Lex and Verum

The National Association of Workers' Compensation Judiciary

Number LXXXVIII
January 2017

NAWCJ President's Page

By Hon. Jennifer Hopens

Happy New Year, *Lex & Verum* readers! I hope you all enjoyed a lovely holiday season.

2017 marks the year of the rooster in the Chinese zodiac, and NAWCJ sure has a lot to crow about in the New Year (I confess - cutting down on gratuitous puns is atop my list of soon-to-be-forgotten New Years' resolutions).

NAWCJ looks forward to continuing our sponsorship this year of the E. Earle Zehmer National Moot Court Competition, which takes place at the World Center Marriott in Orlando from August 5-7, 2017. Please pass the word along to law schools and/or moot court boards in your state. The competition affords law students with an invaluable opportunity to present arguments in front of workers' compensation judges from across the U.S. For questions on the competition, feel free to contact Jacqueline Steele (jsteele@mcconnaughhay.com) of McConnaughhay, Coonrod, Pope, Weaver, and Stern, P.A. in Sarasota, Florida, me (jennifer.hopens@tdi.texas.gov), or any of the following NAWCJ Board of Directors/Officers – Judge David Langham (david.langham@doah.state.fl.us) of Florida (NAWCJ Board), NAWCJ Immediate Past President Michael Alvey (michael.alvey@ky.gov) of Kentucky, or President-Elect James Szablewicz (james.szablewicz@workcomp.virginia.gov) of Virginia. We also hope to see you at that time in Orlando for the NAWCJ Annual Judicial College (see upcoming issues of the *Lex* for more details about the College curriculum).

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The President's Page, from Page 1.

We hope you will get a lot out of this inaugural issue of the 2017 *Lex*. Among the highlights – in the spirit of our commitment to judicial education, an article from Dr. Mark Melhorn and NAWCJ Board member Judge LuAnn Haley on repetitive trauma injuries (those of you who attended last year's College in Orlando may recall Dr. Melhorn's engaging presentation on this topic). Judge Haley, who serves as an administrative law judge with the Industrial Commission of Arizona, chairs the NAWCJ newsletter committee and is instrumental in putting together the excellent content you read each month in the *Lex*. We appreciate her time and effort in support of our organization, as well as the work of her committee members (Judge Langham, Judge Shannon Bruno Bishop of Louisiana, and Judge David Torrey of Pennsylvania). Also in this month's issue, you'll find a spotlight on Judge Bob Cohen, who serves as Chief Judge of the Florida Office of Judges of Compensation Claims and NAWCJ's Treasurer, as part of our continuing series of Board and Officer profiles. Enjoy!

I hope 2017 brings you all nothing but peace, joy, happiness, and lots of good things to crow about.

Mark your calendar! Judiciary College 2017
August 6-9, 2017
Before School – Bring the Kids!

In This Issue

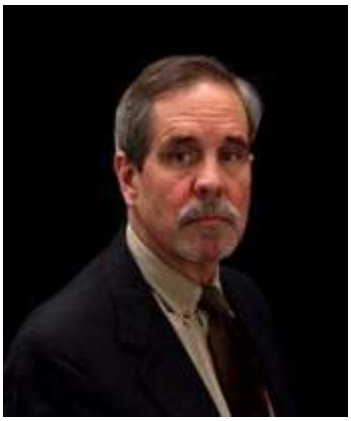
Spotlight on Associate Members: Terry Germany and Sharkey Burke of Anderson Crawley & Burke, PLLC

By: Hon Deneise Lott*

Everybody has a story. I have known Terry Germany and Sharkey Burke, partners in the firm of Anderson Crawley & Burke, PLLC, for many years, but I did not have the pleasure of learning their stories until accepting this assignment to "spotlight" two associate members of NAWCJ.

Terry graduated from Mississippi State University where, like many good lawyers-to-be, he majored in history and minored in political science. After graduation, he left academics for some real-world experience as a claims adjuster with Southern Farm Bureau. While working as an adjuster over the next five years, he earned his law degree from Mississippi College School of Law. He has been a member of the Mississippi Bar since 1981 and a member of the Louisiana Bar since 1982.

After working in oil and gas for a couple of years post-graduation, he joined forces with Jim Anderson and has been practicing workers' compensation law since 1983. He now represents employers, carriers and self-insureds in workers' compensation claims. He clearly enjoys the practice because he is both successful and well respected by his peers, but he expressed the common lament that law practice sometimes feels more like a business than a profession. And that cost concerns can disproportionately drive strategy.



Terry Germany

The best part about practicing law for Terry? The people. In his words: "the people I have had an opportunity to work with and/or meet over the thirty-three years I have practiced workers' compensation law. I have made enduring friendships with several people I would never have known but for this practice."

When asked what he does for fun or to blow off steam, he replied, "I am an avid photographer, mostly of wildlife and nature. I write songs from time to time and play guitar and saxophone very badly. I enjoy traveling outside of the United States. And, I love Harley Davidson motorcycles." His favorite past time as a photographer explains his "secret ambition to work for National Geographic as a photographer or to open a Tikki Bar on the Pacific side of Costa Rica." And I guess it's his sense of adventure that animates his persistent desire to be an astronaut. (Who knew!)

Terry was also gracious enough to share the best advice he ever received. From his grandfather: "Always be a man."

Terry's wit and wisdom are matched by the dedication and verve of his partner, Sharkey Burke. Like Terry, Sharkey majored in history while in college. He graduated from Millsaps College before attending Mississippi College School of Law and graduating with honors in 1996.

Sharkey began his practice doing defense work for an revered firm on the Mississippi Gulf Coast. After four years, he moved to Jackson and opened a branch office for the firm with another partner. His workers' compensation practice grew, and, in 2003, he co-founded his current firm: Anderson Crawley & Burke, PLLC.

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Governor Rauner Appoints Two Arbitrators

In December, Illinois Governor Bruce Rauner appointed Mr. Frank J. Soto as an arbitrator for the Illinois Workers' Compensation Commission. Mr. Soto was formerly an attorney with the Law Offices of Mr. Frank J. Soto while serving as the Village of Bensenville President. Mr. Soto is a graduate of Eastern Illinois University and the John Marshall Law School.

Governor Rauner also appointed Mr. Michael Glaub as a Workers' Compensation arbitrator. Mr. Glaub was formerly a partner with the firm Hennessy & Roach. Mr. Glaub brings nearly 30 years of experience in workers' comp law. Mr. Glaub is a graduate of the Southern Illinois University and DePaul University Law School.

Spotlight on Associate Members, from Page 3.

Since then he has continued to represent insurers, insureds and self-insured corporations in a variety of civil litigation in state and federal courts. His focus over the past 12 years has been on defending employers and carriers in workers' compensation claims as well as employment discrimination matters. He also handles tort claims against county and local governmental entities.

P. Sharkey Burke

In 2014, Sharkey was chosen as one of Mississippi's Leaders in the Law by the Mississippi Business Journal. He has also distinguished himself as accomplished mediator and popular presenter at seminars. And he has an impressive list of cases in which he secured a defense verdict as lead or co-counsel.

When queried about current challenges as a workers' compensation practitioner, Sharkey noted the difficulty of returning claimants to work and settling claims when claimants are being maintained, sometimes for years, on Opioids for chronic pain. Medicare services enforcement of the Secondary Payer statute also complicates settlement of claims for both sides of the bar.

Sharkey's favorite part of practicing workers' compensation law is "working with an experienced claimant's attorney to bring a claim to conclusion by way of settlement."

Off duty, Sharkey enjoys being outdoors - hunting, fishing, playing golf - and spending time with his wife and four children. He is also active in his church, serving on the Diaconate and teaching Sunday School.

He divulged that he enjoys singing and plans to one day teach himself how to play the harmonica. He also enjoys cooking and flirted with the idea of attending culinary school and pursuing a professional career as a chef before attending law school. Luckily for his clients, his career veered in the direction of creative lawyering rather than creative cooking.

Interestingly, while writing this article, I learned from Sharkey that I was the judge in his first workers' compensation case. And Terry reminded me that he was defense counsel in my first workers' compensation hearing as a judge. Connections both coincidental and curious; sometimes the circle will not be unbroken.

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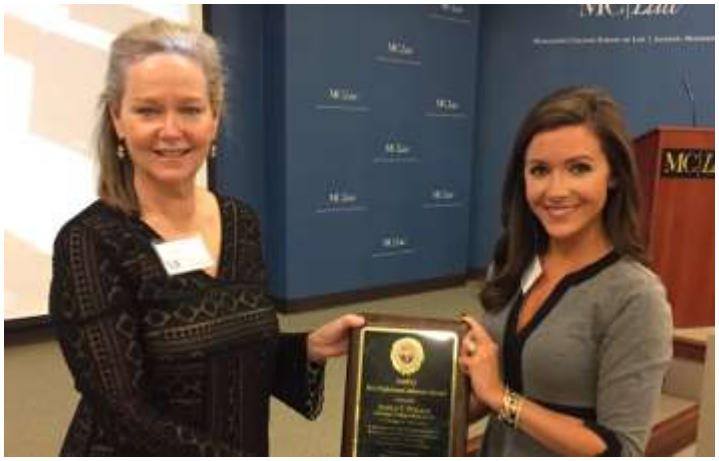
* Hon. Deneise Lott is Senior Administrative Law Judge for the Mississippi Workers' Compensation Commission, and a member of the NAWCJ Board.

