Lex and Verum

The National Association of Workers' Compensation Judiciary

Number LXXXV
October 2016

NAWCJ President's Page

By Hon. Jennifer Hopens

Fall greetings, *Lex & Verum* readers. While the passing of summer can bring on feelings of sadness and introspection, mourn not, judges of NAWCJ. Autumn is a time of hope, promise, and new beginnings.

And football.

In the spirit of football season, I wanted to start out this month's President's Page with a trivia question: who is the first Heisman Trophy winner to coach another Heisman winner? The answer is found at the end of this article.

Just before the autumnal equinox, I had an excellent opportunity to take part in my agency's annual educational conference, which was held here in Austin from September 19-20, 2016. Attendees came from around the country to listen to presentations on various topics, including overviews of rulemaking, dispute resolution, current trends, fraud, and compliance and enforcement in the Texas workers' compensation system. Also on the conference agenda were items of interest in the field of health and safety, such as an overview of prescription drug abuse and the dangers of certain drug interactions and side effects.

A definite highlight of the conference was a roundtable discussion comprised of state workers' compensation regulators that was moderated by Texas Department of Insurance, Division of Workers' Compensation Commissioner Ryan Brannan. Commissioner Brannan was joined on the panel by Robert Gilliland (Chair, Oklahoma Workers' Compensation Commission), Sheral Kellar (Director, Office of Workers' Compensation Administration, Louisiana Workforce Commission), and Frank McKay (Chairman, Georgia State Board of Workers' Compensation).

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The President's Page, from Page 1.

What followed was an engaging and informative discussion of comparative workers' compensation legal systems, including the different types of benefits and the award of attorney's fees in each jurisdiction.

Director Kellar and Chairman McKay are members of the NAWCJ Board of Directors, and they have both greatly contributed to the success of our organization. Getting to know and learn from dedicated public servants like them over the years through NAWCJ has been an invaluable experience.

As for the trivia question, the answer is Steve Spurrier, who won the Heisman Trophy in 1966, while a senior at the University of Florida. He was later the head football coach at Florida, where he would coach Danny Wuerffel, the 1996 recipient of the Heisman. In this issue of the *Lex & Verum*, you'll find a number of photos of NAWCJ judges proudly posing with Coach Spurrier, who gave the keynote address at this year's Workers' Compensation Educational Conference in Orlando, Florida.

I hope you enjoy this month's issue of the *Lex & Verum*, and I wish you all a wonderful October.

In This Issue

Judiciary College 2016

Judge Michael Alvey (KY), Board Chair Frank McKay (GA) and South Eastern Conference Football legend Steve Spurrier enjoy a laugh at a reception before the NAWCJ Judiciary College.

Judges Scott Beck (SC), Neal Pitts (FL) and Bruce Moore (KS) judged preliminary rounds of the Earle Zehmer Moot Court Competition at the 2016 Judiciary College.

Steve Spurrier (R) had the opportunity to meet fellow Gator legend John Lazzara, founding President of the NAWCJ, and NAWCJ College Dean.

Spotlight on Associate Members: James Anderson, of Anderson, Crawley & Burke

By: Hon. LuAnn Haley*

As most of our readers know, each month we list the NAWCJ Associate Members in the Newsletter in recognition of their support for our organization. The complete list of our Associate Members appears on page 29 of this month's newsletter. In order to express thanks to these members for lending their name to enhance the NAWCJ in the Workers' Compensation Community, the editors will provide some information about the members in each monthly newsletter.

James M. Anderson is not only first on our list of associate members but he is also a stand-out in the field of workers' compensation in his home state of Mississippi. Mr. Anderson is a founding partner in the Jackson Mississippi office of Anderson, Crawley & Burke and has worked in the field of workers' compensation since the 1970's. Since entering private practice in 1978, his career has focused on workers' compensation issues involving the defense of employers in litigation and mediation of disputes. He has also served as President and continues to serve on the board of the Mississippi Workers' Compensation Educational Association. The Association directs and sponsors the Commission's annual seminar, and it provides educational outreach to all shareholders in Mississippi's workers' compensation system. In addition to his service on many boards and to the legal profession, Mr. Anderson has been honored as a Fellow in the College of Workers' Compensation Lawyers and currently serves on the Board of Directors of the CWCL.

Mr. Anderson is not the only stand-out in the field of workers' compensation in his law office, as two of his associates recently had the pleasure of coaching the winning moot court team at the E. Earle Zehmer National Moot Court competition in Orlando. This year's winning team hailed from the Mississippi College School of Law and Daniel Culpepper and Amanda Myers coached the team to victory. The team coached by Mr. Culpepper and Ms. Myers also included the winner of the 2016 Outstanding Professional Advocate of 2016.

A special thanks to all of the Associate Members of the NAWCJ and this month to Jim Anderson and his firm, Anderson, Crawley & Burke.

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

Medical Marijuana Use as an Alternative to Opioid Use for Relief of Chronic Pain

A Michigan Survey Suggests That Medical Marijuana Patients Are Decreasing Opioid Use to Treat Chronic Pain

By: Roger Rabb

Two topics that have received a great deal of attention in recent years regarding the medical treatment of chronic pain have been the use and abuse of opioids such as Vicodin and the legalization in many states of medical marijuana. Although one often-used argument for keeping marijuana use illegal has been that the drug might be used as a "gateway" to the use of other drugs, the use of medical marijuana might actually lead to a decrease in the use of addictive opioids as a treatment for chronic pain. In "Medical Cannabis Use Is Associated With Decreased Opiate Medication Use in a Retrospective Cross-Sectional Survey of Patients With Chronic Pain," published in the June 2016 issue of *The Journal of Pain*, researchers from the University of Michigan surveyed users of medical marijuana looking for some insight into the relationship between medical marijuana use and alternatives such as opioids for chronic pain management.

Methodology

For this study, the researchers conducted an online survey with 374 participants recruited from November 2013 to February 2015 through a Michigan medical marijuana dispensary, although they extracted most of their data from the 185 survey participants who fully completed the survey. Almost two-thirds of these were men, and all 185 identified chronic pain as a target condition. 39% were between 18 and 35 years of age, 31% between 36 and 55, and 30% between 56 and 75.

In addition to demographic information about the participants, the survey included questions eliciting information about the medical conditions being treated with medical marijuana, the frequency of marijuana use, changes in drug use since marijuana use began, changes in side effects, and quality of life changes. Some of the questions required participants to provide a measure of intensity on a scale of one to ten, with one being the least amount and ten the greatest for that particular question. All participants also completed the Fibromyalgia Survey Criteria, which assigned an FM score from 0 to 31, with the higher score indicating more severe FM pain at the time of the survey. These FM scores were used to group all participants into quartiles for purposes of analysis.

Survey Results

Of the 185 participants with fully completed surveys, 79% of the participants reported daily marijuana use and another 12% reported 4 to 6 uses a week. On days when marijuana was used, 20% reported using it at least 5 times on that day, 42% reported using it 3 to 4 times that day, 25% used it twice that day, and only 12% reported limiting use to only once on usage days.

Among the fully-completed surveys, the mean change in reported opioid use after beginning medical marijuana use was -64%, with 119 participants reporting opioid use before beginning marijuana treatment and only 33 reporting opioid use after initiating marijuana use. However, this decrease in opioid use was not consistent through the 4 FM quartiles, with the lowest FM quartile, i.e., those showing the least amount of FM pain, reporting an opioid usage decrease of 79%, while those in the highest FM quartile reported an opioid use decrease of only 48%. The second and third quartiles showed decreases of 74% and 63%, respectively. This outcome ran counter to what the researchers expected to find, as earlier studies had suggested that persons with higher FM scores, suggesting that the central nervous system was playing a greater role in pain, were less likely to benefit from opioids and more likely to respond better to marijuana for pain relief.

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Medical Marijuana, from Page 5.

