Lex and Verum

The National Association of Workers' Compensation Judiciary

Number CXIV
February 2019

NAWCJ President's Page

By Hon. Jim Szablewicz

Happy February everyone. As I write this a powerful "polar vortex" is about to bring extreme frigid temperatures and wind chills to much of the country, the lowest in recorded history for many locations. Fortunately, a number of upcoming educational events provide opportunities to escape to warmer places and thaw out.

First up is the two-day Workers' Compensation Mid-Winter Seminar and Conference sponsored by the ABA Section of Labor & Employment Law to be held at the Biltmore Hotel in Coral Gables, FL on March 14 and 15, 2019. Following the Seminar and Conference will be the third annual College of Workers' Compensation Lawyers (CWCL) Workers' Compensation Symposium on March 16, 2019. A number of NAWCJ members will serve as presenters at both the Seminar and Symposium, which promise excellent substantive programs in addition to the warmer temperatures. More information about these events is available at https://www.americanbar.org/events-cle/mtg/inperson/349870404/.

Speaking of the CWCL, congratulations to NAWCJ Board member Judge Neal Pitts (FL) and Judge Daniel G. Foote (IN) on their election as Fellows. They, along with previously elected Fellows NAWCJ Board member Judge Suzette Carlisle (MO) and Commissioners Robert Rapaport (VA), and Cynthia Miraglia (MD) will be inducted at the CWCL ceremony and dinner on the evening of March 16.

Continued, Page 2

The President's Page, from Page 1.

Just a few weeks later, the IAIABC Forum will be held at the Paradise Point resort in sunny San Diego, CA from April 1 to 4, 2019. A highlight of the Forum will be a one-day judicial program conducted jointly by the NAWCJ and the IAIABC Dispute Resolution Committee on April 1, which will include a spotlight on California's workers' compensation system. You will find more details about the Forum below and at the IAIABC website: https://www.iaiabc.org/assnfe/ev.asp?ID=527.

Meanwhile relax with your favorite warming beverage and enjoy this month's edition of the *Lex & Verum*, including Tom Robinson's recap of the Top 10 Bizarre Workers' Compensation Cases of 2018, Judge David Langham's thought-provoking article on the ethical complexities judges face when asked to write letters of recommendation, and Judge Dave Torrey's *Notes From a Seminar*: Texas Bar Association Annual CLE.

As always, please contact me at james.szablewicz@workcomp.virginia.gov with your comments and suggestions, or if you wish to be more actively involved with one of the NAWCJ's committees. Stay warm.

In This Issue

Save the Date!

On Monday, April 1st, 2019, the IAIABC and NAWCJ will be hosting a Judges' Program during The IAIABC Forum 2019 in San Diego, California.

Details on Page 29

2018-19 NAWCJ Officers

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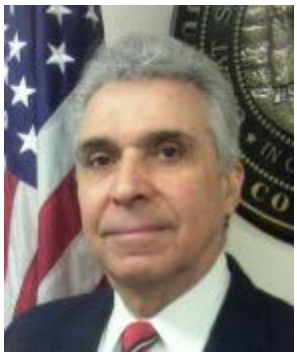
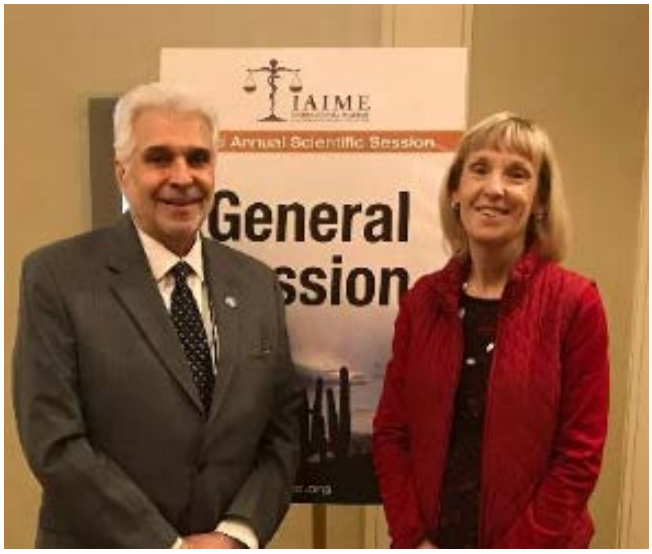
Is There a Doctor in the Hearing Room?



By Hon. John J. Lazzara*

Have you ever had that queasy sensation in the pit of your stomach when you visit a doctor? Just that anxious, nervous feeling about what the doctor might tell you about some of the problems you've experienced. Well consider talking to about 150 doctors in the same room about your experiences as a workers' compensation adjudicator in evaluating the opinions of medical experts for admissibility and credibility. Surprisingly it was a most pleasant and rewarding experience, as these doctors were genuinely interested in what I had to say and impressed me with their focus on providing tribunals with the most appropriate medical testimony to make our decision-making easier.

On January 16-17, 2019, The Honorable LuAnn Haley, Administrative Law Judge, Industrial Commission of Arizona, and I were invited to speak before International Academy of Independent Medical Evaluators (IAIME) at its 3rd Session of IAIME Medicolegal Institute in Tucson, Arizona.[1] The IAIME, formerly known as the American Academy of Disability Evaluating Physicians (AADEP), is a medical educational society devoted to promoting best practices in assessing impairment based on the *AMA Guides to the Evaluation of Permanent Impairment* and the use of proper techniques in the treatment and evaluation of industrial injuries and conditions. Its membership encompasses the U.S., Canada, Australia and Europe, and many hold law degrees in addition to medical doctorates; thus, their interest in disability evaluations and medicolegal matters.



Hon. John Lazzara (FL) and Hon. LuAnn Haley (AZ)

The topics that Judge Haley and I were asked to address were "The Important Role of the Medical Expert in Workers' Compensation" and "Finding the Medical Expert Credible: Perspectives of Two Workers' Compensation Judges." Working from our experiences as adjudicators, we both touched on the indispensable role of physicians in the field of workers' compensation litigation and decision-making. Without the medical expert to assist adjudicators regarding injuries and causation thereof, and the residual effects of such injuries, rendering an appropriate and just decision would be next to impossible. Such medical evidence provides invaluable guidance to injured workers, lawyers and adjudicators in their effort to successfully navigate today's disability benefit system. The importance is especially significant relative to IME physicians, who are expected, as non-treating medical evaluators, to render unbiased and objective opinions to resolve medical conflicts in diagnosis, causation, treatment and return-to-work issues.

Continued, Page 4.

Doctor in the Courtroom, from Page 3.

The second topic dealt with ascertaining the credibility of medical opinions from the perspective of a workers' compensation judge. Of course, judges have their own unique take on what factors are most important when determining which medical testimony deserves more weight over another. Surprisingly, the doctors said that they rarely know the basis why an adjudicator has rejected their opinions. Some of the more general attributes of credibility mentioned were the medical witness's expertise in a specialty; whether a treating physician or one-time examiner; review of relevant medical records and diagnostic tests; consideration of past medical history; expert's bias; consistency of the testimony on direct and cross examination; opinion more consistent with logic and reason; and preparedness and demeanor of the witness.

As Judge Torrey astutely noted in an article he wrote, "medical testimony comes down to persuasiveness more than credibility."[2] In other words, as Judge Haley and I stressed, "what in the testimony tips the scale over another equally credible testimony." You could tell from the questions and comments we received during the follow-up panel discussions, that these doctors were sincerely concerned about being objective and as unambiguous as possible when rendering medical opinions.

Some of the other informative session workshops I attended included: Evaluating First Responders; Medical Mimics of Musculoskeletal Conditions; Causation Analysis; IME/Testimony; Apportionment and Causation; and Evidence-Based Medicine: Evaluating the Evidence.[3] The names of some of the speakers that NAWCJ members will recognize were: Robert Barth, Ph.D.; James Talmage, M.D; and Mark Melhorn, M.D., who have presented at past judiciary colleges at one time or another. It was interesting to hear medicolegal issues discussed from the perspective of physicians.

A special shout-out to Dr. Marjorie Eskay-Auerbach, M.D, J.D., IAIME President, who was kind of enough to invite me at the suggestion of Judge Haley. As an aside, I mentioned to her that IAIME and NAWCJ should explore the possibility of a joint educational venture in the future, as I noted that the doctors were as interested to hear what judges had to say about medical testimony as judges are interested to know more about the IME process. I believe that there are many interests the two groups have in common.

In conclusion, a very comprehensive and informative conference, and I was honored to present along with Judge Haley who did the heavy lifting for our panel. I know I got more out of the program than what I contributed. Finally, I am most appreciative of all the courtesies and camaraderie extended to this lawyer by the IAIME, Dr. Eskay-Auerbach and the doctors in attendance.

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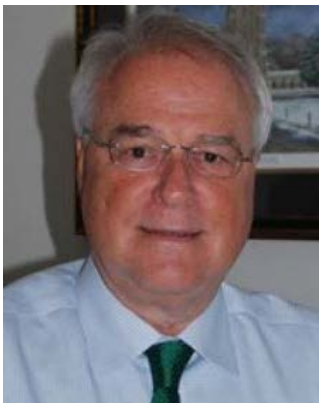
* Judge Lazzara was the Inaugural President of NAWCJ and is a retired Florida Judge of Compensation Claims as of May 2018. He is currently available as a workers' compensation mediator, speaker, and consultant. He can be reached at: john.lazzara18@gmail.com.

Endnotes on page 34.

Legal Ha Ha

LAWYER: Doctor, did you say he was shot in the woods?
WITNESS: No, I said he was shot in the lumbar region.

The Top 10 Bizarre Workers' Comp Cases for 2018



By: Thomas A. Robinson, J.D.*

More than 30 years ago, my mentor, Dr. Arthur Larson, and I began a quirky New Year's tradition. Early one January evening, we sat together in his home on Learned Place, near Duke University's campus here in Durham, North Carolina, sipped an adult beverage, and compared our respective lists of the previous year's "bizarre" workers' compensation cases. We continued that tradition until his death. A few years later, I decided to reprise the annual list.

I pulled together my choices, gleaned from my work on Arthur's treatise, and sent them out in early January to about a dozen colleagues. They enjoyed my sharing and for the next four or five years, I expanded the list of "subscribers" until my good friend and collaborator, Robin Kobayashi, J.D., skilled editor/writer at LexisNexis, suggested that I take advantage of technology to broaden my reach.

I took her advice and for the past dozen or so years, I have continued the annual "review of the bizarre" in electronic form. As some of you know, a few years ago, my annual list was even featured on National Public Radio's Saturday morning show, "Wait, Wait, … Don't Tell Me."

As with all previous "Bizarre Lists," I am ever mindful of the fact that while a case might be factually bizarre in an academic sense, it is intensely real for the participants and their families. These highlighted cases involve *real injuries*, some even fatal. My intent is not to trivialize their injuries and claims. Instead, I propose that life often has its bizarre moments and, since the workers' compensation world is quite representative of the larger world around it, the cases we see each year sometimes have quirky, truly bizarre, fact patterns.

And so, in the spirit of my annual January ritual, I offer ten bizarre *published* cases (in no particular order), and half a dozen others that, although truly bizarre, didn't make their way to our appellate courts (yet?). If you know of others that fit the category, please send them along to me tom@workcompwriter.com.