Judiciary College 2016



Judge Deneise Lott (MS), NAWCJ Board Member, presented the NAWCJ Best Professional Advocate Award to law student Jessica T. Pulliam at a recent ceremony at Mississippi College School of Law in Jackson, Mississippi.

This esteemed panel of adjudicators presided over a preliminary round of the Zehmer Moot Court in 2016. Left to right are Judge Massey (GA), Judge Beck (FL) and Commissioner Dwight Lovan (KY).

The Virginia delegation, led by Chair Wesley Marshall and Chief ALJ Jim Szablewicz, paused for a group photo at the 2016 NAWCJ Judiciary College.

Compensability of Common Upper Extremity Conditions When Work Activities Are Repetitive

By J. Mark Melhorn, MD*, LuAnn Haley, JD**
and Charles N. Brooks, MD***


Hon. LuAnn Haley

Repetitive illness, sometimes called repetitive injury or cumulative trauma but probably mislabeled as such since there was no singular traumatic event, claims come to the attention of physicians when an employee cannot identify a specific injury as a cause the symptoms. In workers' compensation such gradual illness claims may be compensable if the condition arises out of the course of employment, which requires that it be caused by occupational duties, exposures, or equipment used on the employer's premises. Like a three legged stool, it is important to the integrity of the workers' compensation system that the medical expert have, and base his or her causal opinions on, thorough knowledge of three sets of data. First, the expert must know the best scientific evidence currently available regarding causation of the condition(s) in question, ie, generic causation.

Second, the expert must know the facts of the individual case, specific causation. Just how repetitive were the allegedly causative activities? What were the forces and postures involved? Was the worker exposed to vibration or temperature extremes, especially a cold environment? Are avocational activities a more probable cause for the condition?


J. Mark Melhorn, M.D.

Third, the expert must know the legal threshold in the applicable jurisdiction for acceptance of a condition as work related. To render a well-informed final decision on compensability, a judge, hearing officer, or other judicial administrator must have a complete understanding of both sets of medical facts, generic and specific, then apply them to the applicable state, provincial, or federal law.

Hence it is useful to define repetitive. Repetitive can simply be described as doing something a second time or again and again. When considering cumulative, repetitive, or gradual illness in a legal setting there is no specific threshold for the number of times an action must be performed to be deemed repetitive. From a medical standpoint, repetitive has been described as jobs with a high number of cycles, which may include cycle times of less than 30 seconds and more than 50% of the time at the activity spent performing the same cycle.[1] Unfortunately, this definition and approach has been repeated without validation. Additionally, the information contained in that study represents auto industry job tasks in the 1980's. Hence the information may not be transferable to other job tasks and industries.


Charles N. Brooks, MD

Therefore, practitioners may face difficult questions when asked by a patient, employer, adjuster, attorney, or judge if an upper extremity condition is causally related to the patient's repetitive work activities. As implied, before providing a medical opinion regarding causation, the physician should know scientific evidence regarding the cause of the condition, specifics of the individual case, and a modicum of law, the jurisdiction and legal threshold for causation therein. However, in reality physicians commonly parrot information provided by the patient regarding job tasks and causation.

The American Medical Association's *Guides to the Evaluation of Disease and Injury Causation, Second Edition* is an excellent resource, and provides the physician a blueprint for the assessment of causation in occupational injury and illness claims.[2]

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Upper Extremity Conditions, from Page 6.

The book adopts the methodology developed by the National Institute of Occupational and Health (NIOSH) and the (ACOEM). A step-by-step method for the physician to determine causation is in Table 3-2 (right).

Once the practitioner has an adequate understanding of the work activities performed by the patient, a structured analysis must be undertaken to determine work-relatedness of the condition. Following the above methodology should allow the medical expert to arrive at a supportable conclusion based both on case specific facts and scientific evidence.

Additionally, the medical expert will need to consider the causation standard in the relevant jurisdiction before confirming any opinion regarding work relatedness. Many jurisdictions require the physician to establish causation of the condition "with a reasonable degree of probability."

TABLE 3-2. National Institute for Occupational Safety and Health/American College of Occupational and Environmental Medicine Steps for the Determination of Work-Relatedness of a Disease

1. Identify evidence of disease
2. Review and assess the available epidemiologic evidence for a causal relationship
3. Obtain and assess the evidence of exposure
4. Consider other relevant factors
5. Judge the validity of testimony
6. Form conclusions based about the work-relatedness of the disease in the person undergoing evaluation

Source: Adapted from Kusnetz and Hutchison, Eds. DHEW, CDC, NIOSH, Pub. No. PB298-561; 1979 and Occupational Medicine Practice Guidelines, 2nd and 3rd Eds. ACOEM OEM Press, 2004, 2008, 2011.

The AMA causation book also has a useful chart of causation thresholds in each jurisdiction. This information should be consulted before offering a final conclusion regarding work relatedness in any case.

The physician must also understand the patient has reporting requirements for claiming conditions as work-related. Often the patient has an obligation to report the condition promptly for it to be considered compensable. If there is a sufficient delay in the employee's report of injury or illness, the claim may be denied despite supporting medical opinion. Therefore, a treating physician should communicate an opinion regarding causation promptly to the patient to enable him or her to comply with statutory reporting requirements.

The opinion of a medical expert who does not know generic causation for the condition in question, specific facts of the case including occupational and avocational activities, and the legal threshold for causation, will collapse.

A medical opinion lacking an adequate and proper foundation will likely be ignored by the adjudicator.

With this foundation regarding assessment of causation in mind, let us turn to a specific and common example of an upper extremity condition, carpal tunnel syndrome (CTS), that many patients believe must be related to work activities such as use of a computer keyboard. The following is an abbreviated example to illustrate the process of causation analysis and does not include all of the materials that would be required to provide a formal causation opinion and report.

The physician would complete a traditional history and physical examination. Supporting clinical studies such as X rays and electrodiagnostic testing would be appropriate.

A detailed job history with start and end dates, tasks performed, duration of tasks, etc, as well as a history of hobbies and avocational activities, should be obtained.

The worker is a 30-year-old, right handed female legal secretary for a workers' compensation attorney.

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Upper Extremity Conditions, from Page 7.

She works full time in the law office, spends 5 to 6 hours per day at the keyboard preparing documents, and has done so for the past 8 years with no change in job tasks or hours. Her work station does not include an ergonomically designed keyboard, however, the height of the keyboard may be adjusted by the employee. She noted gradual onset of numbness and tingling in all right fingers beginning about two months ago, and denies any injury or precipitating event. In the last two weeks she experienced a sudden onset of the same symptoms in her left fingers, but again without specific injury.

Her physical examination and electrodiagnostic testing are consistent with bilateral carpal tunnel syndrome.

The secretary filed a workers' compensation claim using the date of diagnosis as her date of injury. The employee continues to work but is requesting that right and left carpal tunnel releases be paid for as compensable treatment for her industrial injury claim.

Is there a compensable injury or illness on right, left, or both sides? The NIOSH/ACOEM 6 step approach is then utilized.

1. Identify evidence of the disease = Diagnosis. For this example we will assume the diagnosis is correct.
2. Review and assess the available epidemiological evidence for a causal relationship. This can be completed by the physician using the Methodology approach outlined in Chapter 4 of the Causation Book or review of Chapter 9, Upper Limb already includes the science for CTS.
3. Obtain and assess the evidence of exposure. This is why the job activities and tasks information is important. Although there are occupational risk factors for the development of CTS, the individual may not have been adequately exposed to these risk factors at their job.
4. Consider other relevant factors. Individual risk factors can be just as important as occupational risk factors in the development of a condition.
5. Judge the validity of testimony or science. In other words, the physician must consider the individual risk factors and the occupational risk factors; was this individual exposed to sufficient occupational risk factors to contribute to the development of the disease identified in step 1?
6. Form conclusions about the work-relatedness of the disease in the person undergoing evaluation. The final step requires an understanding of the legal threshold for the specific jurisdiction which might be "any contribution," "more likely than not," or "prevailing factor" and the ability to take the epidemiological data and apply this to the individual.

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2016 NAWCJ Board of Directors

Upper Extremity Conditions, from Page 8.

Although this is only one example of a causation analysis in claims involving repetitive work activities, the same guidelines can be used in assessing causation questions in other cases. When asked to render opinions regarding causation, a physician is wise to consider the above methodology in determining the work relatedness of the condition. Medical opinions based on an accepted methodology and the best scientific evidence currently available will result in better patient outcomes as well as enhance the role of the medical provider in workers' compensation systems.

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[1] Silverstein BA, Fine LJ, Armstrong TJ. Occupational factors in carpal tunnel syndrome. Am J Ind Med 11 (3):343-358, 1987.

[2] Melhorn JM, Talmage JB, Ackerman WE, Hyman MH, AMA Guides to the Evaluation of Disease and Injury Causation. 2nd Edition. AMA, Chicago, 2013.

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* Dr. J Mark Melhorn is an orthopedic surgeon in Wichita, Kansas and is affiliated with multiple hospitals in the area, including Via Christi Hospital, St. Francis and Wesley Medical Center. He received his medical degree from University of Kansas School of Medicine.