The survey also measured the number of medication classes used before and after marijuana treatment was started, with classes including not just opioids, but also NSAIDs, antidepressants, disease-modifying antirheumatic drugs, serotonin-norepinephrine reuptake inhibitors, selective serotonin reuptake inhibitors, and other. Among all participants, the number of reported medication classes used dropped from a mean of 2.38 before marijuana use to 1.81 after marijuana use began, although that latter number included the marijuana itself, so the mean drop in use of non-cannabis medication classes was actually from 2.38 to .81. For example, in addition to the opioid numbers described above, 115 participants reported using NSAIDs before beginning marijuana treatment, while only 38 reported such use after. Antidepressants usage decreased from 72 participants before marijuana treatment began to only 25 participants after. Participants in the highest FM quartile, who reported the highest number of medication classes used before marijuana use began, 3.3, continued to report a higher number than the other quartiles after marijuana use began, although the number of classes for even that quartile dropped to 2.4.

Participants also self-reported a decrease in medication side effects after beginning medical marijuana treatment, as well as in the degree to which side effects of medication affected daily function, described in the survey as the "ability to do the things you needed to accomplish each day." On the 1-to-10 scale, where 1 meant there was no effect and 10 meant a significant effect, the mean score describing daily impairment in the period before marijuana use began was 6.51, while the mean score describing the period after marijuana use began was down to 2.79. While this suggests that participants self-reported being able to handle their daily functions better after marijuana use began, there is no way of knowing from this survey the extent to which the effects of marijuana use on participant mood might have influenced the answer to this question.

Limitations

While this research provides at least a starting point for evaluating the use of medical marijuana as a treatment for chronic pain as a potential alternative to opioid usage, the researchers note some drawbacks to their survey data, including the unreliability of recall data generally, the fact that the FM scores were measured only at the time of the survey and not at the earlier time when medical marijuana use began, and the limited pool of participants compiled from one medical marijuana dispensary.

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2016 NAWCJ Board of Directors

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.

NAME:_____

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HOW DID YOU LEARN ABOUT NAWCJ?

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850.425.8156; Email: kathy@wci360.com

Medical Marijuana, from Page 6.

They also recognized that the reduction in opioid use they found after medical marijuana use began could have been caused by other factors, given the efforts that have been made to reduce opioid prescriptions generally, although they note that in Michigan the reported number of opioid prescriptions consistently increased from 2007 to 2014. As the researchers note, however, efforts to overcome these limitations suggests a path for further research to take in this area.

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Roger Rabb, J.D. was born a Navy brat in Washington State. Roger also lived in Florida and California before his family settled in Texas. After a stint in the Marines after high school, Roger attended the University of California at Berkeley, earning both a B.A. and J.D. Roger currently resides in Eugene, OR, where he does legal research and writing.

New Texas Hearing Officer Hired

Amber Morgan has been hired as a Hearing Officer for the Waco Field Office of the Texas Department of Insurance, Division of Workers' Compensation. Over the last fourteen years, Ms. Morgan represented individuals before the Texas Department of Insurance, Division of Workers' Compensation, the Social Security Administration, and the Veterans Administration. She earned her B.A. from New Mexico State University and her J.D. from Baylor Law School. Ms. Morgan is also admitted to practice before the U.S. Court of Appeals for Veterans' Claims and the Texas Western District Court.

Workers' Compensation and the Role of Agency Medical Directors

By: Hon. David Torrey*

In my experience, many beginning workers' compensation lawyers are unfamiliar with the state administrative system which is charged with operating the workers' compensation program as a whole. Thus, in teaching workers' compensation, I always review in detail the responsibilities of workers' compensation agencies in their oversight and regulatory functions.

This aspect of workers' compensation is treated nicely in the Little, Eaton & Smith workers' compensation textbook (first sections of Chapter 10), and it is also the subject of Professor Michael Duff's book, similarly at Chapter 10.

A neglected subject (including by myself) in this area is the role of agency medical directors. I was thus pleased that the managed care expert and blogger Joe Paduda has published the edifying article, "Where are the Medical Directors?" in the new issue (July 2016) of the IAIABC periodical *Perspectives*. See www.IAIABC.org. As to Mr. Paduda's blog, see http://www.joepaduda.com/.

Paduda wonders out loud why more legislatures do not create, in their state workers' compensation agencies, a strong medical director. By his count, only seven states do so. The familiar example is Colorado, where Dr. Karen Mueller is well-known for having been a leader in developing medical treatment guidelines for her state's system. However, Paduda also identifies Washington and Ohio (both, notably, fund jurisdictions), as major states that have influential medical directors. In both states, for example, these officials have developed opioid use guidelines.

In Paduda's view, the rapidly-changing medical treatment world calls for effective agencies to have this type of leadership. He asserts, specifically, that state agencies with medical directors are better equipped and positioned to address challenging medical issues that develop, including the opioid abuse crisis and other over-utilization of medications.

The idea of a medical director is unfamiliar in Pennsylvania (my state) – our Act has never provided for such a position. Thus, Pennsylvania is a jurisdiction where Paduda's rhetorical query applies with full force. It is notable that the Pennsylvania agency, like many in the nation, has always been on the passive side in terms of regulatory policy. More room (I am thinking), presumably exists for this sort of pro-activity in fund states, where administration and oversight of the law is comprehensively managed by state government.

What, precisely, are the responsibilities of such officials? Paduda explains that medical directors set policy, provide guidance and input into agency decision-making, review medical treatment, participate in guideline assessment, educate legislators, testify with regard to proposed legislation, and develop recommendations for new medical conditions and treatment. He points out a problem with not having such a position: agencies are, as a result, dependent upon special local interests, like medical societies, for the development of policy and promulgation of regulations.

Dave Torrey has been a Workers' Compensation Judge in Pittsburgh, PA, since January 1993. He teaches the workers' compensation law courses at the University of Pittsburgh School of Law. He is a past-president of the National Association of Workers' Compensation Judiciary (www.NAWCJ.org). His treatise on Pennsylvania Workers' Compensation, published by West, is in its Third Edition.

The foregoing originally appeared on the Law Professor's Blog and is reprinted here with permission.

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: _____

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

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850.425.8156; Email: kathy@wci360.com

Judge Disciplined for Ex Parte Communication

By David Langham

The road to hell is paved with good intentions. This is a quote with various attributions over the years. I was reminded of it recently, while reading a story from *The Florida Bar News* about a judge who was disciplined by the Supreme Court, titled "Judge Holder Reprimanded for Ex Parte Communication." Ex Parte communication is where the judge speaks to one party in a case. It is forbidden by the Code of Judicial Conduct, except in very narrow exceptional circumstances. This story is also about whether a judge can write someone a recommendation letter (which lends the "prestige of judicial office" to someone for their private gain).

Are there appropriate context within which a judge can write a letter of recommendation for someone? The answer is absolutely. But those instances are limited, and fairly defined. The concern embodied in the Code of Judicial Conduct is that the prestige of judicial office should not "advance the personal or economic interests" of others. Rule 1.3, of Canon One of the American Bar Association Model Code of Judicial Conduct says (italics are direct quote):

> *A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so*

So in a general sense, writing recommendation letters is a troublesome subject. In virtually any context, it is inappropriate to use judicial letterhead in any non-official correspondence. It happens from time to time. I have become aware, over the years, of a fair number of judges using such letterhead inappropriately. I always ask the same question when they tell me "why shouldn't I, it doesn't matter." Then, if it doesn't matter, "why did you use it in this instance?" The only reason to use it is to convey that you are a judge. The only reason to convey you are a judge is to draw attention to that, why?

Also, it is likely not appropriate for the letter writer to identify themselves as a "judge." When writing a recommendation letter for an employee or former employee, it should be sufficient to state that the writer was the individuals "direct supervisor." What does the mention of the word "judge" add to the recommendation? The only reason to add it is to convey judicial authority. The only reason to add it would be to give the letter, and thus the individual, "the prestige of judicial office."