CASE #1: Just When You Thought it was Safe to go to the Doctor (Oklahoma)

An Oklahoma claimant, who sustained a compensable 2008 injury to various body parts, including the left knee and cervical spine, had sought treatment in 2012 for continued cervical discomfort. She traveled to a nearby medical facility, underwent a steroid epidural injection to her cervical spine, and then was to be wheeled into the recovery area for observation. Inexplicably, medical personnel placed her in a wheelchair that had no foot rests. This, in spite of the fact that she was still partially under sedation. As they wheeled her to recovery, her feet drug on the floor, her knees went underneath the wheelchair, and she was suddenly thrown forward to the hard floor, causing additional injury to her knee. The employer contended the actions of the medical personnel constituted an intervening action, but the Workers' Compensation Court—and the Supreme Court—disagreed. Claimant was entitled to additional compensation.

City of Tulsa v. Hodge, 2018 OK 65, 429 P.3d 685 (2018)
Larson § 10.09

Continued, Page 6.

Bizarre Cases 2018, from Page 5.

CASE #2: "Summertime, and the Livin' is Easy" or, Should Some Actors Get "Hazard Pay?" (Illinois)

This case comes from an adaptation of Dr. Larson's favorite American "opera," George Gershwin's magnum opus, *Porgy and Bess*. In a Chicago production of the popular musical play, the claimant portrayed the character of Porgy, a physically disabled adult. He testified that portraying Porgy required that he spend most of the performance sitting on his left hip and dragging himself around stage with his upper body, primarily his left arm. He testified that during one such performance, at the beginning of the second act, he "felt a pop and felt pain" as he dragged himself with his left arm from one section of the stage to another. The claimant eventually underwent shoulder surgery. The Commission awarded benefits. The Illinois appellate court acknowledged that there was some conflict in the evidence presented but added that it was for the Commission to resolve those conflicts and that it had done so.

University of Chicago v. Illinois Workers' Comp. Comm'n, 2017 IL App (1st) 170268WC-U, 2017 Ill. App. Unpub. LEXIS 2023 (Sept. 29, 2017)

Larson § 42.01

CASE #3: "The Sheriff's Gettin' Up a Posse" or, "On Being Neighborly" (California)

In a case involving an utterly bizarre fact pattern, a California appellate court held that a civil action for negligence and misrepresentation filed by two private citizens against a California county was barred by the exclusive remedy provisions in Cal. Labor Code § 3366 (California's "posse" law). The two citizens, a husband and wife, did not work for the county. They were telephoned by a Trinity County deputy who asked them — because of their proximity to "the incident" — to "check on" a neighbor who had placed a 911 call for help. According to the plaintiff's allegations, the deputy indicated the call was likely related to inclement weather. The deputy omitted information that suggested potential criminal activity at the neighbor's residence. Plaintiffs unwittingly walked into a murder scene and were brutally attacked by the man who apparently had just murdered their neighbor and her boyfriend. The court held their tort suit barred. Under § 3366, any person "assisting any peace officer in active law enforcement service" is deemed to be an employee of the public entity for whom he or she is "serving," and workers' compensation benefits are the exclusive remedy afforded for any injury.

Gund v. County of Trinity, 24 Cal. App. 5th 185, 234 Cal. Rptr. 3d 187, 83 Cal. Comp. Cases 1042 (2018)

Larson § 28.03

Continued, Page 7.

2018-19 NAWCJ Board of Directors

Bizarre Cases 2018, from Page 6.

CASE #4: Smoking Can Be Hazardous to Your Health (North Carolina)

In a truly unusual case from North Carolina, an appellate court affirmed the denial of benefits to a municipal worker who suffered injuries when he fainted and collapsed after getting choked on an e-cigarette. The worker and his crew had decided to take a lunch break at a Sheetz fueling facility. The worker ate his lunch inside a City of Winston-Salem truck, while the other employees sat at a table outside the fueling facility. After finishing his lunch, the municipal worker went into the facility, decided to buy an e-cigarette—a type of cigarette he had never previously smoked. He returned to the City's truck after making the purchase and began smoking the e-cigarette while sitting inside the vehicle. As he began to puff on the product, he began to cough "uncontrollably." In order to get some fresh air, he opened the vehicle's door and stepped out of the truck while continuing to cough. The worker then "passed out and fell to the ground." He landed on the cement curb, causing injury to his right hip, back, and head. A board-certified orthopedist diagnosed him with "L3, L4 transverse process fractures." Stressing the crucial difference between an "unexplained" fall and an "idiopathic" fall, the appellate court affirmed the denial of benefits, observing that the Commission's denial had been based upon its finding that the worker's fainting and fall resulted from the worker's idiopathic conditions — extreme hypertension, highly elevated blood sugar levels, and a vasovagal reaction to his coughing and choking upon taking his first puff of the e-cigarette — and not to work-related risks.
Brooks v. City of Winston-Salem, 816 S.E.2d 260 (N.C. Ct. App. 2018)
Larson § 9.03

CASE # 5: At Least There Were Plenty of First-Responders Nearby (Virginia)

A Virginia appellate court held that an emergency room paramedic, who sustained serious injuries when he fainted while assisting a physician in an ER procedure, was not entitled to workers' compensation benefits. The paramedic had been asked to assist the physician by standing in front of a patient to stabilize him during a lumbar puncture procedure—a medical intervention that involved inserting a needle into the patient's spine. The paramedic testified that as he observed the procedure, he felt "light-headed" and "dizzy." He lost consciousness and fell to the concrete floor, sustaining a skull fracture and hematoma. His injuries required emergency surgery that day. The appellate court acknowledged that the injuries were sustained in the course of the employment but ruled that the paramedic failed to show that they actually *arose from the employment*. Repeating that Virginia uses the so-called "actual risk test," the court indicated the paramedic failed to show that the causative danger was peculiar to the work environment and not merely common to the neighborhood. The court also stressed that while the EMT had established a *correlation* between the particular spinal procedure and his loss of consciousness, he had failed to show an actual causal relationship between the two. Medical records indicated there were other potential causes that he had not ruled out.
Lynchburg Gen. Hosp. v. Foster, 2018 Va. App. LEXIS 90 (Apr. 10, 2018)
Larson § 9.01

CASE # 6: "Knock Knock," "Who's There?" (Federal Court)

Martyn Baylay, a British citizen, worked as a pilot for Etihad Airways, an airline operated out of the United Arab Emirates. As a part of his duties, Baylay was assigned to a flight crew that also included Saravdeep Mann. The crew members flew from Abu Dhabi to Chicago. After arrival, Etihad arranged for the crewmembers' transportation to a Chicago hotel for an overnight layover. Subsequent testimony indicated the crew members drank pre-dinner cocktails together that night, where Mann consumed a significant amount. Baylay later testified that it appeared to him that Mann had imbibed before meeting the group. Further testimony indicated that Mann downed even more alcohol during dinner and then expressed anti-American and anti-British views while emphasizing his distaste for the British by placing his hands around Baylay's throat.

Continued, Page 8.

Bizarre Cases 2018, from Page 7.

Mann left the restaurant without paying his bill and without his coat. The crew members settled Mann's bill, and Baylay offered to take Mann's coat and return it the next day. Back at the hotel, Baylay heard a knock on the door of his hotel room and saw Mann standing outside his room. Thinking Mann was there to apologize for his earlier actions and collect his coat, Baylay opened the door. Mann struck him on the head and leg with a bronze hotel decoration. During the attack, Mann threatened Baylay, saying, "I'm going to kill you. You f**king British bastard." Baylay managed to escape, took the elevator to the lobby of the hotel, and was then transported to Northwestern Memorial Hospital. Mann was arrested and transported to the Chicago Police Department. The Seventh Circuit held the matter fell within the jurisdiction of the Illinois Workers' Compensation Commission in spite of the Foreign Sovereign Immunities Act.
Baylay v. Etihad Airways P.J.S.C., 881 F.3d 1032 (7th Cir. 2018)
Larson § 100.03

CASE #7: Accountant's Fatal Shooting by Disgruntled Former Client Found Compensable (Alabama)

In one bizarre and tragic Alabama case, the Court awarded death benefits to the surviving spouse of an accountant who was stalked and then shot to death by an assailant who blamed the accountant for tax problems in his business. One year before the fatal incident, the disgruntled assailant's former business partner had warned one of the CPA firm's partners that the assailant blamed the accountant (and the firm) for tax fines, penalties, and other tax-related issues, saying "Y'all need to be careful." On the day of the incident, the assailant first went to the office of a local attorney, whom the assailant held at gunpoint to coerce the attorney into telephoning the assailant's former business partner and requesting, under false pretenses, that the partner come down immediately to the attorney's office. The assailant shot the business partner as he arrived and attempted to shoot the attorney, but the gun jammed. The assailant then apparently went to the office of his current accountant but was unsuccessful in gaining entry there.

He thereafter entered the offices of the CPA firm that employed the deceased, found her, and fatally shot her three times. The appellate court acknowledged that an intentional assault did not arise out of the employment if it was committed because of reasons personal to the employee and not because of his or her status as an employee or because of his or her employment. The court said that here, although the murder was an intentional act on the part of the murderer, it amounted to an accidental injury (death) arising out of the employment. The court noted that the undisputed evidence showed that the assailant intentionally assaulted and killed the accountant not out of any personal ill will, but solely because of their working relationship. Immediately before opening fire on the accountant, the assailant unmistakably expressed his intent to kill her because she had "f-'d up [his] taxes." The record contained no evidence of any other possible motivation for the assault.
Lawler & Cole CPAs, LLC v. Cole, 2018 Ala. Civ. App. LEXIS 115 (July 13, 2018)
Larson § 8.01

Continued, Page 9.

NAWCJ
National Association of Workers' Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

Bizarre Cases 2018, from Page 8.

CASE #8: And You Thought Texting While Driving Was Dangerous! (Federal Court)

Doutherd, who was operating a loaded transport truck and trailer owned by defendant UPS, sustained injuries in a collision with a second vehicle being driven by defendant Montesdoeca. According to plaintiff's version of the incident, at the time of the accident, Montesdoeca was fighting with a male passenger in the back seat of her vehicle when she lost control, careened into the highway divider, and then rebounded from the divider, smashing into the front passenger side of the truck being driven by plaintiff. Doutherd contended that his injuries did not stop with the accident, that the workers' compensation insurance company handling the claim acted inappropriately, so Doutherd filed a tort action in federal district court against the company (and others) alleging, *inter alia*, concealment, fraud, negligent interference, and bad faith breach of contract. The federal district court observed that, generally speaking, the carrier had been sued for its role in the alleged mishandling of plaintiff's workers' compensation claim. The federal court noted that the right to recover worker's compensation benefits was the sole and exclusive remedy available to an injured employee against his or her employer *or the employer's insurer*. The district court acknowledged a narrow exception where the actor, by its alleged acts or motives, was no longer acting as an employer/insurer. Here, the court found the plaintiff's allegations did not fall within that narrow exception.
*Doutherd v. Montesdeoc*a, 2018 U.S. Dist. LEXIS 137583 (E.D. Cal. Aug. 14, 2018)
Larson § 114.02

CASE #9: Assault by the Parking Garage Kiosk! (New York)

An employee, who sustained a shoulder injury as she reached out of her car window to scan her parking pass at a parking garage kiosk near her place of employment, did not sustain an injury arising out of and in the course of her employment, held a divided New York appellate court in a decision affirming that finding by the state's Workers' Compensation Board. The majority acknowledged that parking lot injuries could be compensable if the lot constituted part of the employer's premises. While the parking lot in question had an area specifically dedicated to building tenants - including the respective employer - and while the employer provided free parking to the injured employee and assigned her a special parking space, the majority noted the garage was not owned nor maintained by the employer, but by third parties. The majority also stressed that the parking garage/lot was open to the public, who could access the area by taking a ticket at the same kiosk that the employee used to scan her parking pass. The majority acknowledged the evidence would also have supported a contrary result but held there was substantial evidence to support the Board's decision.
Matter of Grover v. State Ins. Fund, 165 A.D. 3d 1329, 85 N.Y.S.3d 239 (3d Dept. 2018)
Larson § 13.04

Continued, Page 10.

