagner at barbw@sportsinjurylaw.com. You can also contact me at michael.alvey@ky.gov. Thanks in advance for agreeing to assist in this worthy endeavor.

Finally, if you have news, announcements, or items from interest from your state, I encourage you to forward such items to Hon. LuAnn Haley at LuAnn.Haley@Azica.gov for inclusion in the Lex & Verum. Thanks for all you do.
Congratulations
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The National Law Student Writing Competition is sponsored by The College of Workers’ Compensation Lawyers (CWCL). NAWCJ members who have been inducted into the CWCL include Judge Michael Alvey (Kentucky), Commission Chair R. Karl Aumann (Maryland), Judge Melodie Belcher (Georgia), Judge Luann Haley (Arizona), Judge Sheral Kellar (Louisiana), Judge David Langham (Florida), Judge John Lazzara (Florida), Judge Deneise Turner Lott (Mississippi), Commissioner Dwight Lovan (Kentucky), Commissioner Wesley Marshall (Virginia), Judge Maureen (Mikki) McGovern (Iowa) and Judge James Sarkisian (Indiana), Judge James Szablewicz (Virginia), Judge David B. Torrey (Pennsylvania), and Commission Chair Roger Williams (Virginia)

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That got your attention. If we had asked for volunteers in the headline, you would have skipped this article. After all, you have heard the pleas before, “We need volunteers. Join us for the Nth Annual Fill-in-the-Blank Moot Court Competition.” Why is this one different?

More than 25 years ago, at the precursor to the Workers’ Compensation Educational Conference, a breakout session on effective oral argument in workers’ compensation cases was presented. From this humble beginning, the leadership and dedication of attorneys Tracey Hyde, Jacqueline Blanton Steele, Richard Sicking, Barbara Wagner, and Mark Zientz resulted in The E. Earle Zehmer Moot Court Competition.

E. Earle Zehmer was a chief judge of Florida’s First District Court of Appeals, the district responsible for hearing appeals of Florida workers’ compensation cases. Judge Zehmer was an avid supporter of the competition, and upon his untimely death in 1996, the competition was named in his honor.

After submitting written briefs, twenty teams from across the country converge in Orlando to present arguments both on-brief and off-brief in a fictional workers’ compensation case; last year’s teams hailed from Kentucky, Michigan, Mississippi, North Carolina, Pennsylvania, South Carolina, Texas, Virginia, and Florida. The field is narrowed down to eight teams who advance to the quarterfinals. The quarterfinals winners advance to the semi-final round the next day, and the final round, a single elimination round that same afternoon, is presided over by judges from Florida’s First District Court of Appeal.

This competition is the only one in the country that focuses every year on cutting-edge workers’ compensation issues, and although the competition is held in Florida, that does not mean the problem is a Florida case. To the contrary, the issues frequently address fundamental comp concepts applicable in multiple jurisdictions such as unwitnessed accidents, presumptions, and expert testimony. No matter what issues are raised in this year’s case, they will force you to look at the work you do with a new perspective.

In addition, although it is not uncommon to hear moot court volunteer-judges comment that listening to excited law students argue a case on appeal renews their own sense of excitement about the work they do, in this competition, you witness the future of workers’ comp. As a workers’ comp adjudicator, this competition is your chance to mold that future by providing beneficial encouragement and constructive comments about litigating workers’ comp cases. It is not uncommon for competitors to receive employment offers from comp firms based upon their performances at this event. Why wouldn’t you want to be part of such an incredible experience?

This competition also is the only one in the country judged solely by workers’ comp adjudicators. This year, preliminary rounds will be held on August 23 in the Orlando Marriott World Center, but we are looking for volunteers now. In order to give the participants the best experience possible, we need more than 30 judges, and that means we need your help.

Come to Orlando the day before the NAWCJ Judicial College starts. Enjoy a free lunch (See that, you actually do get something free!) Volunteer to judge the E. Earle Zehmer Moot Court Competition. Send your contact information to Barbara Wagner at barbw@sportsinjurylaw.com today.

Judge Melissa Lin Jones adjudicates workers’ compensation appeals as an administrative appeals judge for the D.C. Department of Employment Services, Compensation Review Board. Previously, she served the D.C. Department of Employment Services, Office of Hearings and Adjudication, Administrative Hearings Division as an administrative law judge. She is a speaker at the NAWCJ Judiciary College and her complete biography is on page 37.
“The life of the law has not been logic; it has been experience . . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

Prior to the advent of workers’ compensation, general tort law principles—supplemented by a few extraordinary doctrines—governed industrial accident cases. Foremost among these doctrines were the notorious “three evil sisters:” contributory negligence, assumption of risk, and the fellow servant rule. Despite numerous legislative and judicial reform efforts, the latter doctrine prevented injured workers from suing their employers in a great number of industrial accident cases. Today, many jurisdictions have abandoned the rule entirely. In others, the fellow servant rule’s continuing viability remains an open question. For this reason, one scholar has likened the rule to “a mastodon preserved in a glacier.”

This article discusses the common law fellow servant rule’s birth in the mid nineteenth century, its evolution throughout America’s second industrial revolution, and its descent into relative obscurity following the enactment of state workers’ compensation laws.

I. The Fellow Servant Rule

The fellow servant rule provides that a master is not liable for an injury to a servant caused by the negligence of a co-employee or fellow-workman. To constitute “fellow servants,” employees need not be engaged in identical work, or even engaged in work at the same time. Rather, it is sufficient that they are in the employment of the same master, engaged in the same common work, and performing duties for the same general purpose.

The doctrine reflects the idea that one who enters into the service of another assumes all of the ordinary risks of his or her employment, including the negligent acts of fellow-workmen. The predominant justification for the fellow servant rule is that an employee is in as good of a position as the employer to evaluate the deficiencies of fellow employees, and to guard against them.

The fellow servant rule was born in England in 1837 when it was first pronounced by Lord Abinger in Priestley v. Fowler. In that case, Fowler, a butcher, ordered his assistant, Priestley, to make deliveries in an overloaded van driven by another assistant. When the van capsized, fracturing Priestley’s leg, Priestley sued his master for damages and won; the master appealed. Lord Abinger’s opinion in Priestley rested primarily upon public policy concerns. In this regard, Abinger explained, “diligence and caution . . . are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.” Lord Abinger imagined a draconian future that would ensue if masters were to be held liable for the negligent acts of their servants.

The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.
Just four years after Priestley, the fellow servant rule had traversed the Atlantic Ocean, and embedded itself within America’s common law. Many courts evidently considered adoption of the fellow servant rule to be inevitable. For example, although the Pennsylvania Supreme Court had not yet adopted the fellow servant rule in 1853, a Pennsylvania trial court held that a master’s liability for injuries caused by the negligence of a fellow workman could “s scarcely be regarded as an open question; for other Courts, of the highest respectability . . . have considered and decided it.”

Indeed, the fellow servant rule appears to have been so deeply rooted within our jurisprudence that many courts found it unnecessary to discuss (or even to cite), the authorities upon which it originated. By 1866 the Pennsylvania Supreme Court described the fellow servant rule as follows:

The case presented by this report is to be determined by the application of rules now too well established to require an elaborate statement of the reasons on which they are founded or an extended examination of the authorities by which they are supported.

Nevertheless, the Pennsylvania Supreme Court appears to have first embraced the rule in 1854. In Ryan v. Cumberland Valley R.R. Co., the defendant-employer (Cumberland) hired Ryan to make repairs to its railroad. Ryan, along with his fellow employees, was required to ride in a gravel train car to get from one area to another within the jobsite. Ryan was injured when the incorrectly “hooked” gravel train car that he was riding in overturned. In his suit against Cumberland, Ryan argued that Cumberland had a duty—by way of its engineers and/or conductors—to ensure that all railroad cars were properly attached before departing.

The Supreme Court affirmed the jury’s verdict in favor of Cumberland and, in doing so, conclusively held that “where several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible.” The court acknowledged that the issue presented by Ryan was one of first impression, but noted that a near-consensus, in favor of the fellow servant rule, was evident. The litany of support for the rule in other jurisdictions evidently led the court to adopt it without hesitation. In fact, the court noted that it could discern only one case that had rejected the rule.

The Ryan court also discussed several public policy justifications behind its adoption of the fellow servant rule. First, the court speculated that imposing liability upon employers would render certain classes of workers essentially unemployable. The court also worried that employers would, under the threat of vicarious liability, simply contract around the law to indemnify themselves. Lastly, the court was troubled that holding employers liable for the negligent acts of their servants would burden the courts with excessive litigation.

II. The Vice-Principal Exception

Although the fellow servant rule was widely adopted by American courts, several jurisdictions created exceptions to the rule. At least in part due to this steady erosion of the fellow servant rule throughout the nineteenth century, the law of industrial accidents had become, in the words of one New York lawyer, a “hodge podge” of inconsistent and contradictory rules and standards.

Pennsylvania courts, from an early point, recognized a narrow “vice-principal” exception to the fellow servant rule. The exception is based upon the theory that a master always owes certain absolute duties to his servants, which the master can only relieve himself of by performance. For example, a master owes a duty to his employees to provide a reasonably safe place to work, and to provide only reasonably safe instruments, tools, and machinery. Should a master delegate one or more of these absolute obligations to an agent, that agent stands in the place of his principal, and the latter is responsible for the acts of the agent.

In 1875, the Pennsylvania Supreme Court announced this earliest exception to the fellow servant rule in Mullan v. Philadelphia & Southern Mail S.S. Co. There, the court reasoned, “Where the employer leaves [everything] in the hands of a middle-man, reserving to himself no discretion, then the middle-man’s negligence is the master’s negligence, for which the latter is liable.” Pursuant to this doctrine, a master is liable for the negligence of its agent when the former places complete control of the business—or a distinct branch of it—in the hands of an agent or subordinate who exercises no discretion or oversight of his own.
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The plaintiff in *Mullan* was injured while docking and unloading cargo ships on the Delaware River. At the time of the incident, Mullan was raising two tierces of rice by a rope. The rope, which had been spliced, pulled apart at the connection. One of the tierces fell onto the vessel, crushing Mullan’s arm so severely that it required amputation. Mullan sued his employer, alleging that his injury was caused by “the head stevedore’s” failure to inspect and/or properly splice the rope. Mullan further contended that the fellow servant rule was inapplicable to the facts of his case because the head stevedore was in a position superior to him, and, therefore was not a fellow servant.

On appeal, the Pennsylvania Supreme Court held that:

The principle that the master is exempt from responsibility to the servant for injuries received from the ordinary dangers of his employment, including the negligence of his fellow servants, is too deeply imbedded in our law to be disturbed. But where a master places the entire charge of his business, or a distinct branch of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect by the agent of ordinary care in supplying and maintaining suitable instrumentalities for the work required, is a breach of duty for which the master should be held answerable. The negligence of the agent, with such powers, becomes the negligence of the master.

The narrow exception announced in *Mullan* was subsequently extended in *Lewis v. Seifert*.

In that case, Seifert, a railroad engineer, was injured when his train collided with a train heading in the opposite direction. The collision occurred due to the negligence of the company’s train dispatcher, who informed both trains (via telegram) that they each had the right of way. Seifert sued the train company, contending that the company was liable for the negligence of its train dispatcher.

On appeal, the issue before the Pennsylvania Supreme Court, thus, became “whether the train dispatcher, was a fellow-workman with [Seifert].” In what appears to be the earliest explicit statement of the vice-principal exception in Pennsylvania, the *Seifert* court stated:

It is very plain that it was the duty of the defendant company, as between said company and its employes, to provide a reasonably good and safe road, and reasonably safe and good cars, locomotives, and machinery, for operating its road.

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It is equally clear that it was its duty to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty, which the company owed its employes, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employe. It would be a monstrous doctrine to hold that a railroad company could frame such schedules as would inevitably, or even probably, result in collisions and loss of life. This is a personal, positive duty, and, while a corporation is compelled to act through agents, yet the agents, in performing duties of this character, stand in the place of and represent the principal. In other words, they are vice-principals.  