So, two reasonably ready and simple rules for judges to remember: (1) no personal use of judicial letterhead, and (2) no mention of judicial office.

Beyond those cautions, a good question is whether the individual recommended is a direct employee of the judge? Certainly, a judge may write a letter of recommendation for a former employee. In fact, as a general rule, judges should limit such recommendations to people about whom they possess personal knowledge. Writing recommendation letters for family friends, children of family friends and the like should be undertaken only with caution. The writer should simply keep "the prestige" prohibition in mind.

The next issue here is ex parte communication. Should everyone interested be present (or at least invited/noticed) when a case is discussed? Is it ever appropriate for a judge to engage in ex parte communication with parties in a case that is before a judge? Although the code of judicial conduct seems to suggest that there are instances in which this could be appropriate, I would suggest that it simply is not.

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Judge Disciplined, from Page 10.

The exceptions set forth in the code, for issues such as scheduling, or other innocuous information, can as easily be accomplished by traditional staff interaction as they can be by the judge. And, when the judge stays out of the communication, leaving it to staff, the chances of allegations of inappropriate communication decrease dramatically. As a simple rule, I encourage judges to never speak or write to any one party in a case before them, unless the other party is copied or present (or invited).

Any interpersonal communication between judge and any single party presents far too great a chance of the "appearance of impropriety." This becomes particularly true when the communication is not written, and the recollections of who said what, about what, and to whom can become a difficult Gordian knot of "he said, she said." A judge would be well served not to place her/himself in the position of needing to defend what and how anything was said.

So while the code provides both definition and limitation, there remains of some leeway for judges. It is submitted that the "best practices" suggested by the code, and situations like the one described above, would be:

Only write recommendation letters, based on personal knowledge, regarding individuals over whom you have exercised direction or supervisory responsibility. Limit your recommendation to the performance of duties within that context.

Never write letters of recommendation on official stationary. Never use the judicial title in such correspondence.

Never engage in ex parte communication regarding any case, or the parties in such a case.

It seems that sticking to these best practices, would minimize any judge's chances of arriving at the point of public reprimand evidenced above.

Judge Holder forgot these and a few other prohibitions, according to *The Florida Bar News*. In August, the News reported that Judge Holder was presiding over Veteran's Court in Tampa. A criminal case came before him, involving a "decorated Green Beret." There is a recognition that return to "normal" life can be a challenge for veterans following deployment, and the Veteran's Court program seeks to afford consideration to the adjustments these individuals need.

Judge Holder sentenced this criminal defendant to community control (house arrest) and three years probation. Criminal conviction can affect people in various ways. One familiar to many is the job application process. We have all seen job application questions about previous convictions. This is also discussed in. "Forgiveness in the Employment Process" (http://flojcc.blogspot.com/2016/03/forgiveness-and-employment-process.html). That post discussed an interesting federal judge who went even further than Judge Holder (but did so from the protection of the federal bench and on the eve of retirement), writing about his perception of a reformed convict.

For some those application questions are quick and easy to answer, for others, they may be the most challenging of the process. But the implications can be broader. This particular conviction resulted in the defendant being expelled from college. When he later re-applied, he was "denied re-admission." Essentially, it appears that the college did not want him on its campus. He had been convicted and sentenced for "discharging a firearm from a vehicle and aggravated assault with a deadly weapon," not exactly easy-to-forgive transgressions.

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New Texas Hearing Officer Hired

Rabiat Ngbwa has been hired as the newest Hearing Officer in the Division of Workers' Compensation. Most recently, Ms. Ngbwa served as a reviewing attorney at the Texas Workforce Commission, where she was a Hearing Officer. Between her stints at the TWC, Ms. Ngbwa worked as a consultant at the Equal Employment Opportunity Commission and then as an attorney with Synergy Legal Professionals. She received her B.A. from Texas Lutheran University in 1997 and her J.D. from Houston College of Law in 2003. She is also certified in both human resources and mediation. Ms. Ngbwa will be the third traveling Hearing Officer in the Division's central office.

Judge Disciplined, from Page 11.

Judge Holder learned of this and decided that he would attempt to intervene. He wrote to the president of the school on his official "judicial letterhead." He recommended the readmission of the defendant and asked that the school accommodate defendant with admission to an "online only program." The letter made specific reference to the writer's identity as "the presiding judge." It "attested" to the defendant's effort at rehabilitation. And it "echoed" the "ringing endorsements" of other letter writers, regarding defendant. It was an inappropriate recommendation letter, and it certainly creates an appearance of impropriety.

The letter even offered to "personally modify" the defendant's sentence to facilitate his return to college. In other words, this judge offered to change the outcome of a case, in favor of one party, to change someone's perception of that one party. The *Bar News* notes that at that time there was "no motion to modify community control pending." In other words, Judge Holder was offering to alter the sentence of community control, although neither defendant nor the state had asked for such an alteration. The judge might be seen as becoming an advocate and abandoning the role of impartial adjudicator at that point.

Judge Holder then decided to call "the chief assistant state attorney for the 13th Circuit" to discuss defendant. Judge Holder, apparently representing the interests of the defendant (advocate), asked the state attorney to "review the evidence against the defendant." The judge, completely abandoning any pretense of impartiality, "tried to persuade the state to agree to allow the defendant to have adjudication withheld." Based at least in part on the judge's advocacy, the State further investigated. However, the state declined to change the charges (for which the defendant had already been sentenced). That is a brave state attorney. Many in such a position might fear how they will fare in future cases before an advocate judge to whom they said "no."

The Judicial Qualification Commission concluded that the judge's advocacy "could impair the public's perception of fairness in the judiciary." The Supreme Court agreed and imposed a reprimand regarding the judge's behavior. The Court did so even though it acknowledged the judge's "conduct was well-intentioned."

The judge became an advocate for a party. Some might contend he was practicing law and representing this defendant when he wrote the letter and called the State Attorney. That was inappropriate. He contacted one party to the case pending before him, and that ex parte communication was inappropriate. While the intentions were perhaps justified and purportedly "good," the road to hell is paved with good intentions.

Judges would do well to remember the best practices above. If inclined to contact a party in a case, a judge should think twice (or more). If inclined to write a recommendation letter, a judge should review the Code of Judicial Conduct, and more often than not should simply say "no." Judges should be cognizant of the Code, careful of the appearance of impropriety, careful of lending "the prestige" to others, and careful of how her or his actions can reflect upon the impartiality of the judicial office. It is not an easy burden, but it was voluntarily undertaken by us all. If we cannot live with it, we should find another occupation.

The foregoing was originally published on the Florida Workers' Compensation Blog.

* David Langham is the Deputy Chief Judge of Workers' Compensation in Florida.

Mark your calendar! Judiciary College 2017

August 6-9, 2017

Before School – Bring the Kids!

Judiciary College 2016

Judges Angela Gibbs (VA), Iliana Forte (FL) and Ray Holley (FL) presided over a preliminary round of the Earle Zehmer Moot Court competition at Judiciary College 2016.

Judiciary College is an annual education opportunity, but also an opportunity for reconnecting and conversations.

The Regulator Roundtable presented by the Southern Association of Workers' Compensation Administrators is a Masters level conversation about the hottest topics in American workers' compensation.

New Reports in October: Are the Feds Positioning to Oversee Workers' Comp?

By: Robert Wilson*

There has been a lot of speculation in our industry about the Federal government's appetite for intervening in the world of workers' compensation. While most pundits and many influential professionals have steadfastly maintained that it will "never happen," I have been the contrarian voice on the matter. I have postulated that the Federal government could indeed make a run at our little corner of the world, leveraging SSDI and taxpayer protection as the rallying cry for that expansive effort. Now, an email forwarded to me this week once again raises the specter of Federal intervention into the workers' compensation hemisphere.