Governor Hutchinson Appoints Labor Commissioner

Arkansas Governor Asa Hutchinson appointed Scott Willhite to serve as the labor commissioner.

Scott Willhite has been a partner with Orr Willhite, PLC since 1999. He previously practiced with Baker Donelson and the Hardison law firm in Memphis, Tennessee.

Mr. Willhite has donated more than 50 hours toward pro bono cases. He is chair of the Craighead County Republican Committee; a member of the board of directors for the Voice of Arkansas Minority Advocacy Council; and a member of the board for Arkansans for the Arts.

Mr. Willhite graduated from Arkansas State University and received his Juris Doctorate from the University of Arkansas School of Law in 1989. He is licensed to practice law in Arkansas and Tennessee, and he is a member of the Arkansas Bar Association, the Tennessee Bar Association, the Craighead County Bar Association, and the Memphis Bar Association.

Bizarre Cases 2018, from Page 9.

CASE #10: Close Encounters of Another Kind (Ohio)

In yet another bizarre parking lot case, a worker who alleged that he sustained injuries when he was physically assaulted by the husband of a co-worker and then intentionally struck by the husband's vehicle as the worker tried to block—with his body—the path of the assailant, did not sustain injuries arising out of and in the course of the employment, held an Ohio appellate court. According to the injured worker's testimony, he arrived at the employer's parking lot some ten minutes before check-in time. He could not easily proceed into the lot, however, because the vehicle path was blocked by a stopped vehicle driven by the husband of a co-worker. The husband had dropped off his wife for work but had not moved his auto. The worker said he drove around the stopped car and then proceeded to park, where he was accosted by the husband. The worker said he first tried to call 9-1-1 regarding the assault and then sought to prevent the husband from driving away by standing in front of the vehicle at the exit gate. He claimed he was then struck by the husband's vehicle, which was moving at perhaps 10 to 15 mph. The appellate court agreed that there was insufficient connection to the employment to sustain a claim for workers' compensation benefits. The two men had never met, and the worker did not know or work directly with the wife.
Garner v. Bureau of Workers' Comp., 2018-Ohio-3398, 2018 Ohio App. LEXIS 3675 (Aug. 24, 2018)
Larson § 8.02

Additional Bizarre Unreported Cases

While my custom has been generally to limit my selection only to those cases that reach the appellate courts, in recent years I've also included a few others that warrant inclusion—because of the bizarre nature of the facts (or alleged facts)—in spite of the fact that the relevant claim has not made its way beyond the state administrative board or agency.

Injured Worker Accidentally Kicked by Doctor's Receptionist (Missouri)

A friend and colleague, Martin A. Klug, experienced workers' compensation attorney with the firm, Huck, Howe & Tobin, in Clayton, Missouri, sent me this one. The case turned on an unrelated legal issue, but in short, an employee complained of throat and eye irritation, coughing and wheezing after exposure to Cypermethrin sprayed around air conditioning units in her work place to control ants. She sought emergency room treatment and, thereafter, returned to work without limitations. Later, in response to the employee's continued complaints, the employer sent her to occupational and environmental medicine specialist, Dr. Eddie Runde, for additional evaluation. The employee sat in the waiting room where one other patient was present, along with the patient's small dog. When it came time for the employee to see the doctor, a receptionist escorted her from the waiting room to the patient area and, in the process of attempting to divert the little dog, accidently kicked the employee under her right knee, causing her to trip and fall on her knees. The ALJ found that the injuries sustained at the doctor's office were compensable since they arose out of her original injury.

Continued, Page 11.

Bizarre Cases 2018, from Page 10.

Taco Bell Worker Arrested In "Hot Burrito" Assault (South Carolina)

Last January, a Spartanburg, South Carolina Taco Bell employee was arrested after allegedly throwing a "hot burrito" at his manager because he was "upset over having to work the morning shift." Spartanburg cops were called to a Taco Bell on January 22, 2018 after an employee got into a dispute with his manager.

The manager told an officer that the employee was upset over his work schedule and "was getting into several verbal disputes with other coworkers." The manager added that when she told the employee to "stop being a crybaby," he exploded, slinging a loaded burrito at her. The manager told police that "the melted cheese got all over [her] left arm and went all down [her] left side and leg." The manager added that the airborne burrito "made a mess of the entire kitchen as well, getting cheese over all the appliances." Additional testimony indicated that before storming out of the fast food restaurant, the employee "took off his headset and broke it on his knee and threw it on the ground, causing it to break into several pieces." The employee was later arrested for misdemeanor assault. The manager recovered from her injuries.

Elk Brings Down Helicopter Causing Injury Two-Person Crew (Utah)

In a bizarre story reported by KUTV, Salt Lake City UT, on February 14, 2018, a helicopter crashed in Wasatch County, Utah, near Currant Creek Reservoir. The state's Division of Wildlife Resources ("DWR") had contracted the helicopter, which was staffed with a two-man crew from Australia. The crew was attempting to net an elk, sedate it, and fly it back to put a collar on it for further study by a biologist. The elk didn't like the idea, jumped, and almost severed the chopper's tail rotor, ending the flight abruptly. While both members of the crew sustained minor injuries, the incident proved fatal for the elk. Law enforcement officers commented, "Not something you see every day when an elk brings down a chopper."

Continued, Page 12.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR ASSOCIATE MEMBERSHIP

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

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Mail your application and check to:
Kathy Shelton, P.O. Box 200, Tallahassee, FL 32302
850.425.8156; Email: kathy@wci360.com

Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purpose

Bizarre Cases 2018, from Page 11.

"Oh, Deer:" Animal Crashes Through Patrol Car Window (South Carolina)

Wildlife not only can prove problematic for helicopters; it can be destructive for police cruisers. On December 4, 2018, multiple reports were provided regarding a South Carolina police officer who escaped serious injury when a deer, struck by another motorist, went airborne and crashed through his patrol car windshield, landing in the cruiser's front seat. According to official reports, the Dorchester County Sheriff's Office deputy spotted the deer approaching the road on a highway outside Charleston. As the deputy stopped his vehicle to allow the animal to clear the road, another car hit the deer, sending it into the air. The deer smashed through the police car's windshield, landing in the passenger seat. The deputy and the other driver sustained only minor injuries. The deer, unfortunately, was killed in the collision.

Roofer Kills Co-Worker With Circular Saw (Wisconsin)

In a story reported on August 7, 2018, a 37-year-old construction worker was killed in rural River Falls, when he was apparently attacked by a co-worker wielding a circular saw. According to one story, the alleged assailant was being teased and thought he was being drugged. The deceased, who suffered severe lacerations of the head and neck, was pronounced dead at the scene. A bloody circular saw was found on the ground at the scene.

Amazon Employees Injured by Punctured Can of Bear Spray (New Jersey)

On December 11, 2018, an incident at a Robbinsville, New Jersey Amazon facility resulted in serious injury to one female employee and minor injuries to as many as two dozen other employees. Witnesses at the scene indicated that an automated machine at the facility punctured a 9-ounce can of bear repellent containing Capsaicin, an active component in chili peppers, spraying it near the affected group of employees. Amazon released a statement about the incident: "All of the impacted employees have been or are expected to be released from hospital within the next 24 hours. The safety of our employees is always our top priority and a full investigation is already underway. We'd like to thank all of the first responders who helped with today's incident."

***** Thomas A. Robinson, Durham, N.C., received his B.A., cum laude, for both Economics and History, in 1973 from Wake Forest University, his J.D. in 1976 from Wake Forest University School of Law, where he served as Managing Editor, Wake Forest Law Review, and his M.Div. in 1989 from Duke University Divinity School. From 1976 to 1986, Mr. Robinson was in private practice, where he focused on workers' compensation defense work. From 1987 to 1993, he was research and writing assistant to Professor Arthur Larson. From 1993 until December 2014, Mr. Robinson worked closely with Lex Larson as senior staff writer for Larson's Workers' Compensation Law (LexisNexis) and Larson's Workers' Compensation, Desk Edition (LexisNexis). Since January 2015, Robinson has assumed the role of co-author of those treatises with Mr. Larson. He is a contributing author or editor to five other LexisNexis workers' compensation publications. Robinson also serves on the executive committee of the Larson's National Workers' Compensation Advisory Board (LexisNexis). His award-winning blog, The WorkComp Writer, can be accessed at http://www.workcompwriter.com/.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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Notes From A Seminar: Texas Bar Association Annual CLE

By Hon. David Torrey*

The following essay originally appeared in the *Pennsylvania Bar Association Workers' Compensation Law Section Quarterly Newsletter*, Dec. 2018 (Vol. VII, #136).

On August 23-24, 2018, the author attended the Texas Bar Association Workers' Compensation CLE. This is the Texas version of the PBA Fall Section Meeting. I was a speaker and, as requested, gave a presentation on significant national developments in the law over the last 12 months. The venue was Austin, TX, and about 250 lawyers attended.

Texas, as discussed below, is the only state in which employers are not obliged to take part in the workers' compensation system. In 2018, 28% of Texas employers did not carry workers' compensation insurance and 1.8 million workers, or 18% of the workforce, labored for these "nonsubscribers."[1] Yet, a robust workers' compensation program exists in the state, the contours of which are easily recognized by the Pennsylvania practitioner. I offer here a brief background of the Texas system and select notes that should be of interest to judges.

I. Key Aspects of the Texas System

Texas experienced dramatic change to the law in 1989 (effective 1991). Even some 25 years later, a frequent linguistic turn of the lawyers was talking about the "old law" (pre-1989) and the "new law." It is notable that other significant amendments, particularly in 2005, have unfolded since that time. Leading Texas cases commenting on the reforms that received national publicity are *Texas Mut. Ins. Co. v. Ruttinger*, 381 S.W.3d 430 (Texas 2012) (workers' compensation insurers are not subject to statutory "bad faith" claims for unfair claims settlement practices under the Texas Insurance Code); and *Texas Workers' Compensation Commission v. Garcia*, 893 S.W.2d 504 (Texas 1995)(various aspects of 1989 reform law were not violative of the constitution, including the Texas "open courts" proviso). These cases were mentioned a number of times in the course of the two-day program.

The reforms have been well known around the country for their efforts to disincentivize lawyers from participating in the system. This item was memorably discussed in a 2011 *ABA Journal* article. *See* Terry Carter, *Insult to Injury: Texas Workers' Comp System Denies, Delays Medical Help*, ABA JOURNAL (October 2011), http://www.abajournal.com/magazine/article/insult_to_injury_texas_workers_comp_system_denies_delays_medical help/(remarking that the legislature, in 2005, "enacted a severely restricted fee structure that made it nearly impossible for claimants-side lawyers to make a living wage. And it worked. Where previously hundreds of Texas lawyers had significant workers' comp practices, there now are about 30."). (Some have criticized that article for being biased.)