Four years later, in Ross v. Walker, the Plaintiff (Ross) was injured when he fell from scaffolding while working on the construction of an iron bridge. Ross sued his employer (Walker) in tort, alleging that the worksite foreman (Duffy) was negligent in selecting the timber that was used to build the scaffolding. Ross further argued that Walker was liable for Duffy’s negligence because: (1) Walker had an absolute duty to provide safe equipment/materials, and (2) Walker had delegated that duty to Duffy (a vice-principal).

The Pennsylvania Supreme Court described the narrow confines of the vice-principal exception as follows:

It is thus apparent that, whenever it is sought to hold the master liable for the act or neglect of his foreman, the question to be first considered is whether the negligence complained of relates to anything which it was the duty of the principal to do. If it does, then the principal is liable, for he must see at his peril that his own obligations to his workmen are properly discharged. If it does not, he is not liable, for all his workmen are liable to each other for the consequences of their negligence, respectively, and he does not insure them against each other by the mere fact of employing them.

Therefore, even though Duffy was clearly employed in a supervisory position, Ross’s claim did not fall within the scope of the vice-principal exception. The court reached this conclusion based upon its determination that Walker did not have an absolute duty to “supervise the selection of every stick” that was used in the construction of the scaffolding, and therefore could not have delegated such a duty to Duffy.

III. The Casey Act

In 1907, the Pennsylvania legislature passed the Casey Act, which made the common law fellow servant rule inapplicable in a number of specific instances. Section One of the Casey Act provided that the negligence of a fellow servant shall not be a defense (in actions brought against an employer for injury suffered by his employee) where the injury was caused or contributed to by any of the following:
1) any defect in the works, plant, or machinery, of which the employer could have had knowledge by the exercise of ordinary care;
2) the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant, or machinery;
3) the negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death;
4) the negligence of any person to whose orders the employee was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted;
5) the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.38

Importantly, the burden was on the plaintiff to demonstrate that his or her injury resulted from one of the above causes.39 Section Two of the Casey Act, meanwhile, stated that “[t]he manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employees.”40

Of course, as discussed above, prior to the Casey Act, Pennsylvania courts recognized a limited “vice-principal” exception to the fellow servant rule.41 The master was liable to a servant only for injuries caused by the negligence of a person that the master had delegated an absolute duty to. The Casey Act, therefore, expanded the vice-principal exception to include several categories of vice-principals; including managers, foremen, and other “persons in charge.”

On its face, Section Two of the Act appears, as a matter of law, to create a principal/agent relationship between employers and specific categories of “person[s] in charge.”42 But, despite Section Two’s seemingly expansive language, Pennsylvania courts appear to have universally interpreted the Act narrowly.

In Feeney v. Abelson,43 for example, a junkyard employee was injured while attempting to move a large steel beam with the assistance of two other employees, one of whom was the junkyard foreman. A team of horses was hitched to one end of the steel beam, with the foreman “driving” the horses. According to the plaintiff, the foreman directed the plaintiff to let go of the steel beam, and before he could get out of the way, the foreman “started” the horses. The plaintiff suffered leg injuries, and subsequently sued his employer in tort. Specifically, the plaintiff averred that the foreman was negligent in “start[ing] the horses suddenly before the plaintiff could step aside from danger.”44 A jury returned a verdict in favor of the plaintiff.

The Pennsylvania Superior Court reversed the trial court, and entered judgment in favor of the defendant-employer. With respect to the Casey Act, the court stated:

It was not intended that liability should be created except in the case of results happening through the exercise of superintendency. The consequences of the negligence of the persons of the classes named are visited on the employer because such negligence is that of a representative of the employer – the vice principal as to the particular transaction. The statute does not cover the case of coemployees engaged in the accomplishment of a common object where the negligence of one results in injury to another.45

Continued, Page 10.
Similarly, in *Reiser v. Electric Co.*, the plaintiff, one of several employees, was engaged in the erection of fifty-foot electric poles, one of which fell upon him causing injury. During the process of raising the pole it was the duty of one of the men to assist in holding the pole in position with hooks fastened to the pole. When the pole fell, the foreman was operating the cant-hooks. Notably, the evidence presented at trial showed that the foreman did not usually attend to this duty. The jury, nevertheless, found that the plaintiff was injured due to the foreman’s negligence, and rendered its verdict against the defendant, as the employer of the foreman.

The Pennsylvania Supreme Court reversed the judgment entered against the employer, reasoning that the foreman was acting merely as a fellow workman, rather than as a superintendent, at the time of plaintiff’s injury. The court further explained that the accident:

- did not occur while [the foreman] was engaged in the discharge of any duty which was in its nature that of superintendence; but it did occur while he was engaged in a bit of manual labor with the other men, in an effort to accomplish an object, which all were uniting to bring about. . . . The theory that the pole fell because of anything which [the foreman] did seems to us to have been based on nothing more than conjecture. But if the action of [the foreman] had anything to do with it, clearly it was while he was engaged as a fellow workman, assisting in the work which the men were doing in common; and it cannot, under the evidence, be fairly connected with anything in the line of superintendence.

As exemplified by these two cases, Pennsylvania courts often took a narrow view of the Casey Act. Effectively, an employer would not be liable for the negligence of a manager or foreman who, at the time of the injury, was engaging in any degree of manual labor. As such, the traditional fellow servant rule was frequently at issue in cases involving injured employees even after the passage of the Casey Act.

The cases in which plaintiffs successfully invoked the Casey Act’s exceptions to the fellow servant rule often involved extraordinary circumstances where clear authority over the business had been delegated to a foreman/superintendent. Such cases remained ostensibly rare. Employees were logically far more likely to be injured by a co-employee who was “assisting in the work which the men were doing in common” than by one engaging in the duties of his superior position. Indeed, an employer seeking to avoid being held vicariously liable for the negligence of its employees needed only to avoid establishing work arrangements that fell within the limited prescriptions of the Act.

Although the Casey Act was intended to mitigate the harshness of the common law fellow servant rule, injured employees often found themselves outside of the narrow confines of the statute (as interpreted by Pennsylvania courts). Pursuant to case law, a plaintiff had the burden to demonstrate that the negligent party was a vice-principal under the Act, and also that he or she was executing an “act of superintendence” at the time of the negligent act. Stated differently, the mere fact that an employee was injured as a result of a negligent foreman, manager, or superintendent, was insufficient to except them from the traditional fellow servant rule.
Francis Feehan, a United Mine Workers local president and one of the members of Pennsylvania’s Industrial Accidents Commission, discussed the import of Casey in a 1915 speech. Mr. Feehan noted that, at first, the law was a great disappointment. Yet, in the months before the enactment of the Workmen’s Compensation Act, the Casey Act evidently had an effect on employer liability—to the point that some employers were now in favor of enacting workers’ compensation:

During the 1907 session of our state legislature a number of labor men assembled in Harrisburg and there we made our first strenuous effort to secure the passage of a liability law. We had hoped that if we were successful in securing a liability law, at a later session we would secure a compensation law . . .

The bill became a law . . . . We discovered, much to our disappointment, that what we thought we had, we did not have. The court had practically restored to the employer all the defenses that we thought were taken away. For several years we could not recover under the present law, which is known as the “Casey employers’ liability act.” But quite recently the courts have become very liberal in their consideration of this law and the large amounts of damages that are being recovered are a surprise to many employees . . .

Of course there are numerous other cases where smaller amounts have been recovered. But in the western part of our state . . . the attorneys have been meeting with so much success recently due to the liberal interpretation placed on this law by the courts that they are extremely anxious to get cases, and take them on a small percentage basis.

I merely make reference to this point to show you that employers who have been recently taking cases to court are becoming the most active advocates of the passage of a workmen’s compensation law.52

In any event, the Casey Act was rendered moot – in the vast majority of cases – in 1915, with the passage of Pennsylvania’s Workers’ Compensation Act.53 Decades later, in 1983, the Pennsylvania General Assembly finally repealed the Casey Act.

IV. Conclusion: Does the Fellow Servant Rule Survive Today?

At first blush, one might assume that the enactment of the Pennsylvania Workers’ Compensation Act brought with it the demise of the fellow servant rule in Pennsylvania.54 While the proverbial “grand bargain” did preclude application of the rule in the vast majority of cases, the fellow servant rule lives on, waiting to be invoked in the infrequent case when an injured employee does not fall within the scope of the Pennsylvania Workers’ Compensation Act.55

The Pennsylvania Superior Court had occasion to address the vestiges of Pennsylvania’s fellow servant rule in 1973. In Allen v. Leshner,56 the plaintiff (Allen) was employed by the defendants as a live-in nursing companion for their bedridden mother. The defendants gave Allen a week’s vacation from her duties in August 1965. The defendants hired a temporary caregiver to undertake Allen’s usual duties while she was on vacation. On the morning that Allen returned to the defendants’ home, she and her temporary replacement were both present. Allen’s substitute was ironing in the basement of the residence, while Allen was upstairs tending to the needs of her patient.

Allen subsequently smelled smoke emitting from the basement and darted downstairs to discover that a fire had broken out in the area where the temporary caregiver had previously been ironing. Allen, who suffered injury in the effort, sued her employer in tort, alleging that she suffered severe burns due to the negligence of her temporary replacement. Because both parties agreed that Allen was not covered by the Pennsylvania Workers’ Compensation Act,57 the trial court granted a compulsory nonsuit against Allen, reasoning that the fellow servant rule prevented relief.
On appeal, the Superior Court reversed and remanded, finding that a question of fact existed as to whether Allen and her temporary substitute were fellow servants. Nevertheless, the Allen Court did acknowledge that the fellow servant rule remains a viable defense in cases that are excluded from the Workers’ Compensation Act.

In those states that have not explicitly overturned the fellow servant rule, either by statute or common law ruling, its continuing viability remains an open question. Because state workers’ compensation acts eliminated the “three evil sisters” for cases falling within the scope of the law, the fellow servant rule is rarely raised as a defense in litigation. Similarly, both the Federal Employers’ Liability Act, and the Jones Act have abolished the fellow servant rule with respect to railroad and maritime workers, respectively. Nevertheless, some employers are exempt from their state’s workers’ compensation act, and are not subject to an alternative statutory regime.

Some courts have acknowledged that the fellow servant rule still remains an enigma, but have failed to provide any clear guidance on the issue. In contrast, the venerable Judge Richard Posner has expressed deep skepticism that any modern court would construe the doctrine broadly. Perhaps a unique case that both implicates the doctrine, yet falls outside the scope of the workers’ compensation system, is looming. Until then, it is unclear precisely what remains of this harsh work accident rule of a bygone era.

Endnotes on pages 47-48.

* Lawrence D. McIntyre, J.D. has just graduated from the University of Pittsburgh School of Law (May 8, 2015). He was Lead Research Editor for the Pittsburgh Journal of Technology Law and Policy, and will be a Law Clerk to the Honorable David N. Wecht, Superior Court of Pennsylvania.
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What can we take from the ProPublica/NPR investigative reports on Workers’ Compensation?

By Terry Bogyo*

The ProPublica/NPR investigative reports\(^1\) have highlighted what is wrong with workers’ compensation. Make no mistake; there is much to criticize among the US and Canadian workers’ compensation systems. Does that mean we should throw out the current systems and start again?

Marjorie Baldwin, (Professor, Arizona State University, and Chair of the Study Panel on Workers’ Compensation Data of the National Academy of Social Insurance (NASI.org)) recently responded to the main issues highlighted by this investigation. Her post, “Workers’ Compensation: Critical Questions, Elusive Answers\(^2\)” addresses some of the obvious issues. The journalistic approach of focusing on individuals to illustrate the issues effectively shines a light on vivid examples of poor benefits, bad adjudication and abusive processes that re-victimize the victims of work-related injuries, illness, and disease. The scholarly examination of underlying policies at the root of these failures may not grab headlines but it is critical to public policy development. Headlines don’t tell the whole story. Professor Baldwin’s point that stakeholders need “a more informative accounting of how the system performs” succinctly summarizes both what is needed and what has been missing from much of the discussion.