Authored by Doug Holmes of UWC - Strategic Services on Unemployment & Workers' Compensation (UWC), it announces that the US Department of Labor, "in coordination with the National Academy of Social Insurance," will release two reports reviewing state workers' compensation on October 5th.

In the missive to his UWC membership, Holmes describes the two reports as:

* The Department of Labor's State Workers' Compensation Report, which addresses recent trends in state workers' compensation systems and the effect of these trends on workers, employers, and communities; and
* The National Academy of Social Insurance's report with the latest data on benefits, coverage, and costs in workers' compensation.

Holmes indicates that the US DOL report "is said to address 'recent trends in state workers' compensation systems and the effect of these trends on workers, employers, and communities.'" He also speculates "that it may have been developed with reference to recent stories by NPR and Propublica which raised concerns about state workers' compensation" as well as the highly publicized letter to the DOL from several congressional representatives urging them to look into workers' comp.

Holmes doesn't mince words, and tells his members that, "We can expect that the report released on October 5th will be part of a renewed movement to impose federal requirements on state workers' compensation that will be taken up in the next Congress and in the next administration."

Frankly, the potential for Federal interference in workers' comp has been one of the driving forces behind the "National Conversation." Many of us believe that new, complex regulations, layered over the myriad of standards and regulations we have today will not improve comp for anybody – injured worker or employer. Just as the Feds layered new requirements to protect Medicare, SSDI protections are likely to be equally as burdensome and lack the flexibility required to meet the regional needs seen in comp. The National Conversation is an attempt to address concerns the government may have, and prevent an action that will not benefit anyone involved.

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Feds Positioning to Oversee, from Page 14.

Now it appears I may not be alone in my trepidations regarding this issue.

Holmes tells his members that "The reports and statement from the Secretary of Labor are open to the public only as they are released and a notice to participate in a discussion about the presentations is available at https://www.eventbrite.com/e/dol-nasi-state-workers-compensation-forum-tickets-27729562869.

We can eagerly await the reports, and perhaps glean a bit more about the long term intent of the people in Washington. Time will tell, but the clock may be moving faster than we anticipate.

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The foregoing, and the article on page 16 were originally published on From Bob's Cluttered Desk Blog, and are reprinted here with permission.

* Robert Wilson is President & CEO of WorkersCompensation.com, and "From Bob's Cluttered Desk" comes his (often incoherent) thoughts, ramblings, observations and rants - often on workers' comp or employment issues, but occasionally not. Bob has a couple unique personality characteristics. He firmly believes that everyone has the right to his (Bob's) opinion, and while he may not always be right, he is never in doubt. Enter at your own risk. Bob is an accomplished speaker for the workers' compensation industry.

Heading Toward the Holidays

As October brings the fall leaves as well as the season for trick or treating, most of our members know that the holidays are just around the corner. Judges, like everyone, will become busy with family commitments but also may have an increase in the end of the year work demands. However, the editors of the NAWCJ Newsletter would ask your assistance on gathering information for an upcoming article spotlighting our members for the November edition.

As November will welcome the Thanksgiving season, we would like to publish an article with the theme of "NAWCJ Giving." The subject of the article is an easy one, that is, to showcase all of the giving back that is done by our members. Many of the members of NAWCJ spend much time contributing to the legal profession as well as their communities, therefore, November is the perfect month to acknowledge these contributions.

I would ask on behalf of the editorial committee that all of our readers consider submitting a short statement regarding the contributions made by any of our NAWCJ members for inclusion in this article. Your comments can be sent to my email at LuAnn.Haley@azica.gov. I will appreciate receiving all contributions and also will look forward to including those submissions in November's newsletter.

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/

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

Workers' Compensation and the Sharing Economy: Explanation and Advocacy

By: Justin D. Beck*

Bradley Smith, *Holding a Square Peg and Choosing Between Two Round Holes: The Challenge Workers' Compensation Law Faces with Uber and the Sharing Economy*, LEX & VERUM, p.17 *et seq*. (May 2016), available at www.NAWCJ.org.

National Employment Law Project, POLICY BRIEF: ON-DEMAND WORKERS SHOULD BE COVERED BY WORKERS' COMPENSATION (June 2016), available at http://www.nelp.org/content/uploads/Policy-Brief-On-Demand-Covered-Workers-Compensation.pdf.

> *The workers' compensation rights of Uber drivers, and others laboring in the sharing economy, is an issue that has attracted the attention of enterprises, their workers, and regulators. To date, no workers' compensation appellate authority seems to have developed. In this set of abstracts, the author summarizes two recent analyses of the issue. The first is by Galfand Berger attorney Bradley Smith, who explains the legal situation and the competing interests involved. The second, by the National Employment Law Project, unequivocally advocates for employee status on the part of the on-demand workers so prevalent in the sharing economy.*

In *Holding a Square Peg*, *supra*, Bradley Smith, an attorney at Galfand Berger (Philadelphia), explains the inherent difficulty of attempting to categorize "sharing economy" workers as either independent contractors or employees. Smith details some of the latest litigation in this area of the law and how a new framework for modern employment relationships might now rest on the shoulders of policymakers.

The author explains that sharing economy workers exhibit qualities of both independent contractors and employees. With significant flexibility in scheduling and lack of supervisory control, these workers do not quite fit the template of traditional employees. At the same time, they generally do not possess specialized skillsets, often work for multiple companies, and have broad freedom in exactly how they perform their work.

For historical context, Smith cites *NLRB v. Hearst Publications*[1] as evidence that this dilemma dates back many years. In *Hearst Publications* (1944), the Supreme Court addressed the question of whether newspaper deliverers were employees or independent contractors (ultimately deciding they were indeed employees). Smith draws an astute comparison between the newspaper boys of yesteryear and today's sharing economy workers; namely, flexible working hours, fixed compensation, and quality control via customer feedback.

The author also notes various Ninth Circuit cases that have wrestled with the employment status of taxi drivers. In *NLRB v. Friendly Cab Co., Inc*.,[2] the Ninth Circuit ruled that such drivers were employees based on the control exercised by their employer. Specifically, these companies barred drivers from operating or developing entrepreneurial opportunities while transporting customers. Conversely, the Ninth Circuit had previously found taxi drivers to be independent contractors in *SIDA of Hawaii, Inc. v. NLRB*[3]; the crucial distinction being that drivers were permitted to use their vehicles for other business purposes.

Based on these considerations, a reasonable reader could conclude that Uber workers more closely resemble *SIDA* drivers. However, Smith is quick to point out that the Ninth Circuit also focused on the fact that *SIDA* drivers could capitalize on positive customer experiences – repeat business would follow. Such opportunities do not exist for Uber drivers, whose customers are unable to request specific drivers. The author suggests that these cases demonstrate an intensely fact-specific analysis for each and every case.

Continued, Page 17.

The Sharing Economy, from Page 16.

Smith asserts that many state courts answer these questions by focusing on the *control* exercised by the alleged employer. This analysis is disadvantageous for the sharing economy worker: the *limited* control exercised over Uber drivers is an impediment to a finding of employment relationship, when control is the dominant focus.

He describes this modern worker as someone in a triangular relationship in which the worker: (1) provides services; (2) to customers; (3) with the help of intermediaries. These services are facilitated through mobile applications and allow the worker to then accept or decline a job. While much freedom exists in how to complete the work, an intermediary (the sharing economy enterprise) may set minimal standards, threshold requirements, and pricing.

The author reminds readers of the nature of many sharing economy jobs: menial tasks, unskilled labor, and dangerous tasks. Drivers find themselves at risk of accident and assault, while hired shoppers may hurt their backs or tear muscles. States that have categorized these workers as independent contractors leave few options and protections in the event of injury.