Continued, Page 15

Texas Bar Association, from Page 14.

It is hazardous in the extreme for an outsider to assess another state's workers' compensation system. Still, the received wisdom about the professional scene in Texas seemed borne out by one lawyer, who commented from the podium that he was one of "the 40 of us left who do this work." Many injured workers, meanwhile, are *pro se*, and others are represented by attorneys of the state's Office of Injured Employee Counsel. (It is notable that the OIEC has an excellent website, with videos of both the Benefit Review Conference (BRC, a form of mandatory mediation), and the Contested Case Hearing (CCH, the full-blown hearing before the ALJ). This website is worth a browse for anyone interested in comp adjudication systems: https://www.oiec.texas.gov/).

One obstacle to lawyer involvement: fees cannot be assessed in cases involving denied and/or unpaid medical. This is a major issue for both injured workers and lawyers as well. In this regard, compromise settlements are prohibited and, as payments of TTD and PPD ultimately run out (in most cases), the worker will still be entitled to medical treatment. Disputes, naturally, will arise over time relative to that entitlement. Workers apparently consult lawyers with regard to such disputes, but no fee can be secured. The result can be lack of representation (or, perhaps, workers forgo treatment or turn to other more willing payers).

Texas, like Pennsylvania, is a big state. And, as in our state, different regions of Texas have their own litigation culture. Everyone seemed to agree that in South Texas, the ALJs at contested case hearings are more liberal than those in the rest of the state. One speaker also voiced two points of common wisdom heard from Pennsylvania veterans: (1) a need exists "for getting along" in the workers' compensation bar – after all, it is a "small family"; and (2) it is not a good idea to over-do public displays of familiarity with the judges, as such behavior breeds distrust among the parties.

Depending upon one's point of view, Texas is either ahead of or behind Pennsylvania on certain issues. Or, of course, maybe it's just different – or in its own category. In Texas, for example, the system maintains a drug formulary that largely excludes opioids; a rule exists for requiring pre-authorization relative to prescription of compound medications; and guidelines are in the works in Texas to facilitate telemedicine for work injuries.

Continued, Page 16.

Gov. Bevin Reappoints Stivers to Kentucky Workers' Compensation Board

Hon. Franklin A. Stivers was recently reappointed to serve a four-year term as a member of the Kentucky Workers' Compensation Board for a term beginning January 5, 2019. The Workers' Compensation Board is the first level of appeal of worker's compensation claims decided by Kentucky's Administrative Law Judges.

Judge Stivers has an Associate's Degree from Sue Bennett College, a Bachelor's degree from the University of Kentucky, and a Juris Doctorate from the University of Louisville. He was initially appointed to the Board by Governor Fletcher in 2007, and has been reappointed by Governor Beshear, and Gov. Bevin.

Prior to his appointment to the Workers' Compensation Board, Judge Stivers served as a deputy prosecutor, and had an extensive civil practice, which included representing injured workers in obtaining workers' compensation benefits.

In addition to serving on the Kentucky Workers' Compensation Board, Judge Stivers is a member of the Kentucky Golf Association Board of Directors, a member of the Little League International Advisory Board, the senior district administrator for Little League baseball in his community, and he is extensively involved with adult education and literacy in his community.

Texas Bar Association, from Page 15.

Meanwhile, Texas, unlike Pennsylvania, is a permanent impairment state, and a worker at MMI is assigned a percentage rating and limited, accordingly, in duration of disability benefits. As to this item – always foreign to Pennsylvania sensibilities – one aspect of dysfunction was pointed out: some doctors, in the PPD process, are sloppy, egregiously according workers MMI *without* any follow-up exam.

The Texas agency is proud that the additional 2005 reforms have lowered costs for employers. Premiums are said to "have dropped nearly 64% …." A new agency report gives "credit to … reforms and innovations, implemented in 2005 and beyond." Still, as always, costs do not tell the whole story of success. The *ABA Journal* article has *that* proposition as its thesis. And, at the seminar, an outspoken injured worker's lawyer savaged one reform device, the panel-of-doctors-like "networks and alliances" for medical care.

His precise source of irritation: the Texas agency had approved WorkWell's San Antonio network, even though that list of approved doctors failed to include a single Board-certified neurosurgeon. So severe was the speaker's criticism of the reform system that he invoked the political scientist Robert Conquest's second rule of politics: "The simplest way to explain the behavior of any bureaucratic organization is to assume that it is controlled by a cabal of its enemies."

A. ***No compromise settlements.*** A key feature of the 1989 amendment was abolition of compromise settlements. That's not just rhetoric – it is very difficult indeed for the parties in a Texas workers' compensation case to compromise-settle virtually any issue. Vivid proof of this fact is a 2016 supreme court case which specifically disallowed the parties from settling a case even at the jury trial level. The parties had effected such a settlement, and the trial court approved the same. The *agency* thereupon appealed and was successful in having the agreement overthrown. *Texas Dept. of Insurance, Div. of Workers' Compensation v. Jones & American Home Assurance Co*., 498 S.W. 3d 610 (Texas 2016). In any event, just as the old law/new law dichotomy certainly showed in the various panel talks, so too, I sensed, was lawyer frustration that certain controverted issues could not be compromise-settled. (With regard to the Texas abolition of compromise settlements, see David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199, 224 *et seq.* (2007)).

B. ***Appeal to "modified" jury trial de novo from administrative adjudication.*** Another key Texas feature: as in four other states, an appeal to a jury trial *de novo*, on limited issues, is available after the final decision of the workers' compensation agency. The dichotomy spoken of in Texas is between "administrative adjudication" versus appeals "the District Court," *i.e.*, the trial court.

The administrative authorities, as foreshadowed above, are (1) the Benefits Review Officer, who holds the BRC – a form of mandatory mediation; (2) thereafter, the ALJ, who holds the contested case hearing; and (3), finally, the Appeals Panel. The Appeals Panel is roughly equivalent to the Pennsylvania Appeal Board.

The Appeals Panel decisions are looked to as precedent in lieu of any appellate case to guide counsel. Indeed, one of the presentations at the seminar was an impressive compilation of the Appeals Panel decisions of the last year. These decisions are considered precedent because relatively few appeals (approximately 10%) are taken from the administrative level to the appellate court. An attorney for a self-insured employers was ultimately to explain that he rarely took an appeal from the Appeals Panel, as the jury trial which comes in between the administrative adjudication and true appellate review is simply too expensive.

Importantly, the "modified" jury trial *de novo* is on limited issues. On certain issues, exhaustion of administrative remedies must be undertaken. For example, the body part injured in the injury must be "administratively found." "Compensability," in the Texas parlance, "is for the Division."

Continued, Page 17.

Texas Bar Association, from Page 16.

II. Occupational Disease Recovery

A panel on proving occupational diseases noted that the claimant initially has the burden of proof by the preponderance of the evidence to establish his or her case. No presumptions of causation exist, as in Pennsylvania. (Ironically, if the Appeals Panel finds that claimant met the burden, it is the employer, on appeal, which bears the burden of proving lack of causation: "the party appealing the decision [of the appeals panel] on an issue [regarding compensability or eligibility for or the amount of income or death benefits] has the burden of proof by a preponderance of the evidence." *Transcontinental Ins. Co. v. Crump*, 330 S.W. 3d 211 (Texas 2010)). In such cases, the toxic agent or agents must be identified.

Proving causation in occupational disease cases is thus difficult. The challenge is complicated by the fact that the claimant, as his or her expert, will often utilize the treating family physician – and not, like the defense, a seasoned forensic expert. Unfortunately, family doctors often utilize legally incompetent "speculative language." This observation will ring true to the Pennsylvania practitioner.

On the burden of identifying the toxic agent, the panelists discussed a 2017 Appeals Panel decision (Appeal 171882), which reversed an ALJ decision granting a Lyme Disease claim. *See* https://www.tdi.texas.gov/appeals/2017cases/171882r.pdf. The worker in that case did indeed have Lyme Disease, "but there was no evidence to establish the type of tick to which the claimant was exposed or that the tick or ticks to which the claimant was exposed carried the bacteria that causes Lyme disease." In the Appeal Panel's view, the physician's "opinion merely suggests a bare possibility of how the claimant was exposed to Lyme Disease." This difficulty on the claimant's part led to a minor trope of the seminar, to wit: "Save the tick!"

III. Pursuit of "Lifetime Income Benefits" (LIBs)

The Texas system is a jurisdiction where, at maximum medical improvement, a worker becomes entitled (or limited) to a permanent partial disability award. However, a worker can pursue "lifetime income benefits," or LIBs, which are similar to the permanent total disability awards of other states. An accomplished claimants' attorney of Plano, TX, William Randell Johnson, spoke at length on his efforts to win LIBs for his clients. Indeed, Mr. Johnson had appealed seven or eight cases to jury trial over the last year. Of course, the fact that some workers' compensation lawyers prosecute cases into the district courts means that such lawyers must have jury trial skills. This is a phenomenon, I believe, of other states, including Maryland and Ohio, where appeal to the trial court is available after exhaustion of administrative remedies.

IV. Review of Recent Appeal Panel Decisions

In the important Appeals Panel update presentation, the speaker reviewed the Lyme Disease case referenced above. There, the tick went missing and could not be verified as having borne the disease, thereafter to be communicated via bite to the worker. The claim was denied. The presenter agreed with the comments of the previous speaker. In such cases, claimant needs to "Save the Tick"!

Meanwhile, judging from the review of recent cases, the all-important course of employment test in Texas (actually, "course and scope") seems to be liberal. For example, an injury developing by merely walking can constitute a "course and scope" injury. Of course, in states like Virginia, with its dogged fidelity to the "accident" requirement, such injuries are conceptualized as not arising in the course of employment. Even in Pennsylvania, such injuries are on occasion denied because our statute speaks of injuries arising in the course of employment and "related thereto" – the latter concept implicating *medical causation*, which is often absent in such cases.

Continued, Page 18.

Texas Bar Association, from Page 17.

A recent case of the Texas Supreme Court, entertaining a dispute over whether a worker was travelling as part of his work or was, instead, merely commuting, resolved the matter in favor of the worker's widow. The dissent indicates that the majority construed the law liberally, at least on this point. *See Seabright Ins. Co. v. Lopez*, 465 S.W.3d 637 (Texas 2015) (worker in the oil and gas field, laboring at remote locations, and who lived during the week at a motel, sustained fatal injuries in course and scope of employment when he was travelling from motel to worksite).

V. Points from a Carrier Physician: "A Biopsychosocial Approach to Preventing Delayed Recovery"

Dr. Marco Iglesias, Chief Medical Officer of Broadspire, advocated the strategy - now familiar in occupational medicine presentations - of expediting the injured worker's prompt return to productive employment. He stressed, as he did in his well-crafted seminar paper, the "biopsychosocial model" of medicine. That model is in contrast to the "biomedical," which "reduces illness and injury to its most basic units; the body is seen as a machine that operates on the basis of physical and chemical processes."

The biopsychosocial model, in contrast, "[l]ooks at an individual's injury or illness through three lenses: biological (e.g., age, gender, the disease itself, comorbid conditions); psychological (e.g., the person's beliefs, emotions, distress, coping strategies, illness behavior); and social (e.g., family and other support systems, work conditions and relationships, cultural background, societal expectations). [This model] allows us to approach the individual at the center of the claim more holistically."