It is not that there isn’t good information out there. The NASI report on *Workers’ Compensation: Benefits, Coverage and Costs 2012*\(^3\) provides a starting point. The AWCBC Key Statistical Measures\(^4\) provides similar data for the Canadian workers’ compensation jurisdictions. The work by IAIABC and WCRI to provide objective data on the *Workers’ Compensation Laws*\(^5\) that ultimately determine the benefits, costs and coverage on both sides of the border is another important information resource.

And it’s not as if there is no objective yardstick on what a workers’ compensation system ought to do. The 1972 *Report of the National Commission on State Workmen’s Compensation Laws*\(^6\) made recommendations that provide clear guidance. ProPublica/NPR journalists the National Commission’s recommendations to design workers’ compensation laws; public policy analysts in Canada, the US and other countries often take the measure of workers’ compensation systems using the National Commission’s recommendations.

Objective assessment of systems’ performance against those recommendations reveals two things. The first is the point of the ProPublica/NPR reports: Worker’s compensation is failing in some states. The second point is really the corollary. Despite the poor performance of some jurisdictions, there are workers’ compensation systems that are providing benefits that meet or exceed most of the recommendations of the National Commission.

Workers’ compensation is not one “system.” There are more than sixty North American jurisdictional attempts at fulfilling a common social policy objective that is the foundation of the Grand Bargain, the Historic Compromise. It is plainly wrong to extrapolate grievous failings from a few jurisdictions to every workers’ compensation system.

Yes, there are failures. Workers’ were promised compensation for work-related injuries but there are jurisdictions where between a third and a half of all workers with lost-time work-place injuries are entitled to no compensation for lost wages—and that does not take into account the issue of claims suppression and under-reporting. Large proportions of the labour force—particularly agricultural workers and domestics—are excluded from coverage in some jurisdictions. Middle-to-high wage earners may have less than half their earnings unprotected by workers’ compensation insurance in states/provinces with low maximum benefits and very low indemnity rates. These inequities are not only unjust, they undermine the social contract and threaten the social policy (and possibly legal) basis of the “exclusive remedy.”

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\(^1\) The ProPublica/NPR investigative reports have highlighted what is wrong with workers’ compensation.

\(^2\) Marjorie Baldwin’s post addresses some of the obvious issues.

\(^3\) The NASI report on *Workers’ Compensation: Benefits, Coverage and Costs 2012* provides a starting point.

\(^4\) The AWCBC Key Statistical Measures provide similar data for the Canadian workers’ compensation jurisdictions.

\(^5\) The work by IAIABC and WCRI to provide objective data on the *Workers’ Compensation Laws* ultimately determine the benefits, costs and coverage.

\(^6\) The 1972 *Report of the National Commission on State Workmen’s Compensation Laws* made recommendations that provide clear guidance.
The ProPublica/NPR reports force policy makers to acknowledge these failures and hopefully seek out those jurisdictions that live up to the bargain. Those jurisdictions that come closest to meeting the National Commission recommendations cover nearly everyone who works for someone else and even offer coverage to those who are self-employed; they cover high wage earners and provide compensation that restores 80-90% of spendable (after tax) income. They provide timely decisions and are accountable for their errors in the application of law and interpretation of policy. They seek and earn a measure of social license for what they do and do it at a cost that is affordable and sustainable.

H. James Harrington (author of Business Process Improvement among others) said:

- Measurement is the first step that leads to control and eventually to improvement.
- If you can’t measure something, you can’t understand it.
- If you can’t understand it, you can’t control it.
- If you can’t control it, you can’t improve it.

NASI, WCRI, IAIABC, AWCBC and others provide objective measurement of jurisdictional and national performance. The National Commission recommendations provide a standard against which the measures from each jurisdiction may be assessed and understood. Measuring the performance of each system against those recommendations can be the first step in addressing the failures, controlling the excesses and improving outcomes for injured workers and their families without a wholesale scrapping of all systems.

No system is perfect. Among the sixty-plus systems in North America, however, there are a few that have come close to meeting the recommendations of the National Commission. They are proof that the Grand Bargain, the Historic Compromise can achieve the social policy objective: to protect workers from work-related injury, disability, illness and death in a compassionate and sustainable way that still allows the economic activity and innovation necessary for societies to operate and thrive.

Continued, Page 16.
Improvement is not only possible, it is essential—not only because it is the morally correct thing to do but also because every failure erodes the public confidence in all workers’ compensation systems everywhere.

Rather than taking a defensive posture, insurers and policy makers can thank the ProPublica/NPR journalists for raising the level of discourse, highlighting the disparities that exist and illustrating the need for genuine improvement in under-performing systems.

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* Terry is an active researcher, speaker and commentator on workers’ compensation issues. Now retired, he was the Director of Corporate Planning and Development for WorkSafeBC. His responsibilities included environmental scanning, strategic planning and inter-jurisdictional comparisons. Terry says of himself: I am a student of workers’ compensation systems. Many years ago I discovered two things about this area. First, workers’ comp and OH&S are of vital importance to people. Protecting, caring for and providing compensation to workers are important, noble and morally responsible endeavors. The second thing I learned was that no matter how much I knew about workers’ comp/OH&S, there was always so much more to learn. This is an endlessly challenging area of study. My purpose, therefore, is not to lecture, but to reflect on the ideas and issues that are topical in this area... and to invite others to share in a learning experience. By adding your knowledge and insights, others with similar interests can participate in the discovery and study of this important domain.

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4 http://awcbe.org/?page_id=9755.
5 http://www.wcrinet.org/result/wclaws_2014_result.html.
7 http://www.goodreads.com/author/show/42617.H_James_Harrington

The foregoing was originally published on Workers’ Compensation Perspectives, http://workerscomperspectives.blogspot.com/. It was also published on the Workers Comp Blogwire at WorkersCompensation.com. It is reprinted here with the permission of the author.
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At a Glance

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WCRI: Direct Dispensing Isn’t the only Revenue-Maximizing Behavior Regulations Have Buoyed

By Ben Miller

While fee schedules tend to cut medical costs, representatives from the Workers Compensation Research Institute cautioned that there is such a thing as a fee schedule that is too low – that is, undercutting Medicare and group health prices might lead providers to take steps to keep revenue levels up.

Providers appear to have shifted behaviors in an attempt to prevent new regulations from deflating their billings, WCRI researchers said during a Thursday webinar. One such recent occasion that grabbed attention in the workers’ compensation world was the revelation earlier this year that physicians in California and Illinois were prescribing drugs in unusual dosages, such as 7.5 mg pills, so that they could charge higher prices.

But the institute has also found that fee schedules with low rates relative to other payers tend to elicit revenue-increasing behaviors from medical providers, and changes to fee schedules can create new opportunities to increase billings.

A WCRI study released in January showed that in the first three months after Illinois declared that physician-dispensed drugs would be reimbursed based on average wholesale price, a new version of the hydrocodone combination product Vicodin hit the market. The new version, which was offered in a different strength than other forms, essentially allowed doctors to charge what they wanted. Only physicians dispensed the drug – it was unheard of at pharmacies – and the medication cost $3.04 per pill compared with 66 cents to $1.06 per pill for the more common versions.

In 2011, physicians in California had started doing the same thing with a novel version of the muscle relaxant cyclobenzaprine. The new version cost $2.90 to $3.45 per pill, compared with 35 cents to 70 cents for the more common versions. “They changed fee schedules in 2007, so right after the reform, the average price for cyclobenzaprine actually gets quite close between physicians and pharmacy-dispensed prescriptions, and it stays that way for several years until (2011). So the timing really coincided with the introduction of this new strength,” WCRI researcher Dongchun Wang said during the presentation.

That’s not to say that price-based reforms don’t work – previous research from the WCRI has shown a strong correlation between states with fixed-price fee schedules and lower medical costs for injured workers. “These reforms indeed had a positive impact, but the goal of the reforms may not be fully achieved in light of those unintended consequences,” Wang said.

For that reason, she urged regulators to measure and respond to the actual effects of reforms as they are implemented. “When (providers) lose revenue because of the … reforms, they would really have added incentive to try to find a way to retain the revenue that they used to get. So they keep playing with the system, playing with the rules,” she said. “I just want to emphasize how important it is to evaluate the impact of reforms and to try to identify those unintended consequences and address them promptly.”

For instance, WCRI researchers have found a correlation between states that set fee schedules for physician services at or below Medicare and group health rates and more frequent billing for high-cost procedures.

Continued, Page 19.
In California, where the average office visit costs about $80, more than 60% of office visits are billed using high-cost codes. But in Iowa, where the average office visit runs more than $130, only 20% of those visits use the “complex” codes.

That trend remains true across many states, WCRI researcher Rebecca Yang said. “The lower the average prices paid for a common office visit in a state, the more (frequently) an office visit bill becomes a complex code with higher prices,” Yang said during the presentation.

In an attempt to regain lost revenue, she said, it appears that doctors may turn to directly dispensing drugs to patients more often when fee schedules are low. “I can tell you if I show you the correlation between the average price paid for a common office visit and the percentage of prescriptions dispensed by physicians, we see very similar negative correlation, which means in a state where the office visits are relatively (inexpensive), there’s more frequent physician dispensing,” she said.

New moves to halt inflation or cut medical costs have also produced unintended consequences, she said. She pointed to California, which froze its reimbursement rates for evaluation and management services from 2004 through 2006. During that time, the state experienced a phenomenon called “upcoding” – that is, doctors used more expensive billing codes for office visits more often. In 2004, the three least expensive office visit codes made up a little more than 60% of billings. By 2006, they had dropped closer to 50%, with the two most expensive billing codes making up the rest.

It kicked off a trend of upcoding that lasted through at least 2012. “In 2012, the two most complex office visits become 65% of all established office visits in California compared with 40% a few years earlier,” Yang said. When reducing fee schedules, she said states have to be careful about the manner in which they structure their new reimbursement rates. Florida’s pricing reforms in 2003 yielded two examples – lumbar magnetic resonance imaging and physical medicine services provided in hospitals.

The reforms created two separate methodologies for reimbursing lumbar MRIs based on whether the service was “scheduled” or “unscheduled.” If it was scheduled, the provider was reimbursed at 110% of the Medicare rate. If it was unscheduled, it was reimbursed at 75% of whatever the provider charged. “For lumbar MRI, if it’s billed as scheduled radiology, the average payment for service is about $450 per case,” she said. “However, if the same service was billed as unscheduled radiology services, then the average payment for service is $1,500.”

From 2004 to 2012, the percentage of lumbar MRIs coded as unscheduled rose from 38% of billings to 71%.

The 2003 reforms also altered the reimbursement method for physical medicine services provided in hospitals from 75% of the provider’s charges to 110% of the Medicare rate. From 2003 to 2012, the percentage of bills from hospital outpatient departments that included physical medicine charges dropped 10%. “Does this mean workers in Florida now have more difficulty … (accessing) physical medicine services in the state? The answer is no. What happened is that workers changed the site of services,” she said.

From 2003 to 2012, the percentage of bills from nonhospital providers that included physical medicine charges rose 9%. Costs aside, Yang warned that regulators must always consider whether injured workers can access good medical care at fee schedule prices. Failing to set prices at levels competitive with other payers can also push some doctors out of the workers’ compensation market, she said.

Continued, Page 20.
“If the provider’s time and expenses for treating an injured worker (are) identical to that of treating a group health or a Medicare patient, then this situation may leave the good quality health care providers not willing to provide timely treatment to the injured workers,” she said. “If the provider’s time and expenses for treating injured workers actually is higher compared to treating the other types of patient, then the situation might be even more (concerning) regarding access to care.”