Smith invokes recent litigation between workers and Uber-type companies. In an example from the Northern District of California involving ride-sharing company Lyft, the court addressed the question of what precisely constitutes control, finding that the right to terminate at will, without cause, was strong evidence of an employment relationship. Remarkably, Uber ceased operations in Alaska following state-prosecuted litigation over classification of its drivers. This particular case concluded in a $78,000 settlement with the Alaska Department of Labor and Workforce Development's Workers' Compensation Division. Smith cautions that Alaska's approach, if adopted elsewhere, would likely cause serious financial trouble for sharing economy businesses.

Smith introduces the concept of a new classification to fill the space between employee and independent contractor, offering the status of a "dependent contractor" as one option. In fact, such statuses have been legally recognized in Canada and Germany for instances where a worker might otherwise be an independent contractor but for his singular employer. Such statuses are also used when employers attempt to label workers with the magic of contractual language.

For an employer, using the independent contractor label has its downsides. In attempting to avoid the payment of worker benefits, sharing economy employers relinquish control of their workers, thereby making business more difficult.

Smith describes a possible third worker classification as an "independent worker." He points to Seth Harris and Alan Krueger of the Brookings Institute, who reject the notion that the market or courts can adequately address the employer classification question.[4] As it pertains to workers' compensation, these social scientists suggest that the *existing* tort system is adequate for sharing economy workers who are injured on the job. As a middle-ground, they further propose allowing these businesses to offer expansive workers' compensation without transforming the relationship into employment. These businesses would then, theoretically, receive limited liability and protection from tort suits. Smith acknowledges that businesses might opt out of providing such coverage if they are unlikely to be found negligent in a typical civil suit.

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The Sharing Economy, from Page 17.

Smith identifies a unique California law for driver-on-demand companies, requiring they provide primary insurance coverage for drivers during such time a passenger is in the vehicle. Notably, these protections do not extend to times when the driver is without a passenger, regardless if they are en route to pick-up. Smith, near the end of his review, quotes one industry executive who predicts that the association of employment with benefits will eventually separate entirely, much as did pensions with the partial substitution of 401(k) and other plans. "If that prediction is right," Smith posits, "perhaps this employee classification question that has plagued courts for decades will fade away…."

The author concludes by emphasizing that sharing economy businesses have a relationship with their workers that is quite different from the typical independent contractor. This brings "a new wrinkle to an old legal issue." Smith suggests that it may be time for policymakers to define a new category of workers to better reflect modern employment, extending much-needed benefits to workers who have no current remedies. Without such legislation, courts will be forced to continue case-by-case determinations, producing inconsistent results among states.

In the National Employment Law Project (NELP) *Policy Brief, supra*, addressing on-demand workers, the new on-demand business economy is considered for its unique characteristics and inherent risks as it relates to workers' compensation. NELP offers suggestions to state agencies and policymakers on how they might respond to growing concerns and pressure for more security when on-demand workers are injured in the course of business.

NELP notes that on-demand jobs are among the most dangerous in the nation, with most work focused on transportation, delivery, and home services – well-known as traditionally hazardous industries. The largest segment of on-demand, for-hire transportation, proves to be particularly dangerous. Statistically, taxi drivers are killed on the job at a rate five times higher than the average for all other workers and face a risk of homicide over twenty times greater than other workers. These drivers often work with cash, alone and in isolated areas, at night, in high crime areas, and with people under the influence of alcohol. Taxi drivers also suffer an increased risk of musculoskeletal injuries, including back and neck injuries from handling passenger luggage and spending long hours behind the wheel.

Those engaged in on-demand domestic work also perform hazardous tasks. A national survey found that 38 percent of these workers had suffered work-related wrist, shoulder, elbow, or hip pain in the prior 12 months. A study of bike messengers in Boston found that 70 percent had suffered an injury resulting in medical attention or lost work.

NELP reminds readers that medical bills and lost time from work can be a significant financial burden on workers and their families. The basic principle of workers' compensation endures – employers assume responsibility for providing insurance that pays out certain benefits for workers injured on the job, without regard to fault, and in return are protected from personal injury or other liability for workplace injuries or illnesses. These worker benefits include medical care, rehabilitation, and reimbursement for lost wages.

Key to any social insurance program is the universal coverage prerequisite. To that end, NELP notes that 129 million workers in the United States are covered by workers' compensation, many of whom engage in job structures quite typical of the on-demand worker. As a classic example, NELP references labor intermediaries, such as staffing and home-care agencies, which must carry workers' compensation policies for workers they dispatch to other physical locations.

Many on-demand companies do not pay workers' compensation for their workers because they classify such individuals as independent contractors. This strategy shifts the cost of workers' compensation onto the backs of workers and goes against the very principle of the "Grand Bargain." In doing so, these businesses avoid paying premiums associated with workers' compensation insurance, and presumably enjoy increased profits, but ultimately they shift injury costs to injured workers and society at large. Significantly, NELP notes that this practice also creates an uneven playing field for competitors who treat their workers as employees.

Continued, Page 19.

Going forward, NELP suggests that state agencies enforce existing workers' compensation laws that cover employees, including those who businesses attempt to label as independent contractors. In particular, Oregon's Bureau of Labor and Industries has issued a guidance stating that transportation network drivers are employees for purposes of workers' compensation, among other protections. In summer of 2015, the California Employment Development Department and Department of Labor Standards Enforcement found Uber drivers to be employees for purposes of unemployment benefits and wage laws. NELP suggests that such rulings can serve as a model for other state agencies as more claims are adjudicated under long-standing labor protections.

Advising policymakers, NELP writes that state legislatures can take action to prevent and correct the misclassification of workers and, in doing so, reduce litigation over employee status. State legislatures ought to explicitly clarify that on-demand companies are obligated to provide workers' compensation to their workers by specifically naming them as "employers" for purposes of workers' compensation coverage, and/or naming the workers in certain jobs as covered "employees."

As an alternative model, NELP notes that New York State applies a 2.44% surcharge onto all for-hire transportation fares, with proceeds going to a state-established fund. This fund then provides workers' compensation coverage to all eligible drivers.

As proof of the inherent danger in these industries, the NELP points to Uber policies requiring all drivers to carry personal auto insurance. In addition, the company supplements these individual policies with $1 million of coverage per incident when its drivers are liable or when the other party is underinsured. Notably, this coverage does not cover any serious injuries or fatalities from passenger violence. NELP makes clear, however, that Uber has not taken these risk seriously; the company's current strategy to deter intoxicated passengers from committing acts of violence against its drivers includes distracting them with children's toys.

NELP emphasizes, in its conclusion, that the use of new technologies should not excuse companies from engaging in age-old tactics to avoid insurance costs. The paper notes that it is necessary to cover on-demand workers under state compensation systems due to the hazardous nature of these jobs. In doing so, on-demand businesses fulfill the purpose of workers' compensation by ensuring that the costs of doing business are paid by that particular industry, rather than by injured workers or the general public at large.

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1 NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944).

2 NLRB v. Friendly Cab Co., Inc., 512 F.3d 1090 (9th Cir. 2008).

3 SIDA of Hawaii, Inc. v. NLRB, 512 F.2d 354 (9th Cir. 1975).

4 *See* SETH D. HARRIS & ALAN B. KRUEGER, A PROPOSAL FOR MODERNIZING LABOR LAWS FOR TWENTY FIRST-CENTURY WORK: THE "INDEPENDENT WORKER" (Brookings Institution 2015), available at http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (last visited October 3, 2016).

Oklahoma Supreme Court Strikes Down State's Opt Out Law

By Thomas A. Robinson, J.D.[*]

Earlier today (September 13, 2016), in *Vasquez v. Dillard's, Inc.*, 2016 OK 89, in a 7–2 decision, the Supreme Court of Oklahoma, in one of the most important workers' compensation decisions in memory, held the core provision of the Oklahoma Employee Injury Benefit Act (the state's Opt Out Law), Okla. Stat. tit. 85A, § 203, creates "impermissible, unequal, disparate treatment of a select group of injured workers" and, therefore, is an unconstitutional special law under the Oklahoma Constitution, art 2, § 59 [Opinion, ¶ 1].