** Judge Haley is an Administrative Law Judge in Arizona, a member of the NAWCJ Board, and Chair of the *Lex and Verum* Committee.

*** Dr. Charles Brooks is an orthopedic surgeon in Bellevue, Washington. He received his medical degree from Wayne State University School of Medicine.

The foregoing was originally published in the November/December 2016 issue of the *AMA Guides Newsletter*. It is reprinted here with the permission of the authors.

2017 ZEHMER MOOT COURT

SAVE THE DATES!!!!

The E. Earle Zehmer National Moot Court Competition will be held at the Orlando World Center Marriott from August 5th – 7th, 2017 in Orlando, Florida.

This competition affords students the opportunity to argue in the preliminary and quarterfinal rounds before sitting workers' compensation judiciary from across the country. The semi-final rounds are judged by retired Judges of Compensation Claims with the final round argued before presiding Judges from the First District Court of Appeals of the State of Florida.

Most competition expenses are generously covered by the Workers' Compensation Institute, including travel to/from the competition (mileage or reasonable coach airfare for out of state competitors); hotel accommodations for two nights; a meal per diem for two days, and copying costs. Please encourage all law schools in your state to consider participation and pass along this information to the law school deans and/or Moot Court Boards. Should you have any questions about the competition, please direct those to one of the following:

Judge Jennifer Hopens
jennifer.hopens@tdi.texas.gov
Jacqueline Steele
jsteele@mcconnaughhay.com
Judge David Langham
david.langham@doah.state.fl.us
Judge Michael Alvey
michael.alvey@ky.gov
Judge James Szablewicz
james.szablewicz@workcomp.virginia.gov

National Association of Workers' Compensation Judiciary

Professor David Engel's "*The Myth of the Litigious Society*": A Tort Book for the Workers' Comp Community as Well

By: Hon. David Torrey*

Do Americans really sue at the drop of a hat for personal injury? Do we live in a hopelessly "litigious society"? Most lawyers (myself included) have unthinkingly uttered this latter phrase, and I certainly have grown accustomed to hearing such declarations – and taking them for granted as true.

Professor David M. Engel, who teaches torts at the University of Buffalo School of Law, will have none of it. In his excellent new book, *The Myth of the Litigious Society: Why We Don't Sue* (Univ. of Chicago Press 2016), he seeks to refute the proposition that we live in a litigious society. Engel cites studies that show that the vast majority of personal injury victims in fact "lump" their injuries and make no claim whatsoever. The small number of victims who do consult a lawyer, meanwhile, in fact do not file complaints.

But why is this so? Engel draws on research from several disciplines to theorize why most injury victims, even those with plainly cognizable causes of action, fail to seek redress. He insists at the outset that many injury victims are not thinking logically in the first place, and the idea that logical explanations for restraint are the source of the answer is mistaken. One must consider, instead, the effects of the subconscious on such decision-making.

And powerful societal forces affect that thinking. The tort reform movement of the last few years, for example, has encouraged people to automatically think of tort claimers as being of questionable character and lacking in personal responsibility. In addition, it is not always apparent to the layperson that one's injury has been inflicted upon him or her – that is, *caused*, by another via some culpable act or omission. Also, many injured individuals may not conceive of their injuries as *being* injuries in the first place. Meanwhile, studies show that family, friends, and co-workers often dissuade victims from pursuing injury claims.

It is notable Professor Engel's book is about tort. Indeed, he states in the initial chapter that an individual's mere *acceptance* of voluntarily-paid workers' compensation insurance benefits is not the type of "claiming" that he is writing about. Instead, claiming involves the injured individual taking some sort of initiative and prosecuting an action.

Of course, Professor Engel might well have considered the *contested* workers' compensation claim. Here is a situation which does, indeed, involve the injured worker's initiative and (usually) the retaining of a lawyer. The issue then would become: why do so many workers not pursue their workers' compensation denials?

And, as a matter of fact, Engel's analysis of the tort situation translates into the workers' compensation sphere. Most of the factors that he identifies as leading to the self-repression of claims are present in our field as well. That makes *The Myth of the Litigious Society* an excellent book for the workers' compensation lawyer or judge. One will find enlightenment on this issue on every page. The book is also a joy to read – Professor Engel tells a good story – and flawlessly edited. Meanwhile, at 232 pages the book is accessible, and I was able to read it through twice and was pleased at my time expenditure.

I'll never hear, "our litigious society," the same way again.

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* David B. Torrey is a Workers' Compensation Judge in Pittsburgh, PA, and is Adjunct Professor of Law at the University of Pittsburgh School of Law. He is a member of the NAWCJ Board of Directors and past president of the NAWCJ.

Kentucky Has Five New Judges

Kentucky has sixteen workers' compensation administrative law judges (ALJs). Each is appointed by the Governor, from a list of nominees submitted by a nominating commission. The Governor's appointees must also be confirmed by the Senate during its next session.

Three Kentucky judges were reappointed in 2015, and were therefore before the Senate for confirmation in 2016. The Senate did not act upon those appointments before adjourning. These three judges' terms therefore expired on June 30, 2016.

Last May, Governor Matt Bevin considered four additional reappointment nominations. Of them, he reappointed only Judge Jane Rice Williams, thus creating three administrative law judge vacancies.

Governor Bevin's reappointment decisions were announced shortly after he issued two executive orders, one ending the nominating commission responsible for vetting judges and judicial applicants, and the other creating a new commission for that purpose. This afforded the Governor the opportunity to appoint all members of the new commission.

Therefore, by July 2016, the Kentucky ALJ workload intensified as only ten of the sixteen judges remained.

There was litigation filed over the executive orders. That remains ongoing, as the court attempts to determine the extent of gubernatorial authority in remaking commissions and boards. Temporarily, an injunction prevented the new commission from operating, precluding appointment of new judges. Through summer, and into the fall, the Kentucky ALJs persevered despite being shorthanded.

In the midst of that effort, Kentucky deployed its long-anticipated electronic filing system. While this will ultimately benefit and aid the ALJs, implementation was undoubtedly challenging for the shorthanded team.

In late November, the court ended the injunction, the commission accepted applications and made nominations.

After a long six months of adjustments and effort, the ALJs saw relief on the horizon. On December 21, 2016 the agency received a great holiday package from Governor Bevin: five new ALJs. They are Christina Ditty Hajjar, Monica Rice-Smith, Brent E. Dye, John H. McCracken, and Richard E. Neal. Each is filling the remainder of a term, and so some were appointed for three year terms and others are effectively three and one-half year terms.

According to the VanAntwerp Attorneys website, Christina Ditty Hajjar was an associate with that firm. She is a native of Ashland, Kentucky and earned her Juris Doctor from the University of Kentucky College of Law. She has practiced workers' compensation for about ten years in Ashland and Lexington, and she has represented employers in workers' compensation litigation since 2007. She shall serve for a term expiring July 14, 2020.

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Judge Chritina Ditty Hajjar

Judge Monica Rice-Smith

Judge Brent E. Dye

Kentucky New Judges, from Page 12.

Monica Rice-Smith is a graduate of Transylvania University. She earned her Juris Doctor at the Chase College of Law at Northern Kentucky University. She practices in Hyden, Kentucky. She shall serve for a term expiring July 14, 2020.

According to O'Bryan, Brown and Toner, Brent E. Dye is an associate attorney with that firm in Louisville, Kentucky. He graduated Georgetown College with a B.S. in business in 2002, and earned his Juris Doctor from the Chase College of Law in 2006. His practice has been focused on workers' compensation defense since that time. He shall serve for a term expiring July 14, 2020.

Judge John H. McCracken

According to the website of John H. McCracken and Associates, John H. McCracken has a general practices in Bowling Green, Kentucky. He has practiced for over 29 years, and previously served as an Administrative Law Judge for the Department of Probation and Parole, as a Trial Commissioner for the Kentucky Bar Association, and as a Special Domestic Relations Commissioner. He has represented both employees and employers in workers' compensation matters. He shall serve for a term expiring Dec. 31, 2019.

According to the website of U'Sellis & Kitchen, Richard E. Neal is an associate with that firm. He has served as an Assistant District Attorney and as a Staff Attorney at the Department of Public Advocacy, prior to entering private practice. He has practiced in workers' compensation for approximately ten years, with experience also in tort defense subrogation and criminal appellate law. He shall serve for a term expiring Dec. 31, 2019.

Judge Richard E. Neal

The five new ALJs will be subject to confirmation by the Senate when it convenes in January.

The newly appointed judges join the dedicated ten that have maintained process and procedure for the last six months. Led by Chief Judge Robert Swisher, these ten judges are Roland Case, John Coleman, Chris Davis, Douglass Gott, Stephanie Kinney, Jeanie Owen Miller, Tanya Pullin, Grant Roark, Jonathan Weatherby, and Jane Rice Williams.

Kentucky Commissioner Dwight Lovan commented "Bob Swisher has been the key to keeping things moving. Anyone who knows him understands he is dedicated to seeing the right thing done regardless of the personal cost. All of us in the Kentucky workers' compensation community owe him a debt of gratitude. The remainder of the ALJs also deserve a big 'thank you.' With a huge increase in workload they worked to insure workers and employers received timely action."