Two Courts Find State not Liable to Inmate Injured while on Work Release

By Sherri Okamoto

Courts in Louisiana and Nevada ruled in May that the Department of Corrections in each state could not be held liable to inmates who suffered injuries while participating in work release programs. But while the Nevada Supreme Court concluded that the comp carrier for the entity using Jonathan Piper’s labor was on the hook for his workers’ compensation benefits, Louisiana’s 3rd Circuit Court of Appeal didn’t say who would be responsible for compensating Paris Madison for his injuries.

Louisiana case law has long held that an injured inmate is not an employee of the state, but not all of the circuits treat inmates as an employee of the work-release program either.

Indeed, courts across the country are not uniform in how they approach claims by injured inmates. Courts in Pennsylvania, Texas, Washington, Missouri and Iowa have also said that inmates can qualify as government employees under their respective comp systems. By contrast, the California Supreme Court has declined to disturb a ruling by an appellate court saying an injured inmate was not a county employee, and the U.S. 5th Circuit Court of Appeals has said the same of an inmate from Mississippi.

The Nevada Supreme Court also took the view that an inmate couldn’t get benefits for a traumatic brain injury from the state last Thursday in a case titled Nevada Department of Corrections v. York Claims Services, No. 64473.

Piper became a ward of the Nevada Department of Corrections in 2008 after being convicted of burglary. In 2010, the NDOC placed him in a transitional housing unit and he joined the work-release program.

Governor Ducey Appoints Commissioner

On April 9, 2015, Governor Doug Ducey appointed Dale L. Schultz to the Industrial Commission of Arizona.

Dale graduated from Arizona State University with a Bachelor of Science in Management and started his business career at the Industrial Commission of Arizona. He has over 40 years of experience in risk and quality management related positions. He has worked for an insurance company and two multi-state integrated health systems as an insurance broker and as a regulator. Dale has been responsible for self-insured workers’ compensation programs, including funding, claims administration, and injury prevention, including life safety, environmental, radiation, and construction safety, as well as emergency management and occupational health programs. He has been the chairman of the board of a health insurance company and a vice chairman or member of four other civic and nonprofit boards. Dale has also developed and managed several “off shore” captive insurance companies for healthcare systems.

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Piper got a job at Washworks Rainbow, a full-service carwash in Las Vegas, wiping down vehicles. York Claims Services adjusted workers’ compensation claims for the company.

After learning Piper had a background in gardening, Washworks’ owner asked him to trim some trees on the car wash property. Piper agreed to do it, but he fell from a ladder and struck his head on the ground. An emergency craniotomy saved his life, but Piper needed extensive care and multiple surgical procedures in the months that followed his injury.

Washworks submitted a claim for Piper’s injury to its carrier, York Claims Services, but York denied coverage. Since Piper was in the legal custody of the Nevada Department of Corrections at the time he fell, York contended that the NDOC was responsible for covering Piper’s accident. The NDOC objected, and Department of Administration Hearings Officer Sondra Amodei found it was York who owed coverage to Piper because Piper had been in the course and scope of his employment with Washworks when he fell.

Eight days later, Piper suffered a major seizure and fell, again striking his head on the ground. He again needed emergency brain surgery, but he was left totally incapacitated by this second fall. Piper, now 38, will require medical care and assistance for the rest of his life. York also denied coverage for Piper’s second fall, and the NDOC’s challenge to this decision was consolidated with York’s appeal of Amodei’s ruling.

Appeals Officer Lorna Ward upheld Amodei’s ruling as to York’s obligation to cover Piper’s first fall. She said York also had to cover Piper’s second accident, since the brain injury from his first fall was a substantial contributing cause to his second fall.

York then petitioned for judicial review, and Carson City District Court Judge James Wilson ruled that the NDOC was responsible for covering both of Piper’s accidents under the plain language of Nevada Revised Statute Section 616B.028(1). Section 616B.028(1) entitles any state inmate to workers’ compensation coverage if he is injured “while engaged in work in a prison industry or work program.”

The NDOC then appealed to the Supreme Court, arguing that Wilson’s interpretation of Section 616B.028(1) was “literally unprecedented in workers’ compensation and employment law.”

When an employer agrees to hire a work-release inmate, the NDOC said it “has no control over how the private employer operates and manages its business or, more importantly, its safety programs and worker protection procedures.”

Since it has no way to ensure its inmates will be employed at a safe work environment, the NDOC argued it shouldn’t be responsible for benefits if the inmates get hurt. The NDOC said it wouldn’t be able to afford the cost associated with providing coverage for all its work-release inmates and it warned that it would have to shut down the work-release program if the court upheld Wilson’s ruling.

That would be a shame, it said, since “work release programs benefit society, the employer, Nevada’s economy, and the paroled inmate.” Ending the work release program would also leave taxpayers with the burden of paying the cost for other programs to reduce recidivism and give inmates transitional skills they can use upon release.

The state Risk Management Division, which handles the state’s comp insurance obligations, also filed a separate brief with the Nevada Supreme Court, emphasizing the lack of control the NDOC had over Piper’s work activities.
Inmate Injured, from page 21.

It also pointed out that Wash Works paid premiums for Piper’s coverage, and that the NDOC had no insurance in place that could potentially cover Piper’s accidents, or the injuries any other work-release inmate may suffer. Thus, upholding Wilson’s ruling would be “significantly devastating” to the NDOC, the division said.

York countered that NRS 616B.028 placed an obligation on the NDOC to obtain workers’ compensation coverage for Piper and its other work-release inmates, since a work release program is plainly a “work program,” as Wilson found.

The Nevada Supreme Court disagreed, finding Section 616B.028 inapplicable. The court said the phrase “work program,” as used in the statute, was ambiguous, so it would have to rely on the legislative history behind its enactment. Lawmakers added the “work program” language in 1995 in response to a series of lawsuits by inmates who got hurt while participating in prison work camps with the Division of Forestry.

The forestry work camp program is codified in Chapter 209, along with the provisions governing prison industries, but the work-release program is part of Chapter 213. Accordingly, the court reasoned that the addition of the “work program” language to Section 616B.028 was intended to clarify that comp coverage applies to all the programs codified in Chapter 209, regardless of whether they take place inside or outside the prison walls. As the work release program was not part of that chapter, the court said a work release program was not a “work program” for purposes of Section 616B.028.

Senior Deputy Attorney General Clark Leslie represented the NDOC before the Supreme Court. Patty Cafferata, the communications director for the Attorney General’s Office, on Monday said “we are pleased that the court reached the right result.”

A divided appellate panel in Louisiana also arrived at the conclusion in May that an injured inmate wasn’t entitled to a recovery from the state, although he was seeking a civil recovery.

Paris Madison was an inmate housed at Dabadie, a prison operated by the Louisiana Department of Corrections. Dabadie is adjacent to Camp Beauregard, a National Guard Base operated by the U.S. military. Camp Beauregard uses inmate labor from Dabadie, and Madison did laundry duty at the camp. He claimed he fell from a truck being driven by James Welch, a Camp Beauregard employee, while transporting baskets of laundry in March 2000.

Continued, Page 23.
Madison filed a tort claim against the LDOC, the National Guard and Welch, but his claims against the National Guard and Welch were thrown out because they weren’t timely filed. Rapides Parish District Court Judge Thomas Yeager then granted summary judgment in favor of the LDOC, finding it had no control over Madison at the time of his alleged injury.

A majority of Louisiana’s 3rd Circuit Court of Appeal upheld Yeager’s decision in May, saying its precedent has clearly established that the LDOC owes no duty to ensure the safety of its inmates while they are performing work release at another facility. Chief Judge Ulysses Gene Thibodeaux and Judge John D. Saunders dissented, saying they thought there was at least a triable issue as to whether the LDOC had abdicated complete control of Madison to the National Guard.

Defense attorney Jeffrey C. Napolitano of Juge, Napolitano, Guilbeau, Ruli & Frieman in Metairie on Monday explained that all the Louisiana cases involving injured inmates turn on the issue of “custody and control.” If the work-release employer has enough control over the inmate, then sometimes the Courts of Appeals will find the inmate to be an “employee” of the work-release employer, he said. In his experience, however, Napolitano said most of the time the employer doesn’t have enough control to create an employment relationship.

Louisiana’s courts evaluate the level of control an employer has over a worker by looking at several factors, including who is paying the worker’s wages, and who has the right to hire and fire the worker, he said. From what he has seen, Napolitano said, most work-release employers don’t directly pay inmates, instead, they pay a fee to the state in exchange for getting the labor of the inmates. The work-release employers also generally don’t have the ability to say which inmates can come work, and which can’t, he added.

But, Napolitano cautioned, the absence of an employment relationship means that the work-release employer then becomes vulnerable to civil liability. “That’s the quid-pro-quo,” he said.

There have been cases coming out both ways, in terms of where an injured Louisiana inmate can seek redress.

Two years ago, the 3rd Circuit ruled in Cormier v. McNeese State University that a work-release inmate who was injured while cleaning the McNeese State University’s football stadium parking lot wasn’t an employee of the school since the school didn’t pick the inmate to come clean its parking lot, it paid him no wages and it did not fix his hours of work.

But in 2011, the 3rd Circuit said in Lee v. Department of Public Safety and Corrections that an inmate who broke his leg while participating in a work-release program could seek workers’ compensation benefits from the company he was working for.

Also in 2008, the 2nd Circuit ruled in Rogers v. Louisiana Department of Corrections that the exclusive remedy for the family of an inmate who was killed in a forklift accident at the Springhill Pallet Co. lay in a comp claim against Springhill.

And just a year before that, the 2nd Circuit ruled in Clinton v. Reigel By-Products that a worker who died after being pulled into the machinery at a chicken-processing plant was an employee of Louisiana Proteins, his work-release employer.

Based on the facts of the Nevada case, as related to him, Napolitano said he thought the NDOC didn’t have enough control over Piper to be considered his employer under Louisiana law, and the odds were good that a Louisiana court would have found the carwash to be Piper’s employer.

The articles on pages 18-23, Direct Dispensing Isn’t the only Revenue-Maximizing Behavior Regulations Have Buoyed and Two Courts Find State not Liable to Inmate Injured while on Work Release are reprinted here with the permission of WorkCompCentral.com, and are the work product of reporter Ben Miller of WorkCompCentral.com. The NAWCJ gratefully acknowledges the contributions of WorkCompCentral to this newsletter and the Association.
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8:00 – 8:30  REGISTRATION AND INFORMATION
8:30 – 9:00  WELCOME
Michael Alvey, NAWCJ President
Kentucky Workers’ Compensation Board
Frankfort, Kentucky

9:00 – 10:50  EVIDENCE FOR ADJUDICATORS
Honorable Deneise Turner Lott, Introduction of Speaker
Mississippi Workers’ Compensation Commission
Jackson, Mississippi

Professor Charles W. Ehrhardt
Florida State University School of Law
Tallahassee, Florida

Evidence is always a challenge for adjudicators. Various states have chosen to apply strict evidence codes in Workers’ Compensation adjudications to varying degrees. But many adjudicators are called upon to make evidentiary rulings on a variety of subjects during a trial without strict adherence to a code. In 2015, we will present evidence in an interactive setting. Adjudicators from various jurisdictions will try their hand at difficult evidentiary objections, we will see if their rulings are correct, and Professor Ehrhardt will provide the expert commentary to explain why or why not.
11:00-11:50 **MEDICAL TERMINOLOGY FOR JUDGES**

Honorable Melodie Belcher, Introduction of Speaker  
*Georgia State Board of Workers’ Compensation*  
*Atlanta, Georgia*

Honorable Ken Switzer  
*Tennessee Department of Labor*  
*Nashville, Tennessee*

It has been said that medical drives the claim. It is a rare case that does not involve review of medical records and testimony. Medical terminology is a challenge for all involved. What do the medical providers mean with their phrases, descriptions, and those many abbreviations? This discussion will be an enlightening and entertaining look at the challenges of interpreting and applying medical terminology and acronyms.