Readers will recall that on February 26, 2016, the state's Workers' Compensation Commission found § 203 and 209 unconstitutional on the basis that the law denied equal protection to Oklahoma's injured workers and denied them the constitutionally protected right of access to the courts (see my earlier post: http://www.workcompwriter.com/oklahoma-commission-strikes-down-states-opt-out-law/). Citing its own earlier decision in *Robinson v. Fairview Fellowship Home for Senior Citizens, Inc.*, 2016 OK 42, 371 P.3d 477 (see my earlier discussion: http://www.workcompwriter.com/oklahoma-supreme-court-lands-yet-another-body-blow-to-states-controversial-opt-out-law/), the majority indicated it had a responsibility to address the issue before it.

Opt Out: an Unconstitutional Special Law

Speaking for the majority, Justice Watt observed that Dillard's had contended the Opt Out law was not a "special" law, since it applied to "all employers," rather than injured employees. The majority was unconvinced, noting the title of the Act made no mention at all of employers. Instead, it referenced "injured employees." The majority also cast aside Dillard's argument that the Opt Out law provided a baseline of "Core Coverage" in § 203(B), guaranteeing individual employees equal treatment, finding that position "incredible" [Opinion, ¶ 20].

The majority stressed that instead of providing employees of qualified plan employers equal rights with those of employees falling within the traditional Workers' Compensation Act, the "clear, concise, unmistakable, and mandatory language" of the Opt Out law provided that "**such employers are not bound by any provision of the Workers' Compensation Act for the purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties** [Opinion, ¶ 22, emphasis by the majority].

Opt Out Not a Constitutionally Permissible Special Law

The majority also cast aside Dillard's final contention that even if the Opt Out law was a special law, it was constitutionally permissible because it was substantially and reasonably related to a legitimate government objective. The employer-enumerated goals could not save the law from the constitutional challenge before the court. Citing *Maxwell v. Sprint PCS*, 2016 OK 41, 369 P.3d 1079, the majority acknowledged that the Legislature had the authority to exclude an entire class of employees from coverage under the workers' compensation system generally. What it could not do was to exclude one group of claimants from benefits that had been accorded to others. The majority stressed, "No distinctive characteristic exists for the disparate treatment of injured workers simply upon the basis that the employer has opted out of the general workers' compensation system."

Continued, Page 21.

Oklahoma Supreme Court, from Page 20.

Opt Out Law's "Severance" Provision No Help

The majority also held that the suggestion that the Opt Out law could be saved by simply requiring that qualified employers treat their employees exactly as the Administrative Act required would frustrate any rational reason for an employer to go to the trouble of developing a plan mirroring the surviving statutory scheme.

Majority's Decision Affects Pending Disputes Before the Commission

The majority noted that there were a number of cases currently pending before the Commission that had been stayed because they concerned similar issues to those in the case at bar. The majority said its decision was to be given immediate effect, not only with regard to the current case, but also with regard to all other affected cases before the Commission and in the appellate pipeline.

Dissenting Opinion

Justice Winchester, joined by Justice Taylor, dissented, indicating that the majority opinion had emphasized (a) that statutory provisions were presumed constitutional; (b) that the Court's function was not to correct the Legislature; and (c) that the Court should rule on the narrowest grounds possible. According to Justice Winchester, the majority's result violated all three. Rather than strike the law, the dissent contended the Commission should have made an inquiry into whether Vasquez had been denied the benefits she would otherwise have received under the general workers' compensation law. The dissent also said that all new legislation needs "fine-tuning, either by legislative amendment or court direction" [Dissent, ¶5]. Employers whose plans had met or exceeded the provisions of the general workers' compensation law would never get the opportunity to have the validity of their plans tested.

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 an Editor-in-Chief of Workers' Compensation Emerging Issues Analysis (LexisNexis) and 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/.

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Virginia Alternative Dispute Resolution (ADR) Captures Innovation Award

By: Evelyn McGill

The Virginia Workers' Compensation Commission is pleased to announce its selection as a recipient of the inaugural, "Innovation Award" by the International Association of Industrial Accident Boards and Commissions (IAIABC). Through innovation, the Commission is continuing to better serve employers and injured workers in the Commonwealth by utilizing technology and deploying resources in new ways. This prestigious award reflects the Commission's commitment to its vision of leading the nation as the most effective and innovative state agency.

The Commission has been recognized for "Innovation and Automation of Alternative Dispute Resolution in Virginia," an initiative to improve service delivery of administrative functions and increased productivity in response to the growing demand for alternative dispute resolution (ADR) services. The project effectively integrated the Commission's mediation efforts creating a streamlined electronic process for case assessment, issue identification, scheduling, and resolution. "Automation of ADR services has allowed us to meet the increased demand for mediation services while at the same time processing and resolving claims more efficiently. It is a cost and time saver -- a win/win for injured workers and Virginia employers alike," commented Deborah Blevins, Deputy Commissioner for the Virginia Workers' Compensation Commission.

The IAIABC's website describes that the Innovation Awards grew out of a need to "share new initiatives and showcase jurisdictional efforts on system improvement." In its inaugural year, eight U.S. jurisdictions submitted projects ranging from agency performance scorecards to a safety grant program. The Commission will be presented with its Innovation Award at the IAIABC Convention held in September in Portland, Maine.

Congratulations

Virginia Commission!

Virginia Workers' Compensation Commission Appoints D. Edward Wise, Jr. as Deputy Commissioner

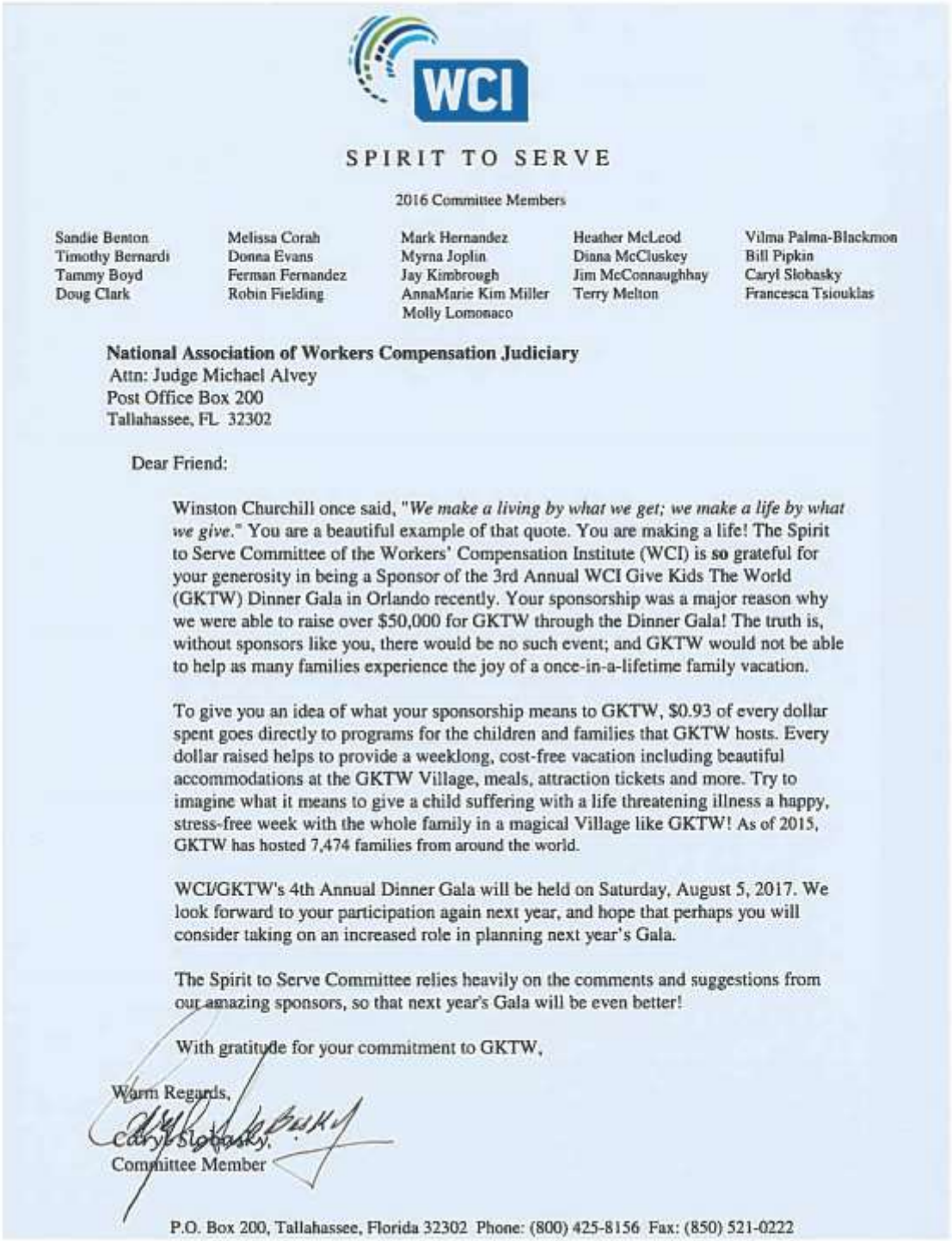
The Virginia Workers' Compensation Commission announced the appointment of D. Edward Wise, Jr. as Deputy Commissioner at its Lebanon regional office. Deputy Commissioner Wise will serve as an administrative law judge for evidentiary and on-the-record hearings under the Virginia Workers' Compensation Act. He will hold hearing dockets in Big Stone Gap.