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR MEMBERSHIP

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

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

OFFICIAL TITLE: _____

ORGANIZATION: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____ **FAX:** _____

YEAR FIRST APPOINTED OR ELECTED: _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ: _____

_____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

_____

_____

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

_____

_____

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

From the Pages of workcompcentral®

Report Questions Motive Behind Abuse-Deterrent Opioids

By Elaine Goodman
Friday, December 16, 2016

Drug companies, which have been lambasted for their role in creating the national opioid epidemic, are now turning their lobbying efforts to promoting abuse-deterrent forms of the painkillers, according to a new investigative report from the Associated Press and the Center for Public Integrity.

The series of articles contends that there's little proof that abuse-deterrent opioids reduce rates of overdoses or deaths. But drug companies are raking in money from the abuse-deterrent formulations, to the tune of $2.4 billion in sales last year, even though the drugs represented less than 5% of all opioids prescribed, the series reported.

The abuse-deterrent drugs are designed to be difficult to crush, preventing a user from snorting or injecting them. Although they're abuse-deterrent, they're not abuse-proof, some note. The abuse-deterrent opioids make up a small, but potentially growing, portion of drugs prescribed in workers' compensation.

In its latest Workers' Compensation Drug Trend Report, Express Scripts said abuse-deterrent formulations accounted for about 2% of opioid prescriptions filled by injured workers in 2015, a similar percentage to that seen in 2014. The formulations include OxyContin, Hysingla ER (hydrocodone), Zohydro ER (hydrocodone), Opana ER (oxymorphone), Embeda (morphine/naltrexone), Exalgo (hydromorphone), Nucynta ER (tapentadol) and Oxaydo (oxycodone).

Prices and utilization increased for each of those opioids, except for OxyContin and Oxaydo, Express Scripts said. Hysingla ER, released in November 2014, had an average cost per prescription close to $400, according to the drug trend report.

A May report from the California Workers' Compensation Institute found that 3.9% of prescription drug payments in California were for opioids in an "other" category in 2014, which included abuse-deterrent formulations.

The abuse-deterrent opioids aren't available as generics and could curtail the industry's success in moving toward generic drugs, according to a report from CompPharma, a consortium of workers' compensation pharmacy benefit managers.

Some in workers' comp said the abuse-deterrent label could give prescribers a false sense of security. The abuse-deterrent properties don't prevent a user from taking too much drug orally, said Silvia Sacalis, vice president of clinical services for Healthesystems, a pharmacy and ancillary benefit manager. "It really doesn't address the main problem," Sacalis said.

Continued, Page 16.

Abuse Deterrent Opioids, from Page 15.

And the availability of abuse-deterrent formulations may just shift opioid use to another form of the drug, Healthesystems noted in the spring 2015 edition of its Rx Informer publication. The company found that after abuse-deterrent OxyContin was introduced in July 2010, prescriptions increased for immediate-release oxycodone, which is not abuse-deterrent. When drug makers replaced Opana ER with a new, abuse-deterrent-formulation in 2012, immediate-release oxycodone prescription rates rose even higher, the company said.

"The continued increase in IR oxycodone prescriptions, despite the introduction of several abuse-deterrent opioids, suggests that abuse-deterrent products are not having the intended overall impact on abuse," Healthesystems said. "Resources should instead be focused on comprehensive pain management programs."

Mark Pew, senior vice president at Prium, said abuse-deterrent opioids are one tool for combatting opioid abuse and may have a limited use. Serious drug abusers will likely find ways to circumvent the abuse-deterrent technology, he said. Pew said the more important question is whether the patient needs an opioid at all. "The best opioid is the one not taken," Pew said.

Almost half of U.S. physicians erroneously believed that reformulated opioids are less addictive than their predecessors, according to the AP/Center for Public Integrity report, which cited results of a survey published in the Clinical Journal of Pain.

According to the investigative report, lawmakers in 35 states introduced more than 100 bills over the last two years addressing abuse-deterrent opioids. About half contained nearly identical wording that would require insurers to cover the new formulations — and several of the sponsors said the language was provided by pharmaceutical lobbyists, the report said.

Some quoted in the series, including Dr. Gary Franklin, medical director for the Washington state Department of Labor and Industries, questioned whether energy should be focused elsewhere in battling the opioid epidemic.

A Purdue Pharma spokesman quoted in the series said the company supports efforts to combat the opioid epidemic, including the use of abuse-deterrent drugs. As part of a multi-pronged Opioid Action Plan unveiled in February, the U.S. Food and Drug Administration said it intends to expand access to abuse-deterrent formulations and encourage their development. "The FDA looks forward to a future in which most or all opioid medications are available in formulations that are less susceptible to abuse than the formulations that lack abuse-deterrent properties," the agency said in a fact sheet on abuse-deterrent drugs. "The FDA also supports the efficient development of non-opioid alternatives for treating pain."

In an opioid prescribing guideline released in March, the U.S. Centers for Disease Control and Prevention said it was not making a recommendation regarding abuse-deterrent formulations. "No studies were found in the clinical evidence review assessing the effectiveness of abuse-deterrent technologies as a risk mitigation strategy for deterring or preventing abuse."

The guideline also pointed out the difference between abuse-deterrent and abuse-proof. "Although abuse-deterrent technologies are expected to make manipulation of opioids more difficult or less rewarding, they do not prevent opioid abuse through oral intake, the most common route of opioid abuse, and can still be abused by non-oral routes," the CDC said.

Social Security Administration Plans Audit to Test Workability of Work Comp Offset

By Emily Brill
Tuesday, December 13, 2016

Since 1965, the Social Security Administration has directed administrators in 37 states to reduce the disability benefits of claimants who also receive workers' compensation. Now, the agency wants to see how well administrators comply with that directive.

A Social Security Administration audit under development aims to survey how well its so-called "offset" requirement is implemented in the states that permit the practice, the National Council on Compensation Insurance reports.

The senior auditor at SSA's Office of Audit in Atlanta, Frank Nagy, has taken the lead on the project, said NCCI's Washington affairs executive, Tim Tucker. So far, Nagy has reached out to about 20 states "on a voluntary basis," asking for claim information, Tucker said.

Nagy did not respond to calls and emails requesting more information about the audit on Monday. But Tucker, who spoke to Nagy for a blurb in NCCI's Dec. 2 legislative activity report about the audit, had some knowledge of its origins, progress and goals. SSA will work with state workers' compensation systems to develop the audit, determining whether the data it needs to conduct the audit is available. It will then look into whether administrators are reducing disability benefits for claimants who also receive workers' compensation benefits.

Tucker said the audit is in keeping with goals recently outlined by the U.S. Labor Department. "In the U.S. Department of Labor report on the comp system that came out on Oct. 5, one of their policy considerations was to examine the coordination between the state-based workers' comp system and federal programs like Medicare and SSDI (Social Security Disability Insurance), so, basically, look at the integrity-type issues - make sure that mechanisms are put in place to ensure the integrity of the programs," Tucker said.

The offset provision is as old as SSDI - Congress wrote it into language that created the program - but how well it is being complied with is murky, Tucker said. The SSDI program came into being in 1956 after being talked about in Congress for about two decades in the wake of the Great Depression. The program is designed to provide income supplements to those with disabilities that restrict their ability to work. "I think it's unclear if the offset is being applied - in other words, if SSA's interests are being met in terms of the offset," Tucker said. "To the extent that it is or isn't, what type of fiscal impact is related to that? Is it quantifiable?"

"What they're really trying to do is get a better understanding of what the lay of the land is - maybe it's being complied with to a very high degree, or maybe it's not," Tucker said. Tucker said he does not believe the SSA has plans to eliminate the offset provision, though the agency may decide to modify it.

The audit will simply test "if the framework is effective, and then look into whether there needs to be a change - a statutory change, regulatory change or just communication," Tucker said. Thirty-seven states allow administrators to reduce SSDI benefits if a beneficiary also receives workers' compensation benefits. The offset applies whether a worker is eligible for periodic or lump-sum workers' compensation benefits.

Its goal is to make sure the combined amount of workers' compensation and SSDI benefits does not exceed 80% of the worker's average pre-injury earnings, SSA wrote in a 2004 fact sheet explaining the policy.

Continued, Page 18.

Gov. Ricketts Names Dirk V. Block to Nebraska Workers' Compensation Court

Nebraska Governor Pete Ricketts announced his appointment of Dirk V. Block to the Nebraska Workers' Compensation Court.

Block, 55, is managing member of Marks, Clare, and Richards, LLC in Omaha where he leads a team of attorneys who try cases before the Nebraska Workers' Compensation Court and counsel clients on employments matters. He has also worked as a partner and associate attorney at the firm. Block was previously an associate attorney at Knapp, Mues, Beaver, and Luther in Kearney.

Block holds a Bachelor of Science in Criminal Justice from the University of Nebraska-Omaha and a Juris Doctor from Creighton University School of Law. He has received the Martindale Hubbell "AV" peer review rating since 2005.

The vacancy is due to the retirement of Judge Laureen K. Van Norman, effective January 1, 2017.

Social Security, from Page 17.

Fourteen states allow "reverse offsets," meaning that workers' compensation systems can reduce benefits to account for a worker's receipt of SSDI benefits. Those states are Alaska, California, Colorado, Florida, Louisiana, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oregon, Washington and Wisconsin, according to SSA.

States were allowed to choose whether they wanted to be "reverse offset" jurisdictions between 1965 and February 1981.