12:00 – 12:30 **LUNCH (PROVIDED)**

12:30 – 2:00 **COMPARATIVE WORKERS’ COMPENSATION LAW PANEL**

This panel discussion will bring perspective on how our statutes are different, and how they are similar. Dealing with statutory interpretation is part of our daily routine. Despite the diversity of our particular statutes, we share a multitude of concordant issues and challenges, which this program illuminates. Each year brings different states to the panel, and therefore differing viewpoints to the conversation. This program is consistently among the highest rated of the judiciary college.

Honorable Melissa Jones, Introduction of Moderator  
*Compensation Review Board*  
*Washington, D.C.*

Honorable Bruce Moore, Moderator  
*Kansas Department of Labor*  
*Salina, Kansas*

Panel  
Honorable Scott Beck  
*South Carolina Workers’ Compensation Commission*  
*Columbia, South Carolina*

Honorable Glen Goodnough  
*Maine Workers’ Compensation Board*  
*Augusta, Maine*

Honorable Ken Switzer  
*Tennessee Department of Labor*  
*Nashville, Tennessee*

Honorable Brian Watkins  
*Washington Board of Industrial Insurance Appeals*  
*Olympia, Washington*

2:00 – 5:00 The Afternoon is divided into two Tracks, one for the newer adjudicator and one for the more seasoned adjudicator
Track One - The NAWCJ NEW JUDGE PROGRAM

Back by popular demand, the NAWCJ presents education specifically for the new adjudicator. Transitioning to the bench from private practice can involve various challenges. Much of the three hour “New Judge” program Monday afternoon is intended to foster frank discussions in small groups. This series of discussions is focused on those who have been on the bench for two years or less, but all adjudicators are encouraged to attend.

2:00 – 2:50 DEALING WITH THE DIFFICULT LITIGANT OR PARTY
Honorable Jim Szablewicz, Introduction of Panel
Virginia Workers’ Compensation Commission
Richmond, Virginia

Honorable Robert Swisher, Moderator
Kentucky Department of Workers’ Claims
Frankfort, Kentucky

Honorable Jennifer Hopens, Introduction of Speaker
Texas Department of Insurance, Division of Workers’ Compensation
Austin, Texas

Alex Cuello, Esq.
Law Office of Alex Cuello, Esq.
Miami, Florida

Courtroom decorum is a must. Maintaining order is challenging. Much may be going on, sometimes with multiple cases, parties, attorneys and witnesses participating, and waiting their turns. Unfortunately, there are occasionally unruly people that may be involved in the process on a given day. They can present a unique challenge. The perspective may be different based on the situation, trial or procedural hearing, the timing, the causes, and the personalities. These adept and experienced adjudicators will provide insight on spotting the problems before they become irreversible, calming difficult situations, and maintaining the order and decorum that the parties deserve.

3:00 – 3:50 WHEN IS A GUARDIAN NEEDED FOR AN INJURED WORKER?
Honorable Jennifer Hopens, Introduction of Speaker
Texas Department of Insurance, Division of Workers’ Compensation
Austin, Texas

Alex Cuello, Esq.
Law Office of Alex Cuello, Esq.
Miami, Florida

Adjudicators deal with a vast assortment of people. They come to the litigation process with various concerns and may or may not have the ability to comprehend what is occurring around them. Adjudicators may have concerns about whether an injured worker needs the assistance of a guardian for the purposes of the litigation specifically or for the broader concerns of caring for her or his financial stability during and beyond litigation. There are a variety of codes and statutes across the country. Mr. Cuello will share his expertise in the field of elder law and his experiences with injured individuals who needed the protection of a guardian.
Monday, August 24, 2015, Continued

4:00 - 4:50  JUDICIAL ETHICS FOR THE NEW JUDGE

Honorable Sheral Kellar, Introduction of Panel
Louisiana Workforce Commission
Baton Rouge, Louisiana

Honorable Ferrell Newman  
Virginia Workers’ Compensation
Richmond, Virginia

Honorable Jerry Stenger  
Georgia State Board of Workers’ Compensation
Savannah, Georgia

Honorable Margaret Sojourner  
Florida Office of Judges of Compensation Claims
Lakeland, Florida

Honorable Jane Rice Williams  
Kentucky Department of Workers’ Claims
Frankfort, Kentucky

This session will be a small-group exercise. Hypothetical problems under the Code of Judicial Conduct will be provided to groups comprised of new judges and seasoned veterans. Teams will discuss appropriate outcomes and responses to the situations under the Code, and then participate in a large-group discussion of conclusions and suggestions. The program will be hosted and moderated by a senior judge with experience in leading agencies through such challenges.

Track Two

2:00 – 5:00  SAWCA REGULATOR ROUNDTABLE

For the more seasoned adjudicators, Monday afternoon offers the opportunity for a doctorate-level exposure to comparative law in workers’ compensation. The Southern Association of Workers’ Compensation Administrators (SAWCA) will present their 5th Annual Regulator’s Roundtable. Regulators and Administrators from across the country will discuss hot topics challenging workers’ compensation systems. Attendees will hear perspectives, initiatives, problems and solutions. Details on pages 44-46.

Monday Evening:

5:00 – 6:00  NAWCJ and SAWCA RECEPTION

The perfect closure for the first day of our NAWCJ program is the official welcoming reception for adjudicator attendees, regulators and associate members. Following a full day of edification and instruction, this is the chance to mingle and unwind with old friends and new acquaintances from across the continent.

7:00 – 11:00  WCI® Reception and Entertainment

Casual attire, drinks and heavy hors d’oeuvres. This is a rocking closure to the first day of the WCI conference. All registered NAWCJ Judiciary College attendees are invited to the reception and entertainment. There will be live entertainment, lighthearted conversation, and more opportunity to renew and form friendships.

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Tuesday, August 25, 2015

9:00 – 11:50  ADVANCED JUDICIAL WRITING

Honorable David Torrey, Introduction of Speaker
Pennsylvania Department of Labor and Industry
Pittsburgh, Pennsylvania

Professor Timothy Terrel
Emory University School of Law
Atlanta, Georgia

The ability to write well, with clarity, is critical in the legal profession. Judicial writing is unique though. Adjudicator clarity is critical to the lawyers’ and parties’ clear understanding of both the trial outcome and the reasons for it. Effective judicial writing is a service to the parties, and facilitates an effective appellate review process. Professor Terrel is a nationally-recognized expert in judicial writing, and brings his wealth of knowledge back to the NAWCJ in 2015.

12:00 – 12:30  LUNCH (PROVIDED)

NAWCJ ANNUAL BUSINESS MEETING

12:30 – 1:00  WORKERS’ COMP: ITS TRIALS AND TRIBULATIONS

Honorable John J. Lazzara, Introduction of Speaker
Florida Office of Judges of Compensation Claims
Tallahassee, Florida

Robert H. Wilson, President and CEO
WorkersCompensation.com
Sarasota, Florida

If it is in the news, if it is workers’ compensation, Bob Wilson is blogging about it on “From Bob’s Cluttered Desk.” He is funny, irreverent, sarcastic, and opinionated, but he brings a unique and fresh perspective to workers’ compensation issues across the nation. Bob will present an overview of workers’ compensation’s hot topics.
1:00 – 2:50  **How to Diagnose and Assess Patients; Impairment v. Workability – Mutually Exclusive?**
Honorable LuAnn Haley, Introduction of Speaker  
*Industrial Commission of Arizona*  
*Tucson, Arizona*

James B. Talmadge, M.D.  
*Orthopedic Surgeon*  
*Cookeville, Tennessee*

There are a myriad of signs and symptoms, complaints and descriptions, and the physician is challenged to rule out the irrelevant, identify the problem, and treat the cause. It can be a daunting task. Every human has distinctions, in the symptoms, the expression of symptoms, and reactions to treatment. Dr. Talmadge will bring decades of experience to bear on the challenges of treating orthopedic injuries. The physical examination will be a specific focus, with descriptions of the physician’s actions, the results that are common, and the interpretation that follows.

3:00 – 3:50  **JUDICIAL ETHICS**
Honorable R. Karl Aumann, Introduction of Speaker  
*Maryland Workers’ Compensation Commission*  
*Baltimore, Maryland*

Honorable Elizabeth Crum  
*Director of Adjudication*  
*Pennsylvania Workers’ Compensation Office of Adjudication*  
*Pittsburgh, Pennsylvania*

The challenges of the Code of Judicial Conduct surround us, on the bench, in our drafting, and even in our private lives. We are constrained, restricted, encouraged, and defined. The effective adjudicator can use the Code as a guide to navigate through conundrums and challenges that must be faced. Judge Crum will outline some of those challenges and provide guidance regarding our successful navigation of the treacherous waters.

4:00 – 4:50  **MEDICAL MARIJUANA: HIGH TIME IN WORKERS’ COMPENSATION?**
Honorable Ellen Lorenzen, Introduction of Speaker  
*Florida Office of Judges of Compensation Claims*  
*Tampa, Florida*

Sanford M. Silverman, M.D.  
*Comprehensive Pain Medicine*  
*Pompano Beach, Florida*

It’s in the news. It’s in the case law. Medical marijuana is coming soon to a case near you. How does marijuana work? What does it do to and for the body? How do the effects compare to other pain medications with which we may be more familiar. Our board-certified pain management physician will discuss the pharmacology, side-effects, benefits and detriments of marijuana. The focus will be on better understanding of what it is, what it does, and where we may expect to see it.
Wednesday, August 26, 2015

9:00 – 10:15  DEALING WITH THE PRO SE LITIGANT

Honorable Jane Rice Williams, Introduction of Speaker
*Kentucky Department of Workers’ Claims*
*Frankfort, Kentucky*

Roger Williams, Chair
*Virginia Workers’ Compensation Commission*
*Richmond, Virginia*

Attorneys are involved in many cases, but there remain instances of unrepresented parties. Injured workers and uninsured employers may appear on their own behalf. They bring with them an added challenge for the adjudicator. Judges cannot provide legal advice, and yet have some degree of responsibility for assuring the due process of all involved. How can the adjudicator foresee such complications? How does the adjudicator balance the obligation of impartiality with the responsibility of assuring fairness in the adjudication of meritorious claims and defenses. Where do the demarcation lines fall between educating the uninitiated and becoming an advocate for one party or the other?

10:30 - 11:45  HOW TO AVOID A REMAND?

Honorable Robert Cohen, Introduction of Panel
*Florida Division of Administrative Hearings*
*Tallahassee, Florida*

Honorable Melissa Lin Jones
*Compensation Review Board*
*Washington, D.C.*

Honorable Michael W. Alvey
*Kentucky Workers’ Compensation Board*
*Frankfort, Kentucky*

Honorable Marshall L. Davidson, III
*Tennessee Department of Labor*
*Nashville, Tennessee*

Honorable Frank McKay
*Georgia State Board of Workers’ Compensation*
*Atlanta, Georgia*

The record is closed, the order is entered and appealed. It is too late to avoid a remand. What can the trial judge do before all of this in order avoid a remand? This amazing panel of appellate judges will provide tips and advice on how to manage the docket, the motions, the trial and the order to prevent having to hear the case again on remand.
Wednesday, August 26, 2014, Alternative Programming

8:30 – 4:30  The Professional Mediation Institute
This is a full day program with a variety of nationally recognized speakers providing insight into the challenges of mediation within the specific context of workers’ compensation and in the broader context of mediation generally.

8:30 – 3:30  The Workers’ Compensation Institute Multistate Program
Sponsored by the Workers’ Compensation Defense Institute, this program provides insight and edification about the inner workings of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia. This program features prominent attorneys and state administrators discussing the significant developments and distinctions of their respective jurisdictions.

9:00 – 4:10  Medicare Secondary Payer Compliance: A Discussion on National Issues and Solutions
This program presents an intermediate level presentation on the operations of the Medicare system, its implications and influences regarding workers’ compensation claims, their management, and settlement. A world-class faculty provides useful information, insight, and advice.