Wise was appointed to serve as Deputy Commissioner on August 29, 2016. He is a graduate of East Tennessee State University and Cumberland School of Law at Samford University. Prior to joining the Commission, he spent over 22 years representing Claimants in Virginia and Tennessee. Mr. Wise is a Fellow in the College of Workers' Compensation Lawyers.

The Commission is pleased to announce and welcome this highly-experienced attorney to serve as Deputy Commissioner in the agency.

Give Kids the World!

The NAWCJ Supported Give Kids the World in 2016. This unique institution provides free accommodations to the families of outstanding young people, visiting the Orlando area through organizations such as Make a Wish. We are all better for the work of these organizations, the lives they touch, and their impacts on our lives. As we look toward NAWCJ Judiciary College 2017, we reflect on the Association's achievements and generosity in 2016!



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National Association of Workers Compensation Judiciary
Attn: Judge Michael Alvey
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Dear Friend:

Winston Churchill once said, "*We make a living by what we get; we make a life by what we give.*" You are a beautiful example of that quote. You are making a life! The Spirit to Serve Committee of the Workers' Compensation Institute (WCI) is so grateful for your generosity in being a Sponsor of the 3rd Annual WCI Give Kids The World (GKTW) Dinner Gala in Orlando recently. Your sponsorship was a major reason why we were able to raise over $50,000 for GKTW through the Dinner Gala! The truth is, without sponsors like you, there would be no such event; and GKTW would not be able to help as many families experience the joy of a once-in-a-lifetime family vacation.

To give you an idea of what your sponsorship means to GKTW, $0.93 of every dollar spent goes directly to programs for the children and families that GKTW hosts. Every dollar raised helps to provide a weeklong, cost-free vacation including beautiful accommodations at the GKTW Village, meals, attraction tickets and more. Try to imagine what it means to give a child suffering with a life threatening illness a happy, stress-free week with the whole family in a magical Village like GKTW! As of 2015, GKTW has hosted 7,474 families from around the world.

WCI/GKTW's 4th Annual Dinner Gala will be held on Saturday, August 5, 2017. We look forward to your participation again next year, and hope that perhaps you will consider taking on an increased role in planning next year's Gala.

The Spirit to Serve Committee relies heavily on the comments and suggestions from our amazing sponsors, so that next year's Gala will be even better!

With gratitude for your commitment to GKTW,

Warm Regards,

Caryl Slobasky,
Committee Member

P.O. Box 200, Tallahassee, Florida 32302 Phone: (800) 425-8156 Fax: (850) 521-0222

Florida Governor Appoints Five New Judges


Frank Clark

Governor Rick Scott today announced his appointments for Judges of Compensation Claims. For the last few months, the OJCC has managed with five vacancies around the state. Some unexpected retirements at the OJCC created three of those before expected, and two other judges retired last year.

Ft. Myers

In Ft. Myers. Governor Scott appointed Frank Clark. Mr. Clark is 52 years old and a long-time resident of Florida. He began his legal career in private practice in 1988. He has primarily represented injured workers since that time. Judge Clark earned his Bachelor of Arts from the University of South Florida and his Juris Doctor from the University of Florida.


Jonathan Walker

Panama City

In Panama City, Governor Scott appointed Jonathan Walker. Mr. Walker is 49 years old. He started his legal career in the State Attorney's Office in Walton County, and then served as Assistant County Attorney. Since 1999 he has practiced workers' compensation defense with the Conroy Simberg firm. Judge Walker earned his bachelor's degree from the University of West Florida and a Masters' in Public Administration at the University of South Alabama. He earned his Juris Doctor from Samford University School of Law.


Keefe Owens

Port St. Lucie

In Port St. Lucie, Governor Scott appointed Keefe Owens. Mr. Owens is 41 years old. He began his legal practice as a Staff Attorney with the Florida Fifth District Court of Appeal in 1998. Since 2002 he has been with Zimmerman, Kiser & Sutcliffe. Though based in Orlando, he has engaged in a statewide practice with emphasis on appellate law. Judge Owens earned his Bachelor of Arts from the Stetson University and his Juris Doctor from the University of Florida College of Law.


Greg Johnsen

West Palm Beach

In West Palm Beach, the Governor filled two vacancies. To replace Judge Shelley Punancy, Governor Scott appointed Gregory Johnsen. Mr. Johnsen is 46 years old and long-time resident of south Florida. He began his legal career defending workers' compensation cases with Valdez and Villaverde. Since 2006 he has served as a State Mediator in the Miami and Ft. Lauderdale District Offices. Judge Johnsen earned his Bachelor of Arts from Barry University and his Juris Doctor from the University of Miami.

To replace Judge Basquill in West Palm Beach, Governor Scott appointed Thomas Hedler. Mr. Hedler is 41 years old and a Florida Native. He has practiced in workers' compensation since 2002, primarily representing injured workers. Judge Hedler earned his Bachelor of Arts from Palm Beach Atlantic University and his Juris Doctor from Florida State University College of Law.


Thomas Hedler

Use of Medical Treatment Guidelines Split 50/50 Among States' Work Comp Systems

By Emily Brill
September 21, 2016

Five years ago, a workers' compensation reform bill required Montana to adopt treatment guidelines for injured workers. After considering the customary options — the Work Loss Data Institute's Official Disability Guidelines (ODG), the American College of Occupational and Environmental Medicine (ACOEM) standards or state-specific guidelines — Montana went with a combination of two. The state adopted Colorado's medical treatment guidelines in 2011, filling in gaps with elements of the ACOEM guidelines. "From that point moving forward, we have only made changes to the guidelines when Colorado has updated their guidelines," said Bill Wheeler, chief of Montana's Workers' Compensation Claims Assistance Bureau. The agency reviews the guidelines every year in search of updates.

This year, the sections concerning thoracic, shoulder and cumulative trauma injuries may see an update. A public hearing on the changes is set for Friday. Montana is one of 18 states that requires doctors to use evidence-based treatment guidelines when caring for workers' compensation patients. Another seven states, including Kansas and Oklahoma, use guidelines as a standard of reference but do not require doctors to consult them. New Hampshire uses treatment guidelines only in managed care cases.