In 2003, about 13% of SSDI beneficiaries had a connection to workers' compensation, SSA reported. Jurisdictions with the highest percentage of workers receiving both types of benefits were California, Puerto Rico, Rhode Island and West Virginia. Jurisdictions with the lowest percentages were the District of Columbia, Indiana, Wisconsin and North Carolina.

Spokespeople for the SSA, the SSA Office of Audit and the SSA's field office in Atlanta were not available for comment Monday.

The articles on pages 15-18, *Report Questions Motive Behind Abuse-Deterrent Opioids* and *Social Security Administration Plans Audit to Test Workability of Work Comp Offset* 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.

In 2016, the Tallahassee Bar Association presented its lifetime professionalism award to Director Cohen, NAWCJ Treasurer for Life

The "Reasons Personal" Exception of Section 301(c)(1), and Its Odd Ambiguity, Receives the Definitive Briefing

By: Hon. David Torrey*

"Don't Take it Personally": Explaining the Correct Interpretation of Pennsylvania Workers' Compensation Act Section 301(c)(1)'s "Reasons Personal" Exception- and Why it's More than Just a Matter of Semantics, PBA WORKERS' COMPENSATION LAW SECTION NEWSLETTER, Vol. VII, No. 128, p 47 (December 2016).

When Richard Baumhammers, in 2000, went on his hate-filled shooting spree and assassinated, among others, an Asian gentleman as he labored at a Chinese restaurant, the issue arose as to whether his death was work-related. Plainly this Pittsburgh resident was killed in the *course* of his employment, but did his injury *arise out of* his employment?

According to the Larson treatise, we should treat such a casualty as one from a "neutral risk," that is, one neither intimately connected to the employee's work (professional risk), nor uniquely connected with the employee's private life outside of work (personal risk). Injuries from the former are almost always compensable; injuries via the latter are not. The Larson treatise further posits that most courts hold that injuries from neutral risks, sustained while the worker is otherwise in the course of employment, should be deemed compensable - the work-connectedness is satisfied by the employee's presence at work and lack of culpability. It is hardly a reach in such cases to say that the injury arose out of the employment.

Baumhammers' assassination of the worker seems to have been a perfect example, however rare, of a neutral risk injury. A mentally ill gunman, seething with hatred of Asians, enters a venue where he is sure to find an Asian to murder, and carries out the act. The worker has no prior relationship with the assailant. But for the circumstances and obligations of the employee's work, he would never have been subject to this risk of injury. He was totally free of culpability in being victim to a random hate crime atrocity. Under the majority view, his injury arose out of his employment.

As the talented Post & Schell attorney Kyle Black explains, however, this is not the analysis undertaken under the Pennsylvania Act. In his new article, Mr. Black explains that the analysis is driven by statute, specifically a proviso of Section 301(c)(1). That proviso creates an affirmative defense, the "reasons personal" exception (also known as the personal animus exception), under which an employer contesting a claim may seek to show that the injury was for "reasons personal." *See* 77 P.S. *§* 411(1); *Torrey-Greenberg* Treatise, *§* 4:106.

Amazingly, a fundamental ambiguity has existed in this statute since at least 1959, specifically over whether the *reasons* must be reasons personal to the *employee* or to the *assailant.* Often, a mutuality of personal animus exists, so in most instances the uncertainty of language is probably irrelevant. But what of neutral risk cases, where the assailant, like Baumhammers, has reasons personal (hatred of Asians), but the employee has no familiarity with the assailant and is completely free of culpability? In such cases, the difference matters.

Continued, Page 20.

Reasons Personal, from Page 19.

Mr. Black has written the definitive brief on this issue, methodically considering statutory construction, effectuation of the Act's humanitarian purpose, similar statutes, and the approach of other jurisdictions. He ultimately submits that the Section 301(c)(1) exception should be read to exclude only injury and death caused by an act of a third person intended to injure the employee because of reasons personal to the *employee*.

Under this interpretation, the Baumhammers hate-crime victim, who was in the course of his employment, who had imported no risk, and who otherwise lacked culpability, would have been deemed to have sustained a work-related death. The employer, in this regard, would have been unable to show that his death was for reasons personal to *him*.

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* David B. Torrey is a Workers' Compensation Judge in Pittsburgh, PA, and is Adjunct Professor of Law at the University of Pittsburgh School of Law. He is a member of the NAWCJ Board of Directors and past president of the NAWCJ.

Attorney Kyle Black was the co-winner of the 2016 CWCL student writing contest and his article "Haters Gonna Hate" was reprinted in the May 2016 edition of *Lex and Verum* at page 24.

Interesting Workers' Compensation Blogs

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

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

Tennessee Court of Compensation Claims
http://tennesseecourtofwcclaims.blogspot.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/

The New Orleans WC Summit and the National Conversation

By: Robert Wilson*

Editor's Note These observations (of Mr. Wilson) were intended as a general overview, and in no way reflected, or were intended to reflect, official positions of any segment of the Summit membership. His thoughts are reprinted here with permission. The NAWCJ has not endorsed nor adopted Mr. Wilson's observations.

The third meeting of the Workers' Compensation Summit was held in New Orleans, LA on November 29that the Morial Convention Center. It was graciously hosted by the National Workers' Compensation and Disability Conference. This meeting, like the ones that preceded it in Orlando and Dallas, had its share of frustrations, but also produced what will come to be its defining highlights.

The 40 participants that gathered for the 5 hour meeting spent a great deal of time discussing bad actors in the workers' compensation system. The subject of the talks ranged from outright fraudulent activities such as surgeons using counterfeit parts and "injury mills" recruiting workers for bogus claims, to the less obvious malevolent players whose actions include intentional delays in benefits as well as vendors pursuing profit without value in the rendering of services to the injured worker. It was a long and animated section of the meeting, and one that did not bring clear resolution to the issue. It was clear, however, that those acting with ill-defined and negligent intent are hurting people and stealing resources from the system, and we will need to spend more time focused on this issue in the future.

The group also spent more time discussing the Priority Issues originally identified at the first Summit meeting in Dallas back in May. The primary 3 out of the original 29 issues are Benefit Adequacy, Regulatory Complexity and Delays in Treatment for Compensable Claims. During this round in New Orleans, there were a couple very strong ideas presented and discussed that could have true potential for the industry.

This would be a good time to point out that, due to the makeup of the Summit, you will likely never see an official list of recommended actions from the group. This group is made up of players from all sides of workers' comp, who have strikingly different views and opinions, mostly influenced and driven by the segment they work with and represent. Therefore, the possibility that 100% of participants will align behind a single recommendation is less than unlikely; that type of solidarity is just not going to occur. Still, there were ideas that got strong support from most participants without generating vociferous opposition in competing corners. These ideas will most likely be presented as "considered by the majority of Summit participants as viable for broader discussion and consideration."

Such is the way the wheels (slowly) turn within workers' compensation.

Continued, Page 22.

National Conversation, from Page 21.

We are crafting a report that will summarize Summit findings to date, and more detail will be provided within that document. I can briefly summarize two of the New Orleans generated ideas here. One of the ideas from the Summit was to look at a way of balancing indemnity benefits to better protect injured workers' during the original and early phases of their injury, while at the same time focusing more intently on returning them to work and motivating their ultimate exit from the system. This concept can best be described as a "graduated indemnity schedule." For Temporary Benefits, this would involve removing AWW caps on weekly benefits, so that workers' in the initial throw of a severe injury would be better able to maintain their homes and financial integrity while they heal.

Part of that effort would require a shift to payments on a post-tax, rather that pre-tax basis, and at a slightly higher percentage of AWW than is previously used in most states (say 80% instead of 66 2/3%). That would insure that higher earning workers would not see an increase in take home pay during an injury, but would also prevent them from losing their homes and financial health during an extended healing period.

As they shift to a permanent indemnity structure after a certain period of time, they would see a graduated reduction in indemnity benefits. This amount is to be determined, but for our example, let's assume the reduction would be to 60% of the temporary benefit payment levels. Recognizing that workers' comp is a safety net, and was never designed to fully maintain lost financial abilities, this graduated indemnity schedule would, in the words of one participant, "take care of the injured worker while they heal, while preparing them for a new economic reality from their situation." This entire idea, of course, would be most effectively utilized in a system wholly geared to "workers' recovery."

Another very strong idea that percolated through the din was a method of benchmarking physicians to assure that top performers were identified and used within the system. There is a growing recognition within the industry that the decades long pursuit of the "cheapest doctor for the network" is anything but a grand bargain for the worker or the employer.

Continued, Page 23.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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National Conversation, from Page 22.

Skilled physicians who can get results and help their patient heal quickly are worth their weight in gold, and deserve a commensurate compensation. One participant described how their company has developed a ranking, or benchmarking, system that is easy to understand (they are assigned one to five stars based on pre-defined criteria) so that adjusters can select those physicians known to be performing best in the interest of the injured worker. Getting the best medical care promptly is the fastest path to better results and reduced litigation. This was one of the strongest ideas to emerge in this meeting (IMHO), as it is easily replicable by other players in the industry.

We are in the process of developing a survey for Summit participants that will better define some of the points and ideas discussed at this meeting. A more detailed report will be available outlining these and other concepts discussed. One big positive to me was the participants desire to continue meeting, so we are assessing the best time and place for that continued effort.