9:00 – 12:30  The Center for Excellence - The Study of Medical Cost Drivers In Workers’ Compensation
National experts on the management of workers’ compensation claims present a variety of topics related to the cost of the industry, and the market and human forces that drive costs.
Honorable Michael Alvey
Chairman Michael W. Alvey received his Bachelor’s degree from Western Kentucky University, and his J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1988, Chairman Alvey practiced primarily defending workers’ compensation, federal black lung and personal injury claims. On November 13, 2009 Chairman Alvey was appointed to serve as Chairman of the Kentucky Workers’ Compensation Board effective January 5, 2010. Chair Alvey has served on the board of directors of the National Association of Workers’ Compensation Judiciary, Inc., and is the President. Chairman Alvey retired from the Kentucky Army National Guard in 2000 where he served nearly 21 years as an armor officer and is a graduate of the Armor Officer Basic Course and Armor Office Advanced Course. Chairman Alvey resides in Owensboro, Kentucky where he has been involved in various church and civic activities as well as working with youth sports including both coaching and officiating.

Honorable Diane Beck
Judge Beck was admitted to the Florida Bar in 1983. She is also licensed to practice law (now inactive) in South Dakota and Virginia. In April 1995 she was appointed Judge of Compensation Claims in Sarasota by Governor Chiles, who re-appointed her to that position in 1997. In 2001 and 2005 she was re-appointed to the Sarasota position by Governor Bush. She previously practiced as an associate in a small law firm in Bradenton, Florida, then as a sole practitioner in Aberdeen, South Dakota, in most areas of law, including criminal defense, wills, estates, and trusts, personal injury, and divorce and family law. She was an adjunct professor of business law at Northern State University in Aberdeen, South Dakota. She served as assistant attorney general in Richmond, Virginia, representing various state agencies and funds in workers’ compensation and social services matters, and represented the Department of HRS in child abuse and neglect litigation in Sarasota, Florida. She has lectured and served on panels at numerous seminars regarding workers’ compensation issues. She has served in past years as the Secretary of the Conference of Judges of Compensation Claims, and as President for the 2006/2007 term.

Honorable Scott Beck
Commissioner Beck was appointed to the South Carolina Workers’ Compensation Commission on June 30, 2008. In 2010, he was elected by the Commission as Interim Chairman and in December 2012, Governor Haley nominated Commissioner Beck for reappointment as Chairman. He graduated with a BS degree from Penn State in 1981 and from the USC School of Law in 1999. Prior to joining the Commission, he served in various positions in Law Enforcement from 1979-1996 and most recently as an Assistant Attorney General from 2000-2008 prosecuting healthcare fraud cases. Commissioner Beck served as a city councilman in North Augusta, South Carolina from 1993-1996, and was elected to the South Carolina House of Representatives, serving from 1996-2000.
Honorable Elizabeth Crum
Judge Crum is Director of the Workers’ Compensation Office of Adjudication with management responsibilities for Pennsylvania’s workers’ compensation judges, judge managers and staff in 23 offices located throughout the Commonwealth of Pennsylvania. Prior to her present position, she was Deputy Secretary for Compensation and Insurance with the Pennsylvania Department of Labor and Industry. Judge Crum also served as Judge Manager for the Eastern District of Pennsylvania and as a Judge in Philadelphia. Prior to her appointment as Judge, she served as an attorney and Chief of the Compliance Division with the Bureau of Workers’ Compensation. She began her legal career as an attorney/advisor with the U.S. Department of Labor in Pittsburgh. Judge Crum is a 1987 graduate of the University of Pittsburgh School of Law.

Alex Cuello, Esq.
Alex Cuello, Esquire, the principal shareholder of the Law Office of Alex Cuello, P.A. in Miami, has been admitted to practice law in Florida since 1996. He received his B.A. from Florida International University, law degree from St. Thomas University and Master of Laws degree in Elder Law from Stetson University. Mr. Cuello's practice focuses on Elder Law with an emphasis in the areas of Probate Administration and Litigation, Guardianship Administration and Litigation, Estate Planning, Medicaid Planning, and Social Security Disability claims. He is one of a handful of lawyers in the state of Florida that has been licensed by the Office of Foreign Assets Control of the U.S. Department of the Treasury to travel to the island of Cuba on legal matters involving Cuban heirs’ inheritance in probate cases, wrongful death and benefits claims. Mr. Cuello is Board Certified by The Florida Bar as a specialist in Elder Law, serves on the Executive Counsel of the Elder Law Section of The Florida Bar, taught the court approved Professional Guardian and Family Guardianship Courses, and is rated by Martindale-Hubbel.

Honorable Marshall Davidson
After graduating with honors from the University of Tennessee College of Law where he served as an articles editor for the Law Review, Judge Davidson worked as a judicial law clerk for Judge Houston Goddard on the Tennessee Court of Appeals and then Chief Justice Frank Drowota on the Tennessee Supreme Court. He then worked in private practice handling both civil and criminal cases before serving as a Staff Attorney for the Tennessee Supreme Court for twenty-two years focusing on civil appeals. Under the supervision of the Chief Justice, Judge Davidson implemented and managed the Supreme Court’s system for handling appeals of workers’ compensation cases. Judge Davidson has also served as a Judge Advocate General Officer in the United States Army Reserves, taught as an adjunct professor at Middle Tennessee State University, and has been on the faculty of the Nashville School of Law teaching torts and advanced legal writing since 1992. His published writings include “Twenty Lessons From Twenty Years at the Tennessee Supreme Court,” 41 Tennessee Bar Journal 17 (2005); “The Retirement of Chief Justice Drowota: A Tribute to a Legal Legend and All Around Nice Guy,” 5 Nashville Bar Journal 6 (2005) and 3:1 Tennessee Journal of Law and Policy 95 (2006); “Drowota Contributed Greatly to the State’s Substantive Law,” 41 Tennessee Bar Journal 17 (2005); “Workers’ Compensation Review Panels,” Appellate Advocacy: A Handbook on Appellate Practice in Tennessee (1995); “Seeking Justice on Appeal,” 27 Tennessee Bar Journal 28 (1991); “Causation and Proximate Cause: The Potential Pitfalls of Tort Litigation in Tennessee,” 11 Tennessee Trial Lawyer 6 (1991); “Stealing Love in Tennessee: The Thief Goes Free,” 56 Tennessee Law Review 629 (1989); and “Torts-Wrongful Pregnancy-Ordinary Costs of Raising Healthy Child Not Recoverable,” 55 Tennessee Law Review 153 (1987). In 2014, Davidson was appointed by Governor Bill Haslam to the Workers’ Compensation Appeals Board where he serves as presiding judge.
Professor Charles W. Ehrhardt

Author of *Florida Evidence* (West 2011), the leading treatise on the topic, and *Florida Trial Objections* (West 4th ed. 2007), Professor Ehrhardt has been cited as an authority by appellate courts more than 500 times. He taught Torts, Evidence, Trial Practice and Trial Evidence Seminar, and was named Outstanding Professor seven times. After serving as the Ladd Professor of Evidence for 35 years, he earned emeritus status in 2007. He continues to teach Evidence at the law school.

Professor Ehrhardt served as a commissioner to the National Conference of Commissioners on Uniform State Laws from 1996-2005. He was a member of the faculties of both the National Judicial College in Reno, Nevada, and the Federal Judicial Center in Washington, D.C. He has been a visiting professor at University of Georgia and Wake Forest. Professor Ehrhardt received the Selig I. Goldin Award from the Criminal Law Section of The Florida Bar and the President's Award from the Florida Board of Trial Advocates. He clerked for the Honorable M.D. Oosterhout of the U.S. Court of Appeals for the Eighth Circuit and joined Florida State University College of Law’s faculty in 1967.

For almost 20 years, he served as the university’s representative to the NCAA and the ACC. In 2007, he was inducted into the Florida State Sports Hall of Fame. Education: J.D., University of Iowa, 1964; B.S., Iowa State University, 1962.

Honorable Glen Goodnough

Glen Goodnough has been a Hearing Officer with the Maine Workers’ Compensation Board since his initial appointment in 1994. He adjudicates workers’ compensation cases at the trial level and also serves on panels of the Board’s Appellate Division. Prior to working for the Board, Hearing Officer Goodnough was a trial attorney and hearing examiner with the Maine Public Utilities Commission. Hearing Officer Goodnough has been a member of the Maine Bar since 1986 and is an active member of the Maine Bar Association. He obtained his B.A. Degree (Legal Studies) from the University of Massachusetts, Amherst (1979) and his J.D. from the University of Maine School of Law (1986) where he served as a writing instructor and managing editor of the Maine Law Review. Following law school, Hearing Officer Goodnough was appointed to a one-year term with the Maine Supreme Judicial Court as Law Clerk for the late-Justice David Roberts.
Honorable Melissa Lin Jones
Judge Melissa Lin Jones is a member of the New York, District of Columbia, Maryland, and Virginia bars. For ten years after moving to the D.C. area from New York, Judge Jones litigated workers’ compensation cases in Maryland, Virginia, and the District of Columbia. In 2006, she was appointed administrative law judge with the D.C. Department of Employment Services, Office of Hearings and Adjudication, Administrative Hearings Division presiding over workers’ compensation hearings. Since 2010, she has adjudicated workers’ compensation appeals as an administrative appeals judge for the D.C. Department of Employment Services, Compensation Review Board. A frequent speaker and author on workers’ compensation and adjudication, Judge Jones wrote “Injecting Fault into a No-Fault System: The Aggressor Defense in District of Columbia, Work-Related Fight Cases” in volume 32 of the Hofstra Labor and Employment Law Journal, “Why Did You Do That? Confessions of a Master of Judicial Studies Graduate” in the 2014/2015 edition of Case In Point, and “Success in the Practice of Administrative Adjudication” in the July/August 2010 edition of The Washington Lawyer. In addition to reviewing and improving several textbooks, she also is a contributor to Black’s Law Dictionary, Dictionary of Legal Usage, Modern American Usage, and Reading the Law: The Interpretation of Legal Texts (about statutory construction by co-authors Bryan A. Garner and Justice Antonin Scalia.) She taught evidence and pre-hearing techniques at the National Judicial College, and facilitated breakout sessions as a National Judicial College Group Discussion Leader for Decision Making, Best Practices in Handling Cases with Self-Represented Litigants, and Dispute Resolution Skills. She earned her National Judicial College Administrative Law Adjudication Skills Certificate in 2010, her Dispute Resolution Skills Certificate in 2012, and her General Jurisdiction Certificate in 2013. Judge Jones earned her Bachelor of Arts (summa cum laude) in the honors program at St. Bonaventure University; her major was English literature. Her Juris Doctorate was conferred by the State University of New York at Buffalo School of Law. In May 2014, she earned her Master’s Degree in Judicial Studies at the University of Nevada, Reno, and she currently is pursuing her Doctorate Degree in Judicial Studies at the University of Nevada, Reno. In 2009, Judge Jones helped incorporate the D.C. Association of Administrative Law Judiciary, an affiliate of the National Association of Administrative Law Judiciary. Now, she sits on the Board of the National Association of Workers’ Compensation Judiciary.