The doctor opined that many psychosocial factors do indeed play into workers' compensation claims. In light of this fact, claims of long duration in many cases call for compromise settlement. This is so as the injured worker is able to "move on" beyond his or her claim. Of course, "moving on" is the lingo which injured workers themselves often use when asked for their motivation in settling.

Dr. Iglesias emphasized that a critical intervention in an injured worker's case must be to "talk about function, not pain." Perhaps, Doctor Iglesias posited, doctors and lawyers should not cleave to the "analog pain scale," the familiar 1 to 10 – always soliciting the worker to *make complaints* about pain. Instead, the focus should on a revamped, analogous "*function* scale." The doctor emphasized, "Most of the time, injured workers want to talk about their pain. This can be counterproductive since focusing on pain can make it worse. On the other hand, distraction and activity reduce pain. Redirect conversations about pain to those that focus on activity and function."

Dr. Iglesias' paper is also available online at the Crawford & Co. website: https://www.crawco.com/resources/a-biopsychosocial-approach-to-preventing-delayed-recovery. This white paper is recommendable whether or not one agrees with its philosophy.

VI. Advantages of Non-subscription

Texas, as noted above, is the only state where workers' compensation is not mandatory. Employers are not obliged to opt-in, and many large employers in fact do not. These enterprises are called "non-subscribers." Such employers open themselves up to tort liability, but in the present day a common approach is for employers to establish a private occupational injury program and then oblige workers to arbitrate any dispute as a condition of employment. Critique of this approach was a major feature of the 2015 ProPublica assessment of workers' compensation laws. *See* Michael Grabell& Howard Berkes, *Inside Corporate America's Campaign to Ditch Workers' Comp* (October 14, 2015), https://www.propublica.org/article/inside-corporate-americas-plan-to-ditch-workers-comp.

Continued, Page 19.

Texas Bar Association, from Page 18.

In-house counsel for one such non-subscriber noted that it maintains an ERISA-governed employee insurance plan for most workers, but for its construction company subsidiary it does carry workers' compensation. She believed that running its own program "helps workers and also helps physicians as to understanding the process…." Communicating with physicians is easier in non-subscription. As part of its plan the company employed its own employee nurse case managers, and she conceptualized using them as "just an employee helping another employee."

VII. Utility of Nurse Case Managers

A corporate claims manager thoroughly endorsed the use of nurse case managers (NCMs). He found their acting as the liaison between worker and adjustor or employer was very valuable. They can, for example, serve to communicate to the worker the specifics of light duty, and educate the doctor on the issue as well. The NCM is especially valuable as an agent of early intervention in a complex case. Use of the nurse case manager can also show the employee and physician that the employer *cares* about the case. In the end, however, the claims manager was unapologetic about the ultimate mission of the NCM: "The nurse case manager is there to help you to get the claimant *back to work*."

In Texas, as in Pennsylvania, dissent exists in the claimants' bar over the use of NCMs. One claimants' attorney complained that he does not receive the NCM reports from the carrier as part of discovery, even though they are plainly, in his view, discoverable. (That is certainly the Pennsylvania rule.) The NCM proponent quoted above was challenged from the audience as to *who is served* by the nurse case manager: employer or employee? Plainly, injured workers' lawyers in the audience felt that the NCM was the agent of the employer. They believed that nurse case managers possess an "inherent conflict of interest." This belief sounds correct. Nurse case managers are a constructive part of modern claims adjustment and disability management. Still, no person can serve two masters without the involvement of major tension.

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* Dave Torrey has been a Workers' Compensation Judge in Pittsburgh, PA, since January 1993. He teaches at the University of Pittsburgh School of Law. He is a Past-President of the National Association of Workers' Compensation Judiciary, and is Secretary of the College of Workers' Compensation Lawyers. His treatise on Pennsylvania Workers' Compensation, published by Thomson-Reuters, is in its Third Edition. His most recent book is David B. Torrey, ed., *The Centennial of the Pennsylvania Workers' Compensation Act: A Narrative and Pictorial Celebration* (Pennsylvania Bar Association 2015). A recent publication is Torrey (Book Review), "*John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law*," Workers' First Watch, p.34 (WILG, Winter 2017).

Endnotes on page 34.

Governor Dunleavy Appoints Commissioners

Alaska Governor Michael J. Dunleavy announced the following appointments to Alaska Workers' Compensation Board. Governor Dunleavy has assembled an incredible team of public servants, policy experts and professionals to serve in his administration and across numerous public boards and commissions. He appreciates these individuals' willingness to serve and thanks them for giving their time and talents to Alaska," said Press Secretary Matt Shuckerow.

Bob Doyle of Wasilla, Term: 3/1/19 -3/1/22.

Bradley Austin of Juneau (reappointment), Term: 3/1/19 - 3/1/22.

Sarah LeFebvre of Fairbanks (reappointment), Term: 3/1/19 - 3/1/22.

Christopher Twiford of Kodiak, Term: 3/1/19 -3/1/22.

Albert Haynes of Wasilla, Term: 3/1/19 -3/1/22

Sara Faulkner of Homer, Term: 3/1/19 -3/1/22

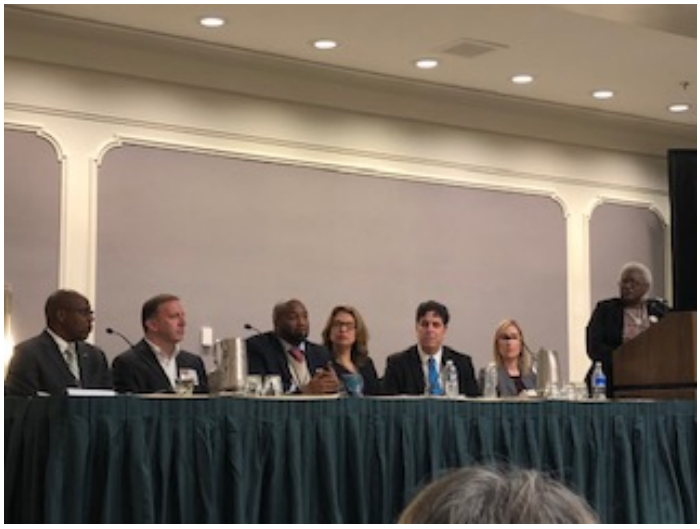
Randy Beltz of Anchorage, Term: 3/1/19 -3/1/22.

Julie Duquette of Fairbanks, Term: 3/1/19 -3/1/22

Louisiana's 9th Annual Workers' Compensation Educational Conference

By: Hon. Shannon Bruno Bishop*

Workers' Compensation professionals from across the country met in New Orleans on January 16-18 to discuss critical issues facing workers' compensation in our country. Attendees had the wonderful opportunity of being in New Orleans prior to the New Orleans' Saints NFC Championship game (worthy of a separate article, not for this platform) and during Mardi Gras season. The atmosphere in the city was electric and inside the Hilton Riverside hotel, it was just as electric as conference attendees heard from dynamic speakers and participated in lively discussions.



Director Kellar introduces the managers of the LWC

The conference kicked off with a welcome from the Secretary of the Louisiana Workforce Commission (LWC), Ava Dejoie, and Assistant Secretary Sheral Kellar. Assistant Secretary Kellar introduced the managers of the LWC: Meridith Trahant (Second Injury Board) who discussed her roles and responsibilities with the Second Injury Board, auditing, and legal; Andre de la Fuente (Records Management) discussed retention of files; Derek Lee (Fraud & Compliance) discussed fraud protections for employees and employers, including Louisiana's GAME ON program, a program in partnership with Fraud, Wage & Hour, Department of Revenue, Department of Agriculture, and Unemployment Insurance, which aims at identifying misclassified employees and fraud in the state; Dr. Picard (Medical Director) discussed his responsibilities and the challenges he experiences with the Medical Treatment Guidelines; Corey Gaines (OSHA & Safety) discussed OSHA 30 which provides safety training to incarcerated inmates.

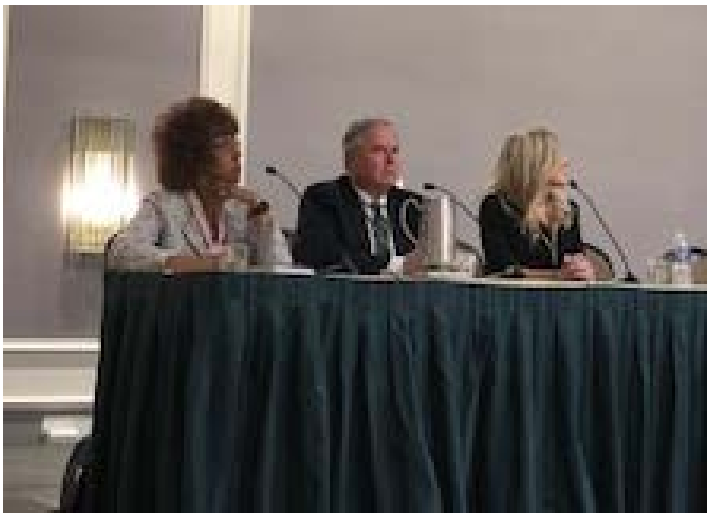
This program, in partnership with the Office of Workforce Development, promotes workforce re-entry programs to assist individuals with job availability upon release. Assistant Secretary Kellar also announced that Louisiana's Medical Treatment Guidelines are currently being updated and the agency is also working diligently on improving payments of Second Injury Board claims and records requests. Also, in the future, Louisiana should see the advancement of chronic pain guidelines.

Continued, Page 21.

Louisiana's 9th Annual, from Page 20.

Attendees had many opportunities to attend several sessions. The first of several breakout sessions provided the option of "The Next Generation of Leaders Are Already Here" and "Telemedicine." Greg Gilbert and Dr. Lisa Figueroa discussed Telemedicine and its benefits. Telemedicine is on the rise due to rising costs and access to care. The speakers explained that employers pay $1 billion per week for injury costs. However, telemedicine has several benefits, including improved access, no travel and less time from work, earlier treatment, positive experience, reduced ER visits.

Assistant Secretary Kellar led a roundtable discussion with the Honorable Karl Aumann (Maryland), Evelyn McGill (Virginia), and Beth Aldridge (Mississippi). They discussed issues, including fee schedules, drug formularies, the opioid epidemic, and misclassification of employees. For example, Virginia's fee schedule, implemented in January 2018, is based on past fees. The information for the fee schedule was gathered from data on past paid medical bills. However, unfortunately, there are 42 different fee schedules from various regions in Virginia. With regard to drug formularies and the opioid epidemic, Mississippi has opioid treatment guidelines, while Virginia and Maryland have prescription monitoring programs. The panel also discussed misclassification. In Mississippi, workers' compensation is required for businesses with five or more employees.