Stand by. For better or worse, it appears the National Conversation of 2016 will live on another year…..

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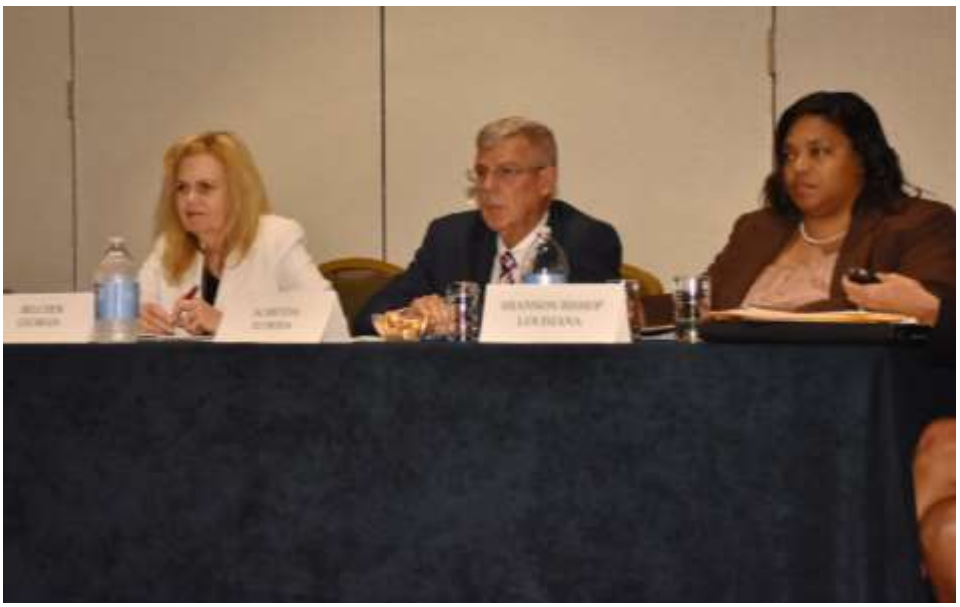
* Robert Wilson is the CEO of WorkersCompensation.com and a nationally known blogger and speaker.



Judges (left to right) Belcher (GA), Almeyda (FL), and Bruno (LA) preside over oral arguments in the preliminary round.

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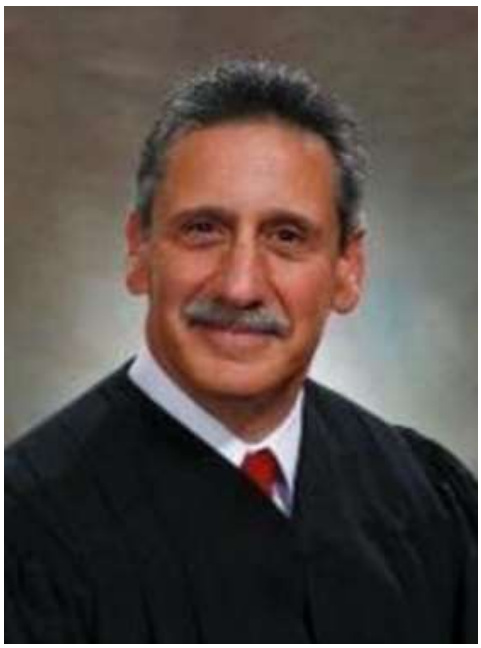
Ten Minutes with Hon. Robert Cohen

Ed. Note: This is the second in a series of interviews with NAWCJ Board members and officers regarding their responsibilities and lives.



L&V: What is your formal title?

RSC: Director and Chief Judge, Florida Division of Administrative Hearings

L&V: How long have you been at your current position?

RSC: 13 years

L&V: Where is your office?

RSC: Tallahassee, Florida

L&V: How many judges are in your office?

RSC: 32 judges of compensation claims (JCCs) and 33 administrative law judges (ALJs)

L&V: How many workers' compensation judges are there in your state?

RSC: 32

L&V: What is your caseload like?

RSC: Because of my administrative and legislative duties and the fact that my position is not commissioned to handle workers' comp cases, I have an annual caseload of 150-200 administrative law cases ranging in complexity from half-day to multiple week hearings.

&V: Are you required to apply the Rules of Evidence in your hearings and decisions?

RSC: Yes, but the rule regarding hearsay is relaxed in Florida administrative proceedings (not workers' compensation proceedings) to allow hearsay to be the basis for a finding of fact if it would be admissible in a court as an exception to the hearsay rule, if it is used to explain or corroborate other non-hearsay evidence, or if it is of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs, whether or not such evidence would be admissible in a trial in the courts of Florida. Additional statutes and rules for workers' compensation cases deal with the appointment of expert medical advisors when a conflict in the medical testimony exists, and any evidence not allowed by the JCC may be proffered for purposes of judicial review.

Continued, Page 25.

Hon. Bob Cohen, from Page 24.

L&V: Do you rule from the bench?

RSC: Only on motions whether provided in advance in writing or *ore tenus*. Since findings of fact and conclusions of law must generally be included in orders from ALJs and JCCs, and testimony is often offered through deposition, the JCC must consider all the evidence before ruling and the ALJ must issue a written order except in those cases where rulings may be made on the spot and a form order issued such as child support matters.

L&V: What did you do before you became a judge?

RSC: I was engaged in the private practice of law for 21 years before becoming a judge. My primary areas of practice were administrative law, and civil litigation in state and federal courts with an emphasis on healthcare law, affordable housing, and representation of law enforcement and local government officials.

L&V: What do you like the most about judging?

RSC: My experience in private practice on both the plaintiff/petitioner and defendant/respondent side of matters gave me a strong background in understanding which party has the burden of proof and of asserting the affirmative in a particular matter. On the bench, you must remain the neutral adjudicator who listens to both sides of an issue and reserves judgment until all the evidence has been presented. The wonder of being a judge is feeling the scales tip from the side that first presents its case well over to the side presenting next. In many cases, the feeling is subtle and the call is close, while in others, the feeling is palpable and, as the famous radio personality Paul Harvey was fond of saying "the other side of the story" can convince you that all you heard first was not decisive in making your ruling.

L&V: What do you do to relieve the stress of judging?

RSC: I play sports, including golf, cycling, running and hiking, and hit the gym. Also, nothing helps a judge escape the courtroom like a good mystery novel, even if it is lawyer related.

L&V: Are you active in the legal community?

RSC: I am a past president of the Tallahassee Bar Association, received its lifetime professionalism award this year, serve on our judicial circuit's professionalism committee, and remain active in legal aid activities although I cannot take on cases as a sitting judge. I am also a past president of the National Association of the Administrative Law Judiciary and am currently secretary of the National Conference of the Administrative Law Judiciary, part of the American Bar Association's Judicial Division, where I also serve as liaison to the ABA Commission on Disability Rights. I also hold memberships in the Florida Government Bar Association, the Tallahassee and Florida Women Lawyers, and the William Stafford Chapter of the American Inns of Court.

Continued, Page 26.

Hon. Bob Cohen, from Page 25.

L&V: Are you active in your community?

RSC: I have served for 10 years on the Ethics Committee of Big Bend Hospice, help cook and serve at the homeless shelter, am a past president and current board member of my congregation, and have served as president of the Tallahassee Jewish Federation. I like staying busy.

L&V: Tell us about your family?

I have been married to Karen Asher-Cohen, a private attorney who was a former prosecutor and insurance regulator in Florida, for 37 years, have two grown children, a wonderful son-in-law and this year will gain a wonderful daughter-in-law, and have one delightful grandson and am excitedly waiting for a new granddaughter expected in February.

L&V: What are your hobbies?

As mentioned somewhat above, outdoor sports, golf, fishing, reading, and traveling.

L&V: What do you see as the value in your association with NAWCJ?

RSC: As its treasurer, I am closely tied to the operations of the organizations and all the outstanding people who make up its board, administrative staff, and membership. The Judicial College put on every year as part of the Workers' Compensation Institute (WCI) has made this a national organization in very few years' time which is quite difficult to accomplish these days. The growing respect demonstrated by the regulators who participate in the WCI each year is evident by their increased involvement year after year. The value of this organization for such a small annual membership fee is phenomenal and I intend to continue to spread the word to all who will listen that this is the best deal going for workers' compensation judges and commissioners.

L&V: Do you have any words of wisdom you would like to share?

RSC: I'm not sure you would call these words of wisdom, but in my experience as a litigator and a judge I have found that people want and deserve to be treated with respect; to have the opportunity to fully air their grievances, claims or defenses; and to receive clear, concise, consistent decisions that consider all the relevant facts and apply the law as written. When I am asked to recommend a person for the judiciary, I consider their demeanor as important a factor as their knowledge of the law since the most brilliant jurist who treats those appearing before him or her with disdain and a lack of respect brings dishonor to our entire noble profession.

New Jersey Governor Christie Appoints Two

Christopher Leitner

Amongst dozens of appointments submitted December 14, 2016 for Senate approval, Governor Christie nominate two workers' compensation judges, Christopher B. Leitner (for Point Pleasant, Ocean) and David J. Puma (for Pitman, Gloucester).

Mr. Leitner has practiced with Leitner, Tort, DeFazio, Leitner and Brausehris since 2000, as a partner since 2006. His practice focused on Workers' Compensation issues. He attended law school at the University of Southern California.