Honorable Sheral Kellar
Sheral C. Kellar has served at the Louisiana Workforce Commission (formerly the Louisiana Department of Labor) as a Workers’ Compensation Judge since 1991 and as Workers’ Compensation Chief Judge since May 1999. Judge Kellar was appointed co-chair of the Louisiana State Bar Association Access to Justice Committee and served from June 2004 to June 2008. In June 2007 she received its President’s Award for her many contributions to the Bar Association and her exceptional service as Co-Chair of the Access to Justice Committee. She is a member of Baton Rouge Bar Association, Louisiana Association of Administrative Law Judges, Louisiana State Bar Association Medical Legal Inter-professional Committee and the National Association of Workers’ Compensation Judges. In 2009 she was elected the recording secretary for the Louisiana Center for Civil Justice, a state-wide call center that facilitates the provision of pro-bono and low-fee civil legal assistance to Louisiana’s poorest citizens. Also, in 2009 Judge Kellar was appointed Chair of the Access to Justice’s Gap Assessment Sub-Committee, where she spearheaded an Economic Impact Study detailing the tremendous positive financial impact Louisiana’s legal services programs have on the state economy. She is a former member of the American Bar Association, the National Legal Aid & Defender Association, board member of the Louisiana Bar Foundation and at-large member of the Louisiana State Bar Association Board of Governors having been appointed in 2002 to a three year term. She is also a Court Appointed Special Advocate (CASA volunteer) and in June 2005 she was selected the CASA-Baton Rouge volunteer of the month. Judge Kellar speaks frequently on issues of workers’ compensation and professionalism. She received her Bachelor of Science and Juris Doctorate degrees from Louisiana State University.
Honorable Frank McKay

Frank R. McKay is the Chairman of the State Board of Workers’ Compensation, appointed by Governor Nathan Deal. He came to the Board from private practice where he was a partner in the Stewart, Melvin & Frost law firm in Gainesville, Georgia. His practice was concentrated in workers’ compensation, and he tried and presented many cases before the Administrative Law Courts and the Georgia Court of Appeals. He is a former Special Assistant Attorney General handling workers’ compensation claims for the State of Georgia. He obtained his law degree (J.D.) from Walter F. George School of Law, Mercer University, and his undergraduate degree (B.A. Economics) from Clemson University. He was on the State Board’s Advisory Council prior to being appointed the Chairman.

Honorable Cynthia Miraglia

Commissioner Miraglia has been a member of the Maryland Workers’ Compensation Commission since her January 11, 1999 appointment by Governor Parris N. Glendening. In 1983, she graduated cum laude from the University of Baltimore School of Law (J.D.). Commissioner Miraglia received her Bachelor’s Degree in Political Science from Goucher College in 1979. She was employed by Allstate Insurance Company as a Senior Casualty Claims Adjuster from 1979 until May, 1980. From November 1983 until December, 1999 she was engaged in the private practice of law, serving as a civil trial attorney for Ashcraft and Gerel, LLP where she concentrated on workers’ compensation, personal injury, medical malpractice and products liability. Commissioner Miraglia is a Past President of the Women’s Bar Association of Maryland, Inc. and serves on the Board of the Maryland Chapter of the National Association of Women Law Judges.

Honorable Bruce Moore

Judge Bruce Moore has served as an administrative law judge for the Kansas Department of Labor, Division of Workers’ Compensation, since 1995 where he presides over workers’ compensation cases. He also serves as a municipal court judge pro tempore for the City of Salina, Kansas. Before joining the Department of Labor, Judge Moore served as municipal court judge pro tempore for the City of Prairie Village, Kansas, and as a district judge pro tempore for Kansas’ 10th Judicial District. He practiced law in Kansas for 15 years, concentrating his practice on criminal prosecution and defense and the prosecution and defense of personal injury and workers’ compensation claims. Judge Moore received his bachelor’s degree from Kansas State University and Juris Doctor from Kansas University. He is the author of “Litigating a Defense of Alcohol or Drug Impairment Under the Workers’ Compensation Act,” published by the Journal of Kansas Trial Lawyers Association, and Chapter 25, “Causation: A Judge’s Perspective,” for the American Medical Association’s Guides to the Evaluation of Disease and Injury Causation,” Second Edition (2013). He has served as President of two Rotary Clubs, and as an Assistant District Governor of Rotary International; he served two terms as President of the Board of Directors of the Salina Community Theatre, and as a Disaster Response team member for the American Red Cross. Judge Moore was awarded a Professional Certificate of Judicial Development in Administrative Law Adjudication Skills in 2008 and a Professional Certificate of Judicial Development in Dispute Resolution Skills in 2009 by the National Judicial College. Judge Moore is an alumnus of The National Judicial College and joined its faculty in 2009.
Honorable R. Ferrell Newman
Ferrell Newman is one of three Commissioners of the Virginia Workers’ Compensation Commission. Commissioner Newman was appointed to the Virginia Workers’ Compensation Commission by the Virginia General Assembly during the 2013 session. Mr. Newman is a 1983 graduate from the Marshall Wythe School of Law and a 1979 graduate from the University of Richmond. His appointment followed a 30-year practice of law with a heavy concentration in workers’ compensation.

Sanford Silverman, MD
Sanford M. Silverman, MD, is in private practice as the medical director and CEO of Comprehensive Pain Medicine in Pompano Beach, FL. He is board certified in anesthesiology with added qualifications in pain management from the American Board of Anesthesiology and a Diplomate in Pain Medicine from the American Board of Pain Medicine. Dr. Silverman is also a Diplomate in Addiction Medicine from the American Board of Addiction Medicine. His practice consists of interventional and medical treatment of chronic pain and opioid addiction, and his current interest includes treating complex chronic pain with hyperalgesia. After receiving his bachelor and master degrees from Tufts University in Medford, MA, Dr. Silverman earned his medical degree from New York Medical College. He then entered active duty military service with the US Army and completed a transitional internship at Letterman Army Medical Center in San Francisco, CA. Dr. Silverman then completed a residency in anesthesiology at Brooke Army Medical Center in San Francisco, CA. Following the completion of his training, he served as a major in the US Army and chief of the Anesthesia and Operative Service at William Beaumont Army Medical Center in El Paso, TX, where he was also the director of the pain clinic and an Assistant Clinical Professor of Anesthesiology at Texas Tech University Health Sciences Center in El Paso, TX. He is the immediate past-president of the Florida Society of Interventional Pain Physicians (FSIPP) and is president of the Broward County Medical Association. The author of articles and letters in publications such as Anesthesiology, the Journal of Cardiothoracic and Vascular Anesthesia, the Canadian Journal of Anesthesiology and Pain Physician, Dr. Silverman has also lectured nationally on topics including interventional pain management, controlled substance management and addiction issues, prescription drug abuse, and in the area of forensic medicine.

Honorable Jerry Stenger
Jerry Stenger is an administrative law judge in the Savannah office of the Georgia State Board of Worker’s Compensation. He was graduated with a B.A. from West Georgia College (now the University of West Georgia) in 1983. He was graduated from Mercer University School of Law in Macon, Georgia in 1986. He was admitted to the practice of law that same year, after which he started his legal career as law clerk to Judge David Elmore and then to Judge Frank Cheatham, two of Savannah’s trial judges. He began practicing some workers’ compensation law in Savannah in 1989 before moving to Atlanta in from 1990, after which he made workers’ compensation his specialty. Since 1995, he has been in his present position at the Georgia Workers’ Compensation Board’s Savannah office.
Judge Margaret E. Sojourner received a Bachelor of Arts with Honors from the University of Florida and a Juris Doctorate from Stetson University College of Law. After admission to the bar, she was employed as a Research Assistant to Judge Winifred Sharp at the Fifth District Court of Appeal. In 1981 she began employment with the firm of Haas, Boehm, Brown, Rigdon & Seacrest, P.A., where she represented employers and insurance carriers. In 1984 she became a partner in the firm of Daze & Sojourner, P.A., a general practice firm, including representation of injured workers. In 1987 she was employed with the staff counsel office of Travelers Insurance where she limited her practice to workers’ compensation matters and the appeals of those matters. In 1998 she joined the firm of Langston, Hess, Bolton, Znosko & Helm, P.A where she continued to represent employers and carriers in workers’ compensation matters and in the appeals of these matters. Ultimately she became a partner in the firm, which at the time of her appointment as Judge of Compensation Claims was known as Langston, Hess, Augustine, Sojourner & Moyles, P.A. She has been Board Certified in Workers’ Compensation since 1992. Judge Sojourner served as a Guardian Ad Litem through the Orange County Bar Association and as a tutor to at risk children through Outreach Love.

Robert Swisher is the Chief Judge of the Kentucky Department of Workers’ Claims. Appointed to the bench in 2009 by Governor Beshear, Judge Swisher became the Chief Judge in 2014. Prior to his appointment, Judge Swisher was a partner with the Northern Kentucky based workers’ compensation defense firm of Jones, Dietz & Swisher. He is a graduate of the University of Notre Dame and the University of Kentucky College of Law. He has been licensed to practice law since 1979.

Kenneth M. Switzer is the Chief Judge of the Tennessee Court of Compensation Claims. He graduated from David Lipscomb College and earned his law degree from the University of Louisville. Judge Switzer has been practicing law almost forty years, since 1977. He has been a litigator and a mediator in workers’ compensation personal injury and medical malpractice. Judge Switzer is certified by the National Board of Trial Advocacy. During his practice, he has been a frequent speaker at educational seminars on the subjects of civil trial and workers’ compensation practice.
James B. Talmadge, M.D.

Dr. Talmadge is a graduate of the Ohio State University for both undergraduate school (1968) and medical school (1972). His orthopedic surgery training was in the United States Army. He is Board Certified in Orthopaedic Surgery and in Emergency Medicine. He no longer operates, but now has an Occupational Medicine and non-operative orthopaedic practice in Cookeville, TN. Since 2005 he has served on the Meharry Medical College Occupational Medicine Residency Review Committee, and he is an Adjunct Associate Professor in the Division of Occupational Medicine, Department of Family and Community Medicine. He is a Fellow in, and Past President of, the American Academy of Disability Evaluating Physicians. He was one of the original Examination Committee members for the American Board of Independent Medical Examiners. He is a frequent contributor to, and the Associate Editor of The Guides Newsletter, which the American Medical Association publishes to update and to help explain the AMA Guides to the Evaluation of Permanent Impairment. He was a reviewer for the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment. He was an author/contributor to the 6th Edition, and a member of the Errata Committee. He has written and/or edited for the AMA a number of companion texts to the AMA impairment Guides. He is co-editor and a chapter author for A Physician’s Guide to Return to (2005), and Guides to the Evaluation of Work Ability and Return to Work (2008), and Guides to the Evaluation of Disease and Injury Causation, 2nd Edition (2013) published by the American Medical Association. He served on the ACOEM Practice Guidelines and Return to Work committees. He chaired the Spine Committee that wrote the 2007 update to the Low Back chapter in ACOEM’s Occupational Medicine Practice Guidelines, and the 2008 update to the Neck chapter. He served on the Chronic Pain Panel and Opioid Panel. He has chaired the Musculoskeletal Advisory Board for the Medical Disability Advisor, Third, Fourth, Fifth Editions, and chaired the entire Medical Advisory Board for the Sixth Edition published by the Reed Group, Limited. He wrote 2 chapters in the monograph Independent Medical Evaluations, published by the American Academy of Orthopaedic Surgeons in 2001. He co-wrote a chapter in the AAOS Orthopaedic Knowledge Update, 10th Edition. He has written multiple other text book chapters. Since 2001 he has served on the Editorial Board of Tennessee Medicine, the journal of the Tennessee Medical Association. Since 2010 he has served on the Editorial Advisory Board for The Spine Journal, published by the North American Spine Society. He is a peer reviewer for Archives of Physical Medicine and Rehabilitation, The Spine Journal, and American Family Physician. He is a consultant to the Federal Motor Carrier Safety Administration, serving on the Medical Exam Work Group (2009) and the Test Development Panel (2012-2014). In 2013 he was Acting Medical Director for the State of Tennessee Division of Workers’ Compensation. In 2014 he became a permanent Assistant Medical Director for the Division. He helped design and implement the Tennessee Medical Impairment Rating Registry that solves disputes over impairment ratings in Tennessee Workers’ Compensation cases, and he is now helping to implement the medical aspects of the 2013 Tennessee workers’ compensation law reforms. Since 1992 he has given almost 700 lectures to physician audiences on workers’ compensation, impairment, disability, and other orthopaedic/occupational medicine issues.
Professor Timothy Terrell

Timothy P. Terrell, a former Fulbright Scholar, received another Fulbright grant-in-aid for scholarly research and teaching in England. Before coming to Emory, he practiced with the Atlanta law firm of Kilpatrick & Cody. His works include “Rethinking Professionalism” and “When Duty Calls” both published in the Emory Law Journal (1992); Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing (Clark Boardman Company, 1992); “Transsovereignty: Separating Human Rights from Traditional Sovereignty and the Implications for the Ethics of International Law Practice,” Fordham International Law Journal (1994); “A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students,” Washburn Law Journal (1994); “Ethics with an Attitude,” Law and Contemporary Problems (1996); “Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel,” Emory Law Journal (1997) and several articles on legal writing and editing for West Publishing Company’s Perspective periodical. Professor Terrell has organized conferences on topics such as “Rethinking Liberalism” and “Human Rights and Human Wrongs: Investigating the Jurisprudential Foundations for a Right to Violence.” He is director of the Hugh M. Dorsey Jr. Fund for Professionalism and also has been active in continuing legal education for practicing lawyers, presenting programs around the country for the American Law Institute and the National Practice Institute on legal writing and legal ethics. He served part-time as the director of professional development for the Atlanta law firm of King & Spalding, assisting that firm in developing its associate training program. He also helped produce two videotape-based educational programs on legal ethics, one for prosecutors and criminal defense lawyers, the other involving representation of clients in the healthcare industry. Education: BA, University of Maryland, 1971; JD, Yale University, 1974; Diploma in Law, Oxford University, 1980.