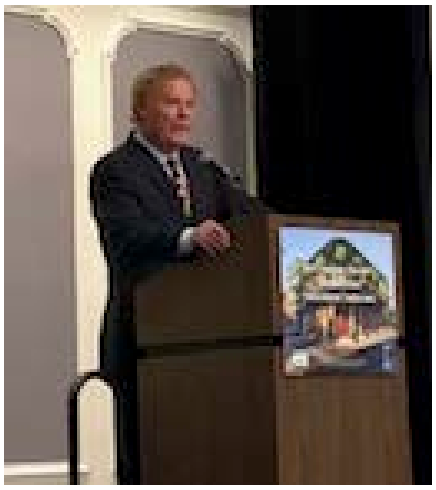


Evelyn McGill (VA), Hon. Karl Aumann (MD), and Hon. Beth Aldridge (MS)

However, Mississippi does not have a compliance department. Business that are not in compliance are referred to the Attorney General's office. Maryland uses the NCCI database to determine lapse in policies. They also have compliance dockets. Virginia has adopted an investigative unit that has generated over $1 million in fines and penalties. In Virginia, workers' compensation insurance is required for businesses with more than two employees.

The "Insurance Carrier Panel" was moderated by Laura Hart Bryan, State Relations Executive at NCCI. The panelists discussed the problem with fatigued and distracted workers contributing to an increase in workplace accidents. They also discussed the increasing number of cases involving individuals working from home and the dilemma of whether the accidents are compensable as occurring in the course and scope of employment.

Attendees had the option of attending a medical breakout session on "Pain Management - If not opioids, then what?" with Rosalie Faris or an ethics session, "Dilemmas (?), Kindergarten, & The Great Pumpkin" with former Chief Judge and Commissioner of the Kentucky Department of Workers' Claims. Judge Lovan led a very interesting and interactive discussion on ethical dilemmas facing attorneys and judges. He presented several scenarios to the audience prompting lively discussions amongst all.



Jim Engster

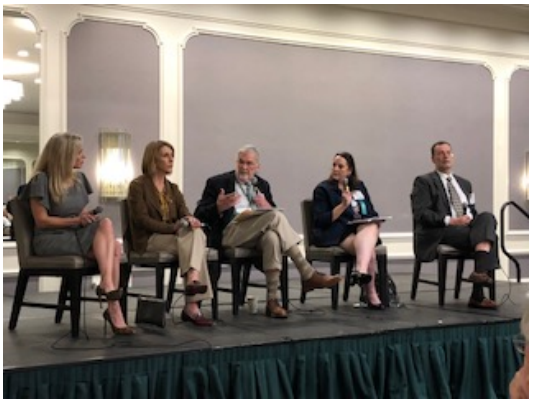
The Keynote Speaker for the conference was Jim Engster, award-winning journalist and broadcast veteran. Mr. Engster provided the audience with a wealth of information from national and local news. The next breakout session provided the option of "Claims Management Best Practices" and "CMS/MSA – I'm From the Federal Government & Here to Help."

Continued, Page 22

Louisiana's 9th Annual, from Page 21.

The most important reminder coming from the latter panel was that everyone should get educated on the latest (January 4, 2019) CMS updates and remember that Medicare's interest must be taken into account or plaintiffs and defendants can be held responsible. "The True Cost of Presumptions" session also involved an interactive discussion with the audience regarding presumptions across the country. Specifically, the session focused on presumptions regarding first responders and some states' tobacco exclusion as it relates to the presumption.

"Louisiana Workers' Comp News" was an informative and heated discussion regarding Louisiana's hot topics. The panelists included an injured worker's attorney, employer's attorney, representative of the AFL-CIO, and insurance carrier representative. The panelists discussed medical marijuana, misclassification of employees, and application of Louisiana's Medical Treatment Guidelines.



Closing out the conference was the Honorable Dwight Lovan, who returned to the stage to discuss "Ethics in Settlement Negotiations." His panel, an injured workers' attorney, an employer's attorney, a Commissioner, and a Judge, discussed ethical concerns related to disclosure of information during negotiations and settlement with a focus on the duty to ensure fairness to all parties.

The LWCEC was an informative and enjoyable event, attended by over 200 stakeholders. The topics and discussions were interesting and thought-provoking. Assistant Secretary Kellar and her staff put on an outstanding event; a special thanks goes out to Gary Davis and SAWCA for its support in making the LWCEC a success.

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* Shannon Bruno Bishop is the Office of Workers' Compensation (OWC) District Judge in Harahan, Louisiana. As District Judge of the OWC, Shannon conducts judicial hearings in the district office by presiding over workers' compensation claims in a judicial capacity rendering final appealable judgments in the claims. She has full administrative responsibility in the district office. Judge Bishop is a native of New Orleans and graduated from Tulane University with a B.A. in Sociology and The University of Mississippi School of Law with a J.D. She is admitted in Mississippi and Louisiana. Prior to becoming District Judge, Judge Bishop served as mediator, in Harahan and New Orleans, where she mediated hundreds of workers' compensation cases each year. Judge Bishop is married to State Senator Wesley T. Bishop and they have two sons. Judge Bishop's past and/or current professional and community involvements include: Louisiana State Bar Association, The Mississippi Bar, American Bar Association, National Bar Association, American Diabetes Association, Young Leadership Council, Martin Luther King Charter School, Greater New Orleans Louis A. Martinet Legal Society, Mississippi Mock Trial Competition, Boy Scouts of America, and Alpha Kappa Alpha Sorority, Incorporated. Judge Bishop is a Board Member of the National Association of Workers' Compensation Judiciary. She also serves on the Editorial Committee of the *Lex and Verum* newsletter.

Save the Date

11th Annual Judiciary College

August 11-14, 2019

Pain-Measurement Device Could Have Many Comp Applications

By Elaine Goodman
January 14, 2019

An experimental device intended to measure a patient's pain by checking the pupil response to different stimuli could have many applications in workers' comp but would need to be used with caution, some say. The device is the idea of Dr. Julia Finkel, a pediatric anesthesiologist with Children's National Health System. The hand-held device watches the pupil's response to a stimulus such as a flash of light and, using proprietary algorithms, objectively determines the type and intensity of pain, according to a news release last week from Children's National.

Although initial development of the device was geared toward premature infants, it can be used for patients of any age, including adults, Children's National said. "The systematic problem we are facing today is that health care providers prescribe analgesics based on subjective self-reporting, which can often be inaccurate, rather than prescribe based on an objective measure of pain type and intensity," Finkel said in a statement. "A clinician would never prescribe blood pressure medicine without first taking a patient's blood pressure." Finkel founded a company called AlgometRx to develop and commercialize the pain-measurement technology.

James Moore, president of J&L Risk Management Consultants, saw several potential applications for a pain-measurement device in workers' comp. Measuring pain intensity would help medical providers decide the type of opioid to use, if any, to treat the pain, as well as an appropriate amount, he said. "Recognizing the level of pain present would be very helpful in a return-to-work situation," Moore said. "The restrictions/abilities for a light- or full-duty return to work could be adjusted depending on the amount of pain or discomfort."

In addition, he said, measuring pain could help determine whether an injured worker is being truthful about his condition, alerting doctors to possible malingering. Pain is now often assessed using a scale that relies on a patient rating their discomfort from zero to 10, with zero being the absence of any pain and 10 being the worst pain the patient can imagine. Not only is the zero-to-10 pain scale subjective, some say its frequent use can have an adverse impact on injured workers.

"Repeatedly asking patients to rate pain severity can increase the perception of pain and delay recovery," occupational medicine provider Concentra said in a November blog post. Emotions such as anxiety, anger and fear can also contribute to perceptions of pain, the company said.

Concentra has shifted away from the pain scale and is instead using a measure it developed, called Functional Restoration/Status of Healing scale, or FReSH. The scale focuses on the injured worker's functional recovery, helping to establish an "ability mindset" rather than dwelling on pain, Concentra said. Geralyn Datz, a licensed clinical health psychologist with Southern Behavioral Medicine Associates in Hattiesburg, Mississippi, said that similar to the scale, a measurement device could cause a patient to focus on pain. Datz's practice includes treatment of injured workers.

Continued, Page 24

Pain Measurement, from Page 23.

While Datz is pleased to see an interest in pain-related technology, she said the AlgometRx device raises a number of questions. For example, how well would it be able to distinguish chronic versus acute pain? Acute pain produces an adrenaline rush in the body, often called the "fight or flight" response, that causes the pupils to dilate, but that's not necessarily the case for chronic pain, she said. Another question is how emotional factors that contribute to pain, such as anxiety or depression, would influence the device's results. Every patient's experience of pain is individual, Datz said, which could make it difficult to quantify.

Children's National said the AlgometRx device could be used to help validate pain treatments such as acupuncture, physical therapy, virtual reality or other non-drug interventions. But Datz said a pain measurement right after treatment wouldn't give a full picture of the therapy's effectiveness. Other factors to consider are whether the patient feels energized immediately after the treatment or longer term, she said, and whether he is functioning better.

Finkel's company, AlgometRx Inc., has raised $2.5 million in capital, and its pain measurement device is being tested in clinical trials. AlgometRx's device was one of eight selected last year by the Food and Drug Administration in the agency's opioid innovation challenge. FDA plans to work with the winners to provide feedback on proposed devices, guidance for clinical trial development plans, and expedited review. AlgometRx was submitted in the FDA challenge as a device for performing rapid drug testing.

National Institute of Health Director Francis Collins has called for development of some type of "pain-o-meter" to provide an objective measure rather than the subjective 10-point scale. Collins would also like to see biomarkers for particular types of pain, which too often are lumped together, he said during an October 2017 hearing of the president's Commission on Combating Drug Addiction and the Opioid Crisis.

Value-Based Care Struggles to Find Place in Workers' Comp

By Elaine Goodman
January 11, 2019

Although value-based care may eventually gain a greater foothold in workers' comp, it faces a number of hurdles — including providers' attachment to the fee-for-service model, a webinar speaker said on Thursday. "Once you try to change fee for service or eliminate it altogether, then you may expect some political challenges," Dr. Randall Lea said during a webinar hosted by the Workers Compensation Research Institute. "Workers' comp is the last bastion of fee-for-service for providers, and I think they're going to defend it with most of the arrows in their quiver."

Lea is an orthopedist and former chief medical officer at Alice Peck Day Hospital in New Hampshire, as well as a WCRI senior research fellow. The webinar was a follow-up to research presented during WCRI's annual meeting last year.

Continued, Page 25.

Value-Based, from Page 24.

Value-based care links providers' reimbursement to the quality and cost of medical care. That contrasts with fee-for-service, in which payment is based on the volume of medical services delivered. Provider payment in workers' comp is largely fee-for-service, which some say yields an incentive for excessive treatment. Bundled payments are a common form of value-based payment, and one that is in use in workers' comp. In bundled payments, a single payment is negotiated to cover all the services required for an episode of care, such as a knee replacement surgery. The model gives providers an incentive to eliminate wasteful spending.

Lea said bundled payments are likely best suited for medical procedures with fairly predictable outcomes, such as knee arthroscopies, rather than low back surgery. Besides bundles, there are several other forms of value-based care that Lea outlined during the webinar. Pay for performance is a rapidly evolving form of value-based care, Lea said. Early versions offered providers an incentive for meeting a few targets regarding treatment quality and efficiency. Now, multiple criteria and complex formulas for measuring performance may be applied to providers, who might also face a penalty for falling short of targets.

In workers' comp, pay for performance might be introduced by offering providers a bonus for quality or efficiency. The payment model has been tested in workers' comp in a smattering of pilot programs, Lea said. Another value-based care model is accountable care organizations, or ACOs, in which providers team up to assume accountability for the quality and efficiency of health care services delivered to a selected group of patients. The providers receive a part of cost savings that are realized or, in some cases, pay a penalty for not meeting targets.