As of 2015, 24 states did not use medical treatment guidelines in any form, according to a Workers' Compensation Research Institute cost-containment report from that year. Todd Brown, practice leader for compliance and regulatory affairs at Medata, said a state's type of workers' compensation system usually determines whether it will use treatment guidelines. "When you look at states that are primarily judicial, they tend not to go down that medical guidelines road. They're not really geared that way," Brown said. "States that I call judicially geared tend to handle workers' comp more with lump-sum settlements, things of that nature. So they don't get involved with the day-to-day treatment processes that occur."

Administrative systems, on the other hand, take a more direct role in patient care, Brown said. He cited California, Washington, Texas, Florida and Colorado as examples. He clarified that he did not find fault in either system. "It's just the way it plays out," he said. Douglas Benner, chief medical officer of EK Health, cited "different views of their role and different political pressures" as reasons a state might not adopt a fee schedule. He also mentioned the effort involved in choosing, implementing and updating guidelines as a possible deterrent. "I think it starts if a state has a medical director. Do they want to have a medical director? Do they want to impact the quality of care? They might want to get involved, then, and have the guidelines," Benner said. "There are often different political pressures — should they get involved or stay out of things?" States such as Montana, Kansas and Wyoming have adopted guidelines within the past several years, perhaps because "evidence-based medicine is very popular" right now, Benner said.

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Treatment Guidelines, from Page 25.

Benner himself supports the use of guidelines because "they provide a basis for quality of care, and they're objective." In some states, stakeholders have come out swinging against the use of treatment guidelines. Pete Pentz, chairman of the workers' compensation section of the Pennsylvania Bar Association, blasted the legislature for considering adopting such guidelines this year. "The flexibility isn't there to address unique situations," Pentz said in March.

The Pennsylvania House of Representatives' Labor and Industry committee in June tabled HB 1800, which proposed adoption of treatment guidelines. Pennsylvania remains one of the 25 states, including the District of Columbia, without any treatment guidelines — mandatory or voluntary.

If states opt to implement guidelines, they essentially have three paths: create or adopt an existing set of state-specific guidelines or go with the ODG or ACOEM standards. Alternately, they could mix and match. California uses portions of all three, Benner said. "Part of their medical treatment utilization schedule is derived from ACOEM, and part of it is from ODG," Benner said. "The acupuncture part actually came from Colorado, and we have a new opiate guideline that the medical director in California did themselves."

Other states take a simpler approach. New Mexico, Wyoming, Ohio, North Dakota and Kansas, among other jurisdictions, use the Work Loss Data Institute's Official Disability Guidelines. "It's just effective, and it's been around for forever," said Jassina Washington, a management analyst with the Kansas Division of Workers' Compensation. "It must've been the most effective, because we're going into 2017 and we're still using it."

Maine's medical treatment guidelines are currently in limbo. The Workers' Compensation Board repealed its "woefully inadequate and out-of-date" guidelines after an executive changeover in 2010 and has not yet replaced them, said Paul Sighinolfi, the Board's executive director.

When the Board implements new guidelines, Sighinolfi predicts it will go with the ACOEM's standards. "My sense is, from my own personal reading on the topic, that those are the most popular, and you might as well deal with things that have been tried and tested by other jurisdictions," Sighinolfi said. "I have no interest in re-inventing the wheel."

States tend to choose their treatment guidelines after looking into "how much detail they want to go into," Benner said. The ODG is much shorter than the ACOEM guidelines. States seeking a higher level of specificity can opt to make their own. "They're all good — Colorado's a good guideline, Washington, New York. ODG's good, ACOEM's good," Benner said. "They all just take a different approach in the comprehensiveness and what they want to deal with."

NCCI: Drug Spend Up 6% in 2014

By Elaine Goodman
September 22, 2016

Prescription drug use in workers' comp claims fell 4% in 2014, but prices for the drugs rose 11% on average that year, resulting in a 6% increase in workers' comp prescription drug spending, according to a report released Tuesday by the National Council on Compensation Insurance.

Spending on prescription drugs accounted for 17% of workers' comp medical costs in 2014, NCCI researchers Barry Lipton and David Colón said in the report. But the prescription drug portion of medical costs increases rapidly as claims age, rising to 45% to 50% on claims older than 10 years, the report said. The NCCI report analyzed data from NCCI's Medical Data Call from 41 states. Among the nine states excluded are three of the nation's most populous: California, Texas and New York.

Continued, Page 27.

Drug Spend, from Page 26.

The report touches on many of the current hot topics in workers' comp drug prescribing: narcotics use, physician dispensing and drug formularies. "Prescription drug costs represent a significant portion of workers' compensation medical costs and is one of the most active subjects of related legislative activity," the authors noted.

The average prescription drug cost per claim was $429 in 2014, a 6% increase from the previous year. The rate of growth was less than the 7% seen in 2013 and the 10% in 2012. Drug utilization increased in the prior two years, but fell 4% in 2014, NCCI said. The average drug cost per claim was highest in Oklahoma, Louisiana, Alabama and South Carolina, exceeding $582 per claim.

Compared to the 41-state average of 6%, 11 states saw prescription drug costs per claim increase more than 8% in 2014. They were Alaska, Arizona, Alabama, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, New Jersey, Oklahoma and South Carolina. The reason for the greater increase varied among states. The average cost per claim for controlled substances held steady in Illinois, at $57, but the cost per claim of physician-dispensed drugs grew to $126, up from $74 in 2013.

The opposite trend was seen in Arizona, where the cost per claim for controlled substances increased to $177 in 2014, up from $134 the previous year. The average cost for physician-dispensed drugs rose $7, to $44. Illinois took steps to control physician dispensing in November 2012, setting the maximum reimbursement amount for drugs dispensed outside of a licensed pharmacy to the average wholesale price of a drug plus a $4.18 dispensing fee.

But since then, physicians have increased their dispensing of commonly used drugs at new, more expensive strengths. As detailed in a July report from the Workers' Compensation Research Institute, the drugs included 7.5-milligram cyclobenzaprine, the 2.5-milligram strength of hydrocodone, and 325-milligram strength of acetaminophen.

The NCCI report also estimated the amount that states could save if they adopted the Official Disability Guidelines prescription drug formulary developed by Work Loss Data Institute. Most states that don't already have a formulary would save 10% to 20% on workers' comp prescription drug spending with a formulary in place; others would save more than 20%, according to NCCI's analysis.

The ODG formulary assigns a status to a long list of drugs. A "Y" means the drug is preauthorized and an "N" means not allowed or authorization is needed. NCCI said that on average, 24% of drug costs and 17% of prescriptions are for "N" drugs, many of which are narcotics. States where opioid use is higher tend to have the largest estimated savings, the report said.

Gary Patureau, executive director of the Louisiana Association of Self Insured Employers, or LASIE, said he expected an implementation of a formulary in Louisiana could save even more than the 10% to 20% in NCCI's estimate. As has been seen in Texas, he said, a formulary paired with medical treatment guidelines is very effective at getting appropriate care to injured workers and getting them back to work sooner. "If you do that, everything else takes care of itself," Patureau said.

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But several attempts to pass formulary legislation in Louisiana have failed. The most recent effort was House Bill 725, backed by LASIE and introduced by Rep. Chris Broadwater, R-Hammond, in March. The bill called for implementation of the ODG formulary by July 1, 2017.

Patureau said the bill failed because it did not gain the support of the Workers' Compensation Advisory Council, a 17-member panel appointed by the governor. The House and Senate labor committees typically defer to the panel's judgment on workers' comp issues, he said.

In Colorado, another state where NCCI estimated a formulary could save 10% to 20% on workers' compensation drug costs, officials are taking a wait-and-see approach.