Honorable Brian Watkins

Brian Watkins is an Assistant Chief Industrial Appeals Judge with the Washington State Board of Industrial Insurance Appeals.

Honorable Jane Williams

Jane Rice Williams is an Administrative Law Judge with the Kentucky Department of Workers’ Claims. Judge Williams received her Bachelor of Arts from the University of Kentucky and Juris Doctorate from Salmon P. Chase College of Law. She was admitted to the practice of law in the Commonwealth of Kentucky in October of 1995 and is a member of the Kentucky and Laurel County Bar Associations.

Judge Williams is a native of Harlan, Kentucky. She was in private practice in Lexington and then London from 1995 until July 2012 handling a variety of civil matters with a concentration on workers’ compensation law representing both plaintiffs and defendants. Judge Williams was appointed as an Administrative Law Judge and has served in that position since July 15, 2012.
**Honorable Roger Williams**

Roger L. Williams, with the Virginia Workers’ Compensation Commission in Richmond, was appointed by the 2008 Virginia General Assembly and began his position on May 1, 2008. Along with two other Commissioners, he oversees the administration of the Commission’s processing of Virginia workers’ compensation claims; they hear appeals from decisions of deputy commissioners; and they formulate Commission policy. For twenty-eight years, Commissioner Williams was engaged in the private practice of law almost exclusively in the area of insurance defense litigation with emphasis on workers’ compensation. He represented employers and insurers in thousands of cases before the Virginia Workers’ Compensation Commission. Commissioner Williams taught AIC34, the Insurance Institute of America’s Workers’ Compensation course for insurance adjusters, lectured on the law of workers’ compensation at various programs presented by the Virginia Workers’ Compensation Commission and Virginia CLE, and conducted workers’ compensation seminars for various insurance carriers and self-insured groups. He is a member of the Virginia State Bar and licensed in all state and federal courts in Virginia. Commissioner Williams earned his B.S. at Washington and Lee University and his J.D. at the University of Richmond.

**Robert H. Wilson**

Bob Wilson has served as President & CEO of WorkersCompensation.com, LLC since co-founding the company in 1999. He has almost 20 years’ experience in the technology arena, including Internet business solutions and website architecture and development. Bob’s broad experience also includes turn around and area management, as well as human resources management and technical recruiting. An accomplished speaker for the workers’ compensation industry, Bob has presented at seminars and conferences on a variety of topics related to both technology within the workers’ compensation industry, and bettering the workers’ comp system through improved employee/employer relations and claims management techniques. He is the author of “From Bob’s Cluttered Desk”, a blog repeatedly selected as a top workers’ compensation blog by LexisNexis. With his extensive business management and human resources background, Bob brings a strong employer and corporate voice to the workers’ compensation arena. Known for an extraordinary sense of humor, his presentations reflect both entertaining and practical advice for both people managing claims and the people “picking up the tab”. He was raised in Durango, Colorado and has a Bachelor’s degree in Business Administration from Fort Lewis College. He resides with his wife in Sarasota.
The Southern Association of Workers’ Compensation Administrators (SAWCA) membership includes 19 jurisdictions; 17 states, District of Colombia and the Virgin Islands. The States are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. The Southern Association of Workers’ Compensation Administrators, Inc. (SAWCA) was formed in 1949 and incorporated in 1980.

Regulation of Workers’ Compensation systems involves a variety of challenges. There are complexities resulting from interrelationships among and between the various constituencies that comprise this unique marketplace. Employer participation in workers’ compensation, their use of primary and excess insurance products, self-insurance, and a variety of ancillary service providers are all regulatory concerns. Rule-making, regulatory compliance, licensing and more present challenges to the Regulator. The vast diversity of workers’ compensation can be a particular challenge to new Regulators.

SAWCA addresses these challenges with the New Regulator College. This is offered by SAWCA in conjunction with the Workers’ Compensation Institute in Orlando, August 24-25, 2015. Details below.
2015 SAWCA National Regulators Roundtable

This year celebrates the 5th Annual National Regulators Roundtable, sponsored by the Southern Association of Workers’ Compensation Administrators (SAWCA). This session brings together regulators from throughout the country to discuss challenges, concerns and issues facing individual jurisdictions in the oversight of the ever-changing workers’ compensation industry. Problems may have already been successfully addressed by other jurisdictions; developing issues of concern in one state may be an omen for future developments in another and, legislative issues know no boundaries. The National Regulators Roundtable® is a forum where regulators share lessons learned and seek timely answers to their most pressing issues.

Topics may include: Emerging Medical Treatments; Employer Compliance; Adjudication of Benefits; Managing the Legislative Environment; Technology, and ending with an open forum providing the audience the opportunity to raise their own issues and concerns for the regulators to address.

The 5th Annual National Regulators Roundtable remains open to all WCI attendees representing a unique opportunity for participants and audience alike. Be sure to join us as the regulatory leadership from across the nation gathers in Orlando addressing those topics that shape our industry.

Welcome:
  Gary Davis
  Secretary / Treasurer
  SAWCA Lexington, KY

Moderator:
  Honorable Melodie L. Belcher
  SAWCA Past-President
  Administrative Law Judge
  Georgia State Board of
  Workers’ Compensation
  Columbus, GA

Alabama
  Gerald Stringer
  Ombudsman
  Workers’ Compensation
  Division, Department of
  Labor
  Montgomery, AL

Arizona
  Honorable Luann Haley
  Judge
  Industrial Commission of
  Arizona
  Tucson, AZ

Arkansas
  Honorable Karen McKinney
  Commissioner
  Arkansas Workers’
  Compensation Commission
  Little Rock, AR

Colorado
  Paul Tauriello
  Director
  Division of Workers’
  Compensation
  Denver, CO

Delaware
  Stephanie Parker
  Administrator
  Delaware Department of
  Labor
  Dover, DE

District of Columbia
  Honorable Melissa Jones
  Judge
  Compensation Review Board
  Washington, D.C.

Florida
  Tanner Holloman
  Director
  Division of Workers’
  Compensation
  Tallahassee, FL

Florida
  Honorable David Langham
  Deputy Chief Judge
  Florida Office of Judges of
  Compensation Claims
  Pensacola, FL

Florida
  Andrew Sabolic
  Assistant Director
  Division of Workers’
  Compensation
  Tallahassee, FL
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Endnotes for Common Law Fellow Servant, from page 12.

2. See Dykhoff v. Xcel Energy, 840 N.W.2d 821, 831 (Minn. 2013).
9. Id. at 1032.
14. Id. (collecting cases).
15. Id. (“Where we find a road is so well beaten, it is easy to follow it, and its beaten character is an indication that we may follow it with safety.”).
16. Id. (citing Little Miami R.R. Co. v. Stevens, 20 Ohio 415 (Ohio 1851)).
17. Id. (quoting WHARTON’S LAW OF NEGLIGENCE, § 229).
18. See Ryan v. Cumberland Valley R.R. Co., 23 Pa. 384, 388 (Pa. 1854) (“If we declare that workmen are warranted against such carelessness, then the law places all careless men, which means all badly educated or badly trained men, and it places even those who have not acquired a reputation for care, under the ban of at least a partial exclusion from all work.”).
19. See id. (“[S]uch a rule could have very little application to great corporations, for they would immediately act on the maxim, conventio vincit legem [“(the express agreement of parties overrides the law”) and provide against it in their contracts.”).
20. See id. (“[S]uch a rule . . . would live to embarrass the more private and customary relations, and be the source of abundant litigation.”).
22. HARY B. BRADBURY, BRADBURY’S WORKMEN’S COMPENSATION AND STATE INSURANCE LAW OF THE UNITED STATES (1912) (noting that employees were increasingly succeeding in tort actions for injuries from work accidents arising out of the negligence of superiors in the workplace (i.e., “the vice-principal doctrine”)).
24. Id. (quoting WHARTON’S LAW OF NEGLIGENCE, § 229).
26. Id. (collecting cases).
28. Id. (quoting WHARTON'S LAW OF NEGLIGENCE, § 229).
29. 78 Pa. 25, 26 (Pa. 1875).
31. Mullan, 78 Pa. at 32.
33. Id. at 518.
34. Lewis, 11 A. at 519 (emphasis added).
36. Id. at 157-59.
37. 43 PA. STAT. §§ 171, 172 (1908) (repealed 1983).
38. 43 PA. STAT. § 171 (1908) (repealed 1983).
40. 43 PA. STAT. § 172 (1908) (repealed 1983).
See Part II, supra; Prevost v. Citizens’ Ice & Refrigerating Co., 40 A. 88, 89 (Pa. 1898) (holding that a “chief engineer” or foreman is not a vice-principal where he has authority over only a portion of the business, and where he is not authorized to make general hiring decisions).

Id.


Id. at 166.

Id. at 169-70 (emphasis added).


Id. at 1044.

Id.; see also Anderson v. Keystone Type Foundry, 98 A. 696, 697 (Pa. 1916) (explaining that where a foreman participates and assists in the work of those under him, he becomes a fellow servant but, where he undertakes duties imposed by reason of his superior position, he is a vice-principal, and his master is liable for his negligence).

See, e.g., Sorden v. Parker, 53 Pa. Super. 539, 543 (Pa. Super. Ct. 1912) (holding that a foreman was acting as a fellow servant rather than as a superintendent when he was holding a ladder for the plaintiff).

See, e.g., Hickey v. Caldwell, 70 A. 855 (Pa. 1908) (involving owners of a foundry who had delegated absolute control of the foundry to a workman, including the power to employ and discharge men).


See 77 PA. STAT. § 41 (“In any action brought to recover damages for personal injury to an employee in the course of his employment . . . it shall not be a defense that the injury was caused in whole or in part by the negligence of a fellow employee.”).

See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 532-33 (4th ed. 1971) (stating that the fellow servant rule “has been said to have practically disappeared” with the enactment of workers’ compensation laws).

Cool v. Curtis-Wright, Inc., 66 A.2d 287, 290 (Pa. 1949) (“The legislative intent . . . clearly indicat[es] that Section 201, abolishing the defenses of negligence of a fellow servant, contributory negligence and assumption of risk, shall apply only in actions brought to recover damages for injuries of the type covered by the Workmen’s Compensation Act.”); See, e.g., 77 PA. STAT. § 676 (exempting persons engaged in domestic service and licensed real estate salespersons from the Pennsylvania Workers’ Compensation Act).


See 77 PA. STAT. § 676(1) (exempting persons “engaged in domestic service,” provided that the employer has not elected to come within the provisions of the Act).

45 U.S.C. § 51 et seq.


See, e.g., 77 PA. STAT. § 676 (exempting persons engaged in domestic service and licensed real estate salespersons from the Pennsylvania Workers’ Compensation Act).


Pomer v. Schoolman, 875 F.2d 1262, 1267 (7th Cir. 1989) (“A modern court that did not abolish the fellow-servant rule outright would probably construe it very narrowly, perhaps so narrowly that a truck driver and a combine driver would not be considered fellow servants.”)