Formerly of Puma and Rhea, Judge Puma focused his practice in the areas of real estate, banking, zoning, probate/inheritance taxes, municipal government, and commercial matters. He earned his undergraduate degree from Widener University in 1986 and his law degree, cum laude, from the Delaware Law School in 1986.

The two were confirmed by the Senate in December.

Top 10 Bizarre Workers' Compensation Cases for 2016

By: Thomas A. Robinson*

Editor's Note These observations of Mr. Robinson are reprinted here with permission. The NAWCJ has not endorsed nor adopted Mr. Robinson's observations.

For the past ten Decembers or so, I have annually compiled what I think are the Top 10 bizarre workers' compensation cases for the year. Typically, my annual blog offering of the truly bizarre gets more hits than any of my other blog posts during the year. Several years ago, my annual list was even featured on National Public Radio's Saturday morning show, "Wait, Wait, … Don't Tell Me." As I have mentioned from time to time, in posting these bizarre selections I am reenacting, at least in part, a tradition that my mentor, Dr. Arthur Larson, and I shared prior to his death some years ago. Each January, Arthur and I would meet in his Durham, North Carolina home on Learned Place, near Duke University's campus. We'd compare our respective lists of unusual or bizarre workers' compensation cases reported during the previous 12 months. Often our respective lists would overlap a bit, but he'd always have several with truly quirky fact patterns that I had missed. One thing we always kept in mind: one must *always* be respectful of the fact that while a case might be bizarre in an academic sense, it was intensely real. It affected real lives and real families. And so, to continue in the spirit of that early January ritual, here follows my list (in no particular order) of 10 bizarre workers' compensation cases during 2016. If you know of others that fit the category, please send them to me—along with any questions or comments—to tom@workcompwriter.com.

CASE #1: Videotape of Plaintiff's Interaction with Hotel Guest Dooms Retaliatory Discharge Claim (U.S.)

A former employee's claim that her former employer improperly discharged her in retaliation for filing a workers' compensation claim was appropriately disposed of at the summary judgment level where the employee could not show that her employer's explanations for discharging her—which were supported by a videotape—amounted to pretext. The bizarre video showed that the former employee verbally engaged a visitor at her employer's hotel when he complained about a vending machine, that she taunted and dared the visitor to join her on her side of the counter to "discuss" the matter, and then blocked his attempt to exit the location. The video continued to show the former employee push the visitor into a wall, swatting and clawing at his face. They tussled for a few seconds, and the visitor slammed the former employee to the floor, kicked her twice, flung open the door, and then left. The employee subsequently filed a claim for her work-related injuries, but was fired when her supervisors viewed the videotape.

Witham v. Intown Suites Louisville Northeast, LLC, 815 F.3d 260 (6th Cir. 2016).

See generally *Larson's Workers' Compensation Law*, § 104.07.

Continued, Page 28.

Bizarre, from Page 27.

CASE #2: "Angry Thoughts" About Co-Worker Do Not Constitute Employee Misconduct (Fla.)

Statements made by a workers' compensation claimant to her attorney that she felt like "punching the lights" out of a co-worker, whom the claimant felt had intentionally caused the claimant injury at work, were not the sort of acts that constituted employee "misconduct," justifying the termination of workers' compensation benefits under § 440.15(4)(e), Fla. Stat., held a Florida appellate court. Claimant, who sustained two similar injuries when she was struck by a door opened by the same co-worker, admitted she harbored anger at the co-worker following the second incident. She received authorized medical care, was assigned some medical restrictions, and returned to work with accommodations. She subsequently sought authorization of a neurologist and a psychiatrist (as recommended by the authorized orthopedist) and payment of TPD benefits. At a hearing, the claimant's attorney suggested that an emergency psychiatric hearing was necessary because "something bad might happen." When the JCC asked for clarification, the attorney announced that the claimant had "discussed homicide and suicide, but not to the level where it's Baker Actable." That evening, the employer terminated the claimant, secured a "no trespass" order with the police, and later amended its defenses to the workers' compensation claim, contending the claimant was ineligible for TPD benefits because she had been terminated for misconduct. The JCC rejected the misconduct defense and the appellate court agreed. Noting that a psychiatrist described the claimant's expressions of anger as "blowing off steam," as opposed to a declaration of an intent to inflict physical harm, the Court said it was one thing for the employer to terminate the employee, but quite a different matter to seek termination of her comp benefits. It had failed to meet its burden of proof that she was guilty of misconduct.

Cory Fairbanks Mazda v. Minor, 192 So.3d 596 (Fla. 1st DCA 2016).

See generally *Larson's Workers' Compensation Law*, § 39.02.

CASE #3: Police Offer's Injuries Avoiding His 2-Year-old Found Not Compensable (Md.)

A Prince George's County police detective, who sustained ankle and knee injuries when he jumped to the side near the front door of his residence to avoid his two-year-old child as he exited his residence en route to retrieve his police cruiser, did not sustain an injury arising out of and in the course of the employment, held a Maryland appellate court. Accordingly, a decision by a county circuit court that would have awarded benefits was reversed. The officer contended that he was on call and performing a special errand incident to his employment because he had intended to get his cruiser for work the next day. The appellate court disagreed. Quoting from *Larson's Workers' Compensation Law*, the court observed that the workers' compensation program was not intended to protect the worker from all the perils of the journey. The court noted that at the time of the injury, the police detective was off duty and not discharging any actual police duty at the time of the accident. While he was required to hold himself ready for emergency duty, here the officer had been on vacation during the preceding week and was not scheduled to work for another two days. He had not been under any directive to retrieve his vehicle at the time of the injury. Even under Maryland's rather expansive use of the positional risk rule, there could be no recovery, indicated the court.

Prince George's County v. Proctor, 228 Md. App. 579 (July 26, 2016).

See generally *Larson's Workers' Compensation Law*, § 14.01.

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CASE #4: Worker Fails To Show Pigeon-Toed Foot Led to Auto Accident (Wyo.)
The Supreme Court of Wyoming affirmed a finding that an injured worker failed to establish a causal relationship between his original work-related injury which, after surgery, left the worker pigeon-toed, and injuries sustained in a subsequent automobile accident that the worker contended was caused when his affected foot slipped off the brake pedal as he attempted to slow his vehicle to avoid a turning car. The Court, citing cases that quoted *Larson's Workers' Compensation Law*, agreed that the worker could recover for subsequent injuries that were the direct and natural result of his original injury. The Court acknowledged that the Office of Administrative Hearings found that the worker had residual problems from the work related injury, yet there was expert medical evidence that the worker's problems occurred when he was standing, walking and/or weight bearing—not when he was in a seated position. The Court also observed that some of the comments the worker made to emergency room personnel and later to a caseworker were not consistent with his version of the auto accident. Substantial evidence supported the findings of the OAH and the trial court.
Claim of Jensen v. State ex rel. Department of Workforce Servs., 2016 WY 87, 378 P.3d 298 (2016).
See generally *Larson's Workers' Compensation Law*, § 10.01.

CASE #5: Pipefitter's Injuries From 25-Foot Fall From Tree Not Compensable (Miss.)
In a divided decision, the Court of Appeals of Mississippi held that a pipefitter, who sustained severe injuries when he fell some 25 feet from the top of a gum tree, was engaged in inappropriate horseplay at the time of the injury, such that the injury did not arise out of and in the course of his employment. Relying upon the four-point "Larson test," the majority said the worker's actions were a sufficient deviation from the employment to deny compensation. None of the worker's duties involved climbing trees. Other workers told him to come down. Instead of heeding the advice of his co-workers, evidence suggested the worker began to shake the tree vigorously, causing it to break, resulting in his fall.
Haney v. Fabricated Pipe, Inc., 2016 Miss. App. LEXIS 722 (Nov. 8, 2016).
See generally *Larson's Workers' Compensation Law*, § 23.01.

CASE #6: Employee Gets $360,000 Verdict for Employer's "Fake Robbery" (Cal.)
A California trial court erred when it ordered a new trial following a jury verdict awarding plaintiff $360,000 in damages where the plaintiff alleged that her employer planned and carried out a mock robbery during which she was approached by a man wearing a ski mask and sunglasses, who slammed a paper bag down on the counter and gave her a handwritten note saying "I have a gun. Put your money in the bag." Plaintiff reached for a silent alarm, but the plaintiff alleged the man pounded on the counter and pointed to the message on the bag. She gave the man money, but when he left, she began shaking and crying hysterically. The "robber" was actually the employer's district quality control manager, and the incident was staged by the employer as a security exercise. The California appellate court held there was sufficient evidence to support the jury's finding regarding the plaintiff's allegations that she had been assaulted and sustained emotional distress as a result of the incident.
Lee v. West Kern Water District, 5 Cal. App. 5th 606, 81 Cal. Comp. Cases 966 (Oct. 24, 2016).
See generally *Larson's Workers' Compensation Law*, § 100.04.