While bundled payments or pay for performance could be implemented in workers' comp with "minimal to moderate" difficulty, ACOs would present major operational challenges, Lea said. But in one possible scenario, an ACO could decide to offer workers' comp services. That would work, Lea said, only if all necessary work comp services were available, including return-to-work and causation and impairment determinations.

"There's not much doubt that the value-based care models of health care reform are being used with increasing frequency by governmental and commercial payers, but it's not clear if and how they're going to be used for workers' comp care," Lea said. Lea also emphasized that he wasn't advocating for or against workers' comp value-based care, which he described as a hot topic that "sometimes creates way more heat than light."

Continued, Page 26.

Interesting Workers' Compensation Blogs

Law Professor's Blog
http://www.lawprofessorblogs.com/

Managed Care Matters
http://www.joepaduda.com/

Tennessee Court of Compensation Claims
https://tncourtofwcclaims.wordpress.com/

Workers' Compensation
http://workers-compensation.blogspot.com/

From Bob's Cluttered Desk
http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/

Workers' Comp Insider
http://www.workerscompinsider.com/

Maryland Workers' Compensation Blog
http://www.coseklaw.com/blog/

Wisconsin Workers' Compensation Experts
http://wisworkcompexperts.com/

Workers' Compensation
http://workers-compensation.blogspot.com/

Value-Based, from Page 25.

Another hurdle to value-based care in workers' comp is the inability in some states to direct injured workers to particular providers. Lea said work comp-specific quality measures would be needed for value-based care, such as compliance with medical treatment guidelines. Some organizations, such as Harbor Health, have developed scorecards for providers in their workers' comp networks. Harbor Health officials have said previously that their provider scores are based on such factors as claim cost, duration, relapse or reoccurrence of a medical condition, and total disability.

But grading network providers doesn't necessarily meet the definition of value-based care, Lea said after the webinar. "It depends what they do with the scorecards," Lea said. Often the network operators try to direct patients to the high-performing providers, he said. While that's a move in the direction of value-based care, it isn't VBC unless the providers are given financial bonuses or penalties based on their performance.

In its Workers Comprehensive newsletter last month, Healthesystems said value-based care models can help align incentives among providers through shared-risk arrangements. "Problems arise, however, when one stakeholder is held accountable for factors they can't control — e.g., physicians negatively impacted by factors in the employer environment, such as the lack of a return-to-work program," the newsletter stated.

The article was a recap of a conference discussion of value-based care featuring Silvia Sacalis, Healthesystems' vice president of clinical services, and Dr. Adam Seidner, chief medical officer at The Hartford. Healthesystems noted that about 70% of physicians have participated in a value-based program, most receiving extra compensation as a result.

The articles on pages 23-26, *Pain-Measurement Device Could Have Many Comp Applications* and *Value-Based Care Struggles to Find Place in Workers' Comp* were originally published on WorkCompCentral.com and are reprinted here with permission. The NAWCJ gratefully acknowledges the contributions of WorkCompCentral to the success of this publication and the NAWCJ.

Governor Whitmer Appoints and Reappoints Magistrates

Gov. Gretchen Whitmer today announced the following appointments and reappointments to the Workers' Compensation Board of Magistrates:

David DeGraw, of Grand Rapids, is a Michigan Compensation Appellate Commissioner. Mr. DeGraw is appointed to succeed Beatrice Logan for a term expiring January 26, 2023.

Michael Heck, of Troy, is the associate counsel at SEVA Law Firm. Mr. Heck is appointed to succeed Lisa Klaeren for a term expiring January 26, 2023.

Philip Della Santina, of Howell, is the Workers' Compensation Claims representative for Chrysler Corporation. Mr. Santina is appointed to succeed Bryan Boyle for a term expiring January 26, 2023.

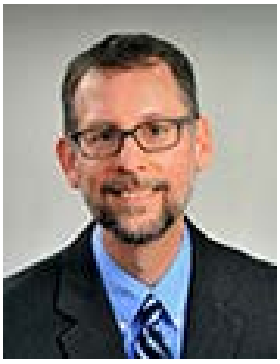
Emil Louis Ognisanti, of Saginaw, was previously a partner at Braun Kendrick. Mr. Ognisanti is reappointed for a term expiring January 26, 2023.

Chris Slater, of Grand Rapids, was previously employed with the Slater Law Office. Mr. Slater is reappointed for a term expiring January 26, 2023.

Luke McMurray, of Grand Blanc, was previously president of McMurray & Associates. Mr. McMurray is reappointed for a term expiring January 26, 2023. He is also appointed to serve as Chairperson and will serve at the pleasure of the Governor.

David Grunewald, of Grosse Pointe Woods, was previously a trial specialist with CAN Insurance Companies. Mr. Grunewald is reappointed for a term expiring January 26, 2023.

Marijuana & Opioids



By: Mark Pew*

If anyone thinks that the momentum in medical #marijuana legalization is not tied to the #opioid epidemic, they've not been paying attention.

I've been engaged in addressing the inappropriate over-prescribing of opioids since 2003. Next week will be the start of my fifth year studying, talking and writing about medical marijuana. So I have a unique perspective borne from years of observation. Early on in that process I believed there was a connection between opioids and marijuana because of conversations I had and stories I read. This was the argument I heard repeatedly from proponents.

Medical marijuana can be a substitute for prescription opioids and is the solution to the opioid epidemic
Elected representatives and non-elected bureaucrats around the country have taken those words seriously. And yesterday, January 23, New Jersey joined that crowd.

Gov. Phil Murphy on Wednesday announced a broad attack on opioid addiction in New Jersey by adding it to the list of illnesses that qualify residents for medical marijuana. “We are pleased to announce that, as of today, opioid use disorder is a condition for which physicians can recommend medical marijuana to patients,” State Health Commissioner Shereef Elnahal said.

To be fair, another part of New Jersey’s strategy to battle the opioid epidemic includes expanding Medicaid coverage for medication-assisted treatment (which is an incredibly important tactic). But that wasn't the title of the NJ.com article. This was - “Medical marijuana can now be used to treat opioid addiction in N.J.”

However, New Jersey isn't the first state to go down this path. I have posted in the past that Illinois, Louisiana and Pennsylvania had as well. So this news from Trenton sparked a thought after dinner - had I missed initiatives in other states? It took me a couple of hours last night but it was worth the research because there are even more than I thought.

I started with Leafly.com for a consolidated list of qualifying conditions included in medical cannabis programs around the country. Because that list has not been updated since October 6, 2018 and there is constant change, I decided to visit each state's website for the most updated list. So as of January 23 at 10pm ET, here are my findings:

- **District of Columbia**: It has some interesting language - “A serious medical condition for which the use of medical marijuana is beneficial: (B) For which there is scientific evidence that the use of medical marijuana is likely to be significantly less addictive than the ordinary medical treatment for that condition.” They do list “scientific evidence” as a caveat but broach the subject of marijuana being “less addictive.” Depending upon who you believe, the scientific evidence is there - or it's not. So something that sounds declarative may actually not be.
- **Illinois**: As of 8/28/18 Illinois has an Opioid Alternative Pilot Program (OAPP) included in its medical cannabis program. The name is self-explanatory.

Continued, Page 28.

Marijuana, from Page 27.

- **Louisiana**: During April 2018 deliberations "proponents of the bill said adding chronic pain to the list of conditions covered by the state's medical marijuana law would actively address opioid addiction rates in the state." HB 579 included the language, "Intractable pain means a pain state in which the cause of the pain cannot be removed or otherwise treated with the consent of the patient and which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible, or none has been found after reasonable efforts. It is pain so chronic and severe as to otherwise warrant an opiate prescription." It was signed into law by the Governor in June. At the very least this is an implied connection.
- **Maine**: Very similar to Louisiana, the LD 1539 description of pain mentions narcotics - "a chronic or debilitating disease or medical condition or its treatment that produces intractable pain, which is pain that has not responded to ordinary medical or surgical measures for more than 6 months or which is pain that, in the medical provider's opinion, is not managed effectively by prescription narcotics." The bill was vetoed by the Governor on July 6, but then his veto was overridden on July 9. Interestingly, the above language did not survive into the final bill.
- **Massachusetts**: This list of qualifying conditions includes the vague language "and other conditions as determined in writing by a qualifying patient's physician." That obviously leaves great discretion to the treating physician.
- **Missouri**: Missouri specifically allows for a physician's discretion and ties it not to addiction but dependence - "A chronic medical condition that is normally treated with a prescription medication that could lead to physical or psychological dependence, when a physician determines that medical use of marijuana could be effective in treating that condition and would serve as a safer alternative to the prescription medication."
- **New Mexico**: The Medical Cannabis Advisory Board has recommended twice that "opiate use disorder" should be added to New Mexico's list of qualifying conditions. In each instance the Health Secretary has denied the request. Obviously they're not going to stop trying, and now may have even more of an argument if they use other states as an example (peer pressure is powerful).
- **New York**: This includes an "Opioid Replacement Condition" (the name is self-explanatory) that has an interesting caveat – "The regulations do not require a patient to try opioids first. Any condition for which an opioid could be prescribed qualifies as a condition to receive medical marijuana." Interestingly the regulations do not prohibit concurrent use of opioids and marijuana (most people agree that's not a good idea - pick one or the other). And it does apply to Opioid-Use Disorder. So wrap your head around what they're saying. Marijuana is not just a treatment after the fact but equal and in parallel with prescription opioids.
- **Oklahoma**: There are no listed qualifying conditions so a recommendation is totally at the discretion of the treating physician who fills out a form with up to three ICD-10 codes to serve as the "recommendation" to treat the "patient medical conditions." This is the very definition of open door.
- **Pennsylvania**: The regulations directly tie marijuana to opioid use disorder as one of the qualifying conditions – "Opioid use disorder for which conventional therapeutic interventions are contraindicated or ineffective, or for which adjunctive therapy is indicated in combination with primary therapeutic interventions."
- **Virginia**: A March 2018 law made qualifying much easier with the following strikeout and addition - "A practitioner in the course of his professional practice may issue a written certification for the use of cannabidiol oil or THC-A oil for treatment or to alleviate the symptoms of a patient's intractable epilepsy any diagnosed condition or disease determined by the practitioner to benefit from such use." That certainly opens the door for discretion.

By my count that yields four states with an explicit connection (IL, NJ, NY, PA) and six states that appear to leave an open door to a connection (DC, LA, MA, MO, OK, VA).

Continued, Page 29.

Marijuana, from Page 28.

In addition, if you consider opioid-use disorder a "chronic or debilitating disease/medical condition" (there is consensus that addiction is a disease) then the following states could potentially include marijuana as a qualifying treatment:

- Alaska, Arkansas, Arizona, Colorado, Delaware, Hawaii, Michigan, New Hampshire, North Dakota, Rhode Island, Vermont, Washington.

The caveat is the patient needs to exhibit one or more of the following symptoms: cachexia (wasting syndrome), severe pain, severe nausea, seizures, severe and persistent muscle spasms. Thinking through the side effects of opioid-use disorder there could be an argument these symptoms are possible.

So, there you have it. The connection of medical marijuana to opioids (prescription and illicit) is not just words. In many cases, it's law. And chances are good that process is only beginning. Whether you think marijuana is medicine is immaterial at this point. That decision has already been made by public vote, law and regulation. For better or for worse, it's here. And it's here to stay.

So is the momentum for medical marijuana connected with the opioid epidemic? Absolutely.