CASE #7: College Summer Work Program Worker Sustains Injury in Car Chase as He Shoots Water at Second Vehicle (Ohio)
An Ohio county court appropriately dismissed the appeal of a workers' compensation claim where the claimant, a participant in a college summer work program, sustained injuries in a two-car crash. Claimant was a passenger in the rear seat of a car driven by his work crew supervisor. At the time of the crash, another summer worker was "chasing" the supervisor's car in another vehicle and claimant was poised in the rear seat of the car in front, shooting water at the car behind. The claimant sustained injuries when the supervisor suddenly stopped his vehicle and the trailing car rear-ended the front vehicle. The employer denied the claim on the grounds that this was impermissible horseplay and that any tort claim was barred by the fellow servant doctrine. The claimant contended that if the claim was not compensable, due to horseplay, he should have been allowed to proceed against the trailing driver in county court. The appeal was dismissed on procedural grounds.
Barton v. Simpson, 2016-Ohio–2998, 2016 Ohio App. LEXIS 1855 (May 11, 2016).
See generally *Larson's Workers' Compensation Law*, § 23.07.

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CASE #8: Departing Employee Allowed to Sue Employer and Co-Workers Following Offensive, "Tea-Bagging" Incident (N.Y.)

Plaintiff alleged that on the night he worked his last shift with the employer—he had been hired for a position at another government agency—he was aggressively grabbed by a much larger co-employee, who picked up the plaintiff and forcibly threw him to the ground, at which point the co-employee held the plaintiff down and forced the plaintiff's arms behind his back. Plaintiff alleged that at that same time, plaintiff's supervisor came over and told the plaintiff that "he had a going away present for him." According to the plaintiff, the supervisor then dropped his pants and got on his knees in front of plaintiff's head, manipulated his genitals and placed his testicles on the back of plaintiff's head, attempting to subject plaintiff to what plaintiff calls "tea bagging." The court added that "tea-bagging" has been defined as a sexual act that involves an individual placing his testicles on the face of head of another person. Plaintiff also contended that the supervisor placed his unclothed penis on plaintiff's head, that the several co-employees required plaintiff to stay in the position for several minutes, and allowed other employees, including another supervisor, to take pictures of the incident. The federal district court dismissed several of the counts in plaintiff's complaint, but allowed the case to move forward.

Hoit v. Capital Dist. Transp. Auth., 2016 U.S. Dist. LEXIS 93576 (N.D. N.Y., July 19, 2016).

See generally *Larson's Workers' Compensation Law*, § 23.07.

CASE #9: Casino Chef Cannot Recover For Stroke That He Contended Was Linked to Wrestling Match With Co-Employee (Nev.)

A Nevada appellate court held that a district court reached the correct decision, albeit for the wrong reason, when it denied benefits to an executive chef at a Nevada hotel and casino, who sustained a stroke several days after he and another casino employee twice got into a wrestling match near the end of a Friday night shift. While there were several versions of the incident, the basic evidence indicated that the other employee, on two separate occasions, put the chef in a "headlock," squeezing the chef's neck in the process. The chef complained to his wife of headaches for two days and indicated he experienced shortness of breath. On the third day following the wrestling incident, the chef collapsed while jogging. He was ultimately treated for an "acute right middle cerebral artery territory infarct secondary to embolus from a focal dissection of the right internal carotid artery, likely acquired secondary to traumatic injury to his neck while wrestling." A hearing officer determined that the chef had established his workers' compensation claim, but the district court granted the employer's petition for judicial review. The appellate court agreed that the hearing officer should not have found the incident compensable, but on different grounds. It said the chef's injury was not fairly traceable to the nature of the employment or to the workplace environment.

Palardy v. Sunset Station, 2016 Nev. App. Unpub. LEXIS 128 (Mar. 16, 2016).

See generally *Larson's Workers' Compensation Law*, § 23.07.

CASE #10: Queen of Snapchat Dies From Stoke Associated with Medical Treatment Related to Fall During Photo Shoot (Cal.)

I am not aware of any court filings yet regarding this incident, but on February 4, 2016, popular model, Katie May, died February 4, 2016, at Cedars-Sinai Medical Center in Los Angeles under truly bizarre circumstances. The 34-year-old knockout, a/k/a "Queen of Snapchat," modeled for *Playboy* and *Sports Illustrated* and had more than 1.7 million Instagram® followers. Approximately one week before her death, she sustained injuries in a serious fall during a photo shoot. She thereafter complained of neck pain and sought the services of a chiropractor. Shortly after the second of two chiropractic manipulations of her neck, she collapsed and was rushed to the hospital, where she ultimately died. Her death certificate indicated she died as a result of "neck manipulation by chiropractor" that tore her vertebral artery and subsequently cut off blood flow to her brain. Ms. May is survived by a 7-year-old daughter.

See generally *Larson's Workers' Compensation Law*, § 10.02.

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Additional Bizarre Unreported Cases

My usual, past practice has been to include only those cases that reach the appellate level, but this year I determined that there were some additional cases that warranted inclusion, in spite of the fact that the injury may have been minor and quickly dispatched without much disagreement within the system.

Idaho Truck Driver Escapes Serious Injury When He "Spills" 2 Million Bees

Folks have heard that there is a bee pollination problem in some parts of the country. To alleviate the problem, bees are sometimes transported to areas where the insect population is too low. In July one Idaho truck driver was porting 400 bee hives, containing some 2 million bees to a rural area, when the trailer overturned, releasing virtually all the honey-makers. Traffic on I–90 was backed up for hours and Idaho police had to warn other drivers to roll up their windows. To make matters worse, Coeur d'Alene was hosting an Iron Man Triathlon event at the same time. Ouch! See http://www.kxly.com/news/local-news/north-idaho/truck-crash-sends-bees-swarming-onto-interstate/176700299.

London Zoo Monkey Handler Assaulted by Meerkat Expert at Christmas Party

This one occurred "across the Pond." A London Zoo monkey handler sustained a cut, requiring three stitches, on her cheek when she was accosted with a glass of wine by a Zoo meerkat expert at a 2015 Christmas party at the Zoo. The two had argued over their respective romantic relationships with a third Zoo employee—a llama keeper. The meerkat expert originally was found guilty of assault in Westminster Magistrates' Court, but the High Court ruled the magistrates utilized the wrong legal test for recklessness in coming to its decision. See http://www.dailymail.co.uk/news/article-3460499/Meerkat-expert-cleared-assaulting-monkey-handler-wine-glass-London-Zoo-Christmas-party-catfight-man-looked-llamas.html.

Norwegian Artist Discovers "Performance Art" Can be Dangerous

In another story with international intrigue, Norwegian artist Hilde Krohn Huse narrowly escaped serious injury when she went into the woods near Aukra in Norway and recorded herself hanging naked from a rope tied to a tree. At the end of her "performance," she discovered that she could not free herself from the rope. The video ran out, and she was still hanging, alone, calling for help. She was finally rescued by a friend, after she had been hanging in suspense for 3.5 hours. All's well that ends well; her video, Hanging in the Woods," was selected to be exhibited in the Bloomberg New Contemporary exhibition. The finished product is on Vimeo®. For more, see http://www.thelocal.no/20150715/video-norway-artist-stuck-naked-in-tree. As noted, the video contains some nudity.

New Jersey Officer Bitten by Crazed Lottery Loser

A New Jersey police officer escaped serious injury when he was bitten by a man that had used an ax to smash a gas station cash register while he demanded lottery tickets. Prosecutors say the crazed man smashed the registered and demanded that workers fill a bag with scratch-off lottery tickets before he ran from the Ewing, NJ gas station. The officer caught up with him and in a struggle over the arrest, the lottery thief bit the police officer. Police officials indicate it was the third robbery attempt for the defendant this month. For additional information, see http://www.foxnews.com/us/2016/12/30/man-charged-with-smashing-register-with-ax-biting-officer.html.

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Angry California Sex Shop Workers Throw "Toys" at Gunman

Apparently the ladies that work in a San Bernardino, CA adult-themed store, "Lotions and Lace," heard about the West Kern Water District worker noted above in Case No. 6—the one who was accosted in the employer-sponsored fake robbery. The store, which bills itself as San Bernardino's "One Stop Sex Shop," is replete with security cameras. Seen on a December 14, 2016 videotape is a scene in which an armed man pulled a hood over his head and entered the store, apparently with robbery on his mind. The clerks weren't in the mood for the intrusion, however, so, notwithstanding the gun, they chased him away by throwing sex toys at him. A supervisor indicated the employees may have concluded that the gun was fake, but that they are encouraged to avoid any type of confrontation. The supervisor added that he thought the clerks "felt violated."

See http://www.nbclosangeles.com/news/local/Armed-Robbery-Sex-Toys-Store-San-Bernardino-407094005. html.

Firefighters Escape Serious Injury Battling Throop Horse Poop Fire

Firefighters near the small, upstate New York town of Throop (in the Finger Lakes region, 20 miles west of Syracuse) were surprised last July 5th when they were called to an unusual fire. Instead of a house or a barn, they had to put out a fire in a huge pile of burning horse manure that had spontaneously combusted, according to fire officials. The summer had been dry and hot and, in a manner similar to the chemical changes that occur within a compost heap, the temperature in the interior of the poop pile built to such a level that the poop ignited. Neighbors had complained that a shift in the prevailing winds carried the odor of burning manure it into neighbors' windows. It took the firefighters almost two hours to put out the fire, working as they were in hot, smelly conditions.

See http://fox59.com/2016/07/29/horse-manure-is-bursting-into-flames-in-new-york-summer-heat/.

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