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* Mark Pew, SVP of Product Development and Marketing for Preferred Medical, has been focused since 2003 on the intersection of chronic pain and appropriate treatment, ranging from the clinical and financial implications of opioids, benzodiazepines and other prescription painkillers, to the evolution of medical marijuana, to advocacy for the BioPsychoSocialSpiritual treatment model. Educating is his job and passion. Contact Pew on LinkedIn at markpew, or on Twitter @RxProfessor.

IAIABC & NAWCJ Judges' Program at the IAIABC Forum

On Monday, April 1, 2019, the IAIABC and NAWCJ will be hosting a Judges' Program during The IAIABC Forum 2019 in San Diego, California. The morning program will feature a spotlight presentation on the California dispute system followed by a comparative law panel with judges from California, Georgia, Kansas, and Wisconsin. Don't miss this chance to share ideas and learn from your peers from other jurisdictions.

The Judges' Program will be followed in the afternoon by the IAIABC Dispute Resolution Committee meeting. The mission of the Dispute Resolution Committee is to promote best practices in workers' compensation judicial and dispute resolution functions among member jurisdictions by providing education, training, and information sharing opportunities for adjudicators and dispute resolution professionals

Through committee meetings, special seminars, and discussion forums, the IAIABC Forum focuses on sharing strategies and solutions to the workers' compensation challenges of today and tomorrow. With over 54 hours of content, attendees gain significant insights they can take home to their organizations.

The Forum 2019 will be held at Paradise Point in San Diego, California. Attendees will enjoy views of Mission Bay from the beautiful resort, just a step away from all San Diego has to offer. Registration for The IAIABC Forum is now open. Registrants for The Forum are welcome to participate in the Judges' Program. A standalone rate of $150 for the Judges' Program is also available. Visit: https://www.iaiabc.org/forum.

Could (Would) I Write you a Recommendation Letter?

David Langham*

A unanimous Florida Supreme Court decided *Inquiry Concerning a Judge* NO. 18-108 RE: Deborah White LaBora on November 15, 2018. It is worthy of consideration. Worthy, because the basic topic, letters of recommendation, is one which all judges face in some form. In this instance, the Judge was asked to write on behalf of a criminal defendant. However, the requests come in a variety of contexts, for employment, school applications, volunteer appointments and more. I have been asked for recommendation letters in various contexts and have been called upon to investigate several Code of Judicial Conduct allegations involving them.

In this case, the Judge is a member of the Miami-Dade County Court. She wrote "a character reference letter, on her official court stationery, on behalf of a criminal defendant awaiting sentencing in federal court." That was noticed by a reporter, and publicized in a local newspaper. The matter was investigated by the Florida Judicial Qualification Commission, which recommended a "public reprimand." The Supreme Court accepted and approved that recommendation. The Judge will travel to Tallahassee to appear before the Court for this reprimand.

The Court explained that such a letter violates both "Canons 1 and 2 of the Florida Code of Judicial Conduct." It accepted that "the judge did not intend to violate the Canons." The absence of intent is important in these Court analyses, as it decides what punishment is appropriate. However, it noted that "she did not take appropriate steps to inform herself about the propriety of sending such a letter." In support of imposing the reprimand as sanction, the Court also noted her "heretofore unblemished service as a judicial officer."

The Court explained that "by writing and submitting a character reference letter, on her official court stationery," the Judge "failed to maintain the high standards of conduct necessary to preserve the integrity of the judiciary" (violating Canon 1). Furthermore, this activity "could potentially undermine public confidence in the integrity and impartiality of the judiciary (violating Canon 2A). Her advocacy also violated Canon 2B by creating "the appearance of impropriety and partiality by improperly lending the prestige of her office to advance the private interests of the defendant."

The Court explained that the object "of (judicial) disciplinary proceedings is not for the purpose of inflicting punishment, but rather to gauge a judge's fitness to serve as an impartial judicial officer." In that regard, the Court stressed the Judge's acknowledgement of the action, cooperation in the investigation, and admission of the Code violations.

So, in what circumstances may a judge write a recommendation letter? The Judicial Ethics Advisory Committee (JEAC) recently summarized the subject in Opinion Number: 2017-09. That opinion provides a volume of scenarios and discussion. All of the JEAC opinions can be searched in a database maintained by the Florida Sixth Judicial Circuit. A simple search for "recommendation letter" also provides guidance.

The JEAC in 2017-09 was asked if a judge could recommend a former, and recently deceased, bailiff in an effort to have his service in a local community recognized with the naming of a sports field in his honor. The JEAC concluded that such a letter was permissible. It noted the broad prohibition on such letters, but also "an exception for" particular letters:

> Although a judge shall be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation.

Continued, Page 31.

Recommendation, from Page 30.

From that exception, the JEAC noted multiple interpretations in which it has concluded a recommendation letter is not inappropriate, if based upon personal knowledge:

> letters of recommendation to a potential employer or commendation to an employee's personal file, Fla. JEAC Op. 10-29, applicant for law school fellowship, Fla. JEAC Op. 07-06, applicant for law school, Fla. JEAC Op. 79-03, letters of commendations, Fla. JEAC Op. 94-45, to judicial nominating commissions, Fla. JEAC Ops. 86-02, 89-15, 91-28, 03-09, to the Florida Department of Elderly Affairs acknowledging that a professional guardian has demonstrated competency, intended to be sent by the guardian seeking waiver of a competency examination, Fla. JEAC Op. 05-04.

The JEAC also provided clear examples of letters that judges "are not allowed by the judicial code to write":

> for investigatory and/or adjudicatory proceedings where legal rights, duties, privileges, or immunities would be decided. Fla. JEAC Op. 94-45. to the Department of Business and Professional Regulation where the privilege of obtaining a professional license would ultimately be determined, Fla. JEAC Op. 13-08, in criminal sentencing proceedings, Fla. JEAC Op. 10-34; recommending parole to the Parole and Probation Commission, Fla. JEAC Op. 77-17, attorney disciplinary action by the Florida Bar, Fla. JEAC Op. 04-22, to the Florida Bar in connection with disciplined lawyer seeking re-admission to the Bar, Fla. JEAC Op. 88-19, to Clemency Board or Board of Bar Examiners, Fla. JEAC Op. 82-15, for judge's personal business interests or matters, Fla. JEAC Ops. 81-08, 92-02, 96-14.

I have concluded that the best answer to such requests is generally no. Any recommendation letter could potentially be interpreted as "improperly lending the prestige of judicial office to advance the private interests" of someone. More importantly, the Code's use of an "appearance of impropriety" standard is very broad, and very subjective. Essentially, might any reasonable person perceive the writing of the letter as inappropriate?

If a judge elects to write a recommendation letter, the best advice includes (1) do not use judicial stationery, and (2) do not mention either the title "judge" or even judicial service in the letter. When I deliver that advice, I generally hear "but if they do not know I am a judge, what good does the letter do?" And, that is perhaps the point. If the letter brings value only because it says or implies judge, then maybe the only point of the letter is "lending the prestige of judicial office?"

Thus, the best advice is to decline all such requests. If the request is within one of the categories approved by the JEAC, then the second best response is to offer a letter on personal letterhead with no reference to judicial service. Any letter on official letterhead or mentioning judicial service merely opens the door to potential criticism or worse.

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* David Langham is the Deputy Chief Judge of Compensation Claims in Florida. He has published in excess of 100 articles and 900 blog posts regarding workers' compensation, judicial ethics, constitutional review, evidence, and more. Judge Langham has delivered in excess of 1,100 professional presentations and panel appearances on the law and economics. He is one of the founders of NAWCJ and the Professional Mediation Institute, a member of the Workers' Compensation Institute Steering Committee, and has been involved in a variety of workers' compensation organizations. Judge Langham is proud to be an Inns of Court member. The foregoing was adapted from a post originally published on the Florida Workers' Compensation Adjudication Blog.

Governor Rick Scott Appoints Two and Reappoints Three

Hon. Neal Pitts*

In a highly anticipated announcement, made several days before the expiration of his term, Governor Rick Scott reappointed several Judges of Compensation Claims in the Jacksonville and Pensacola offices and appointed two new judges in the Tampa and Ft. Lauderdale offices. He also left unfilled a second opening in the Tampa district office, to be filled by the new governor.


Ray Holley

Being reappointed for their third terms in the two judge Jacksonville district office were Ray Holley, 49, and Ralph Humphries, 66; both originally appointed in 2010 by Governor Crist. Judge Holley received both a bachelor's and law degree from Stetson University and Judge Humphries received both a bachelor's and law degree from the University of Florida. Both are active in the Robert E. Williams Inn of Court in Jacksonville and both have served as its president.


Ralph Humphries

Judge Humphries currently is serving as a member of the Board of Directors of the National Association of Workers' Compensation Judiciary. He is very active on its conference committee and its Long Range Planning Committee.


Nolan Winn

Judge Nolan Winn, 65, was reappointed for the Pensacola District. He has served the Pensacola District since 2006 when he was appointed by Governor Bush. He has been reappointed by Governor Crist and Scott. He received a bachelor's degree from Jacksonville University and a law degree from Tulane Law School.

Judge Rita Lawton Young, 59, was appointed for the three judge Tampa District Office. Previously, she served as a state mediator and senior attorney for the Division of Administrative Hearings. She received a bachelor's degree from the University of Mississippi and both a master's and law degree from the University of Florida. She filled the vacancy created by retirement of Judge Spangler.


Rita Young


Michael Ring

Judge Michael Ring, 59, was appointed for the three judge Ft. Lauderdale district office. Prior to this appointment, he practiced law with the Law Office of Michael J. Ring, P.A. He received a bachelor's degree from the University of Florida and a law degree from the Nova University School of Law. He filled the vacancy created by the retirement of Judge Hogan.

There remains the appointment of a new judge for the Tampa District Office. It remains uncertain as to whether the new governor will appoint this position from the current candidates or whether he will send it back to the Statewide Judicial Nominating Committee for a new application process.

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* Neal Pitts is a Judge of Compensation Claims in Orlando, Florida. He serves on the NAWCJ Board of Directors.

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Glen D. Wieland*
Wieland, Hilado & Delaitre, P.A.

*Denotes Charter Associate Member.

Endnotes from Doctor in the Courtroom, pages 3-4.

[1] I was the replacement for The Honorable David B. Torrey, PA Workers' Compensation Judge, a former NAWCJ President, noted author, longtime adjunct professor and acknowledged expert in the area of workers' compensation law and adjudication, who, to my good fortune, was unable to attend.

[2] David B. Torrey Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power, 32 Journal of Nat'l Ass'n Admin. L. Judiciary, Iss.1, p. 147 (2012).

[3] The IAIME 2019 Medicolegal Institute brochure can be found at: https://iaime.memberclicks.net/assets/docs/IAIME%20Jan%202019%20Reg%20Bifold%20Tuscon_final.pdf

Endnotes from Texas Bar Association, pages 14-19.

[1] Louis Esola, *Opt-out Texas Sees Dip in Employers Offering Comp Coverage*, BUSINESS INSURANCE (Dec. 4, 2018).

Judicial Ha Ha

"A judge is a law student who grades his own papers." ~ H. L. Mencken

"A judge is not supposed to know anything about the facts of life until they have been presented in evidence and explained to him at least three times." ~ Lord Chief Justice Parker

"Judges don't age. Time decorates them." ~ Enid Bagnold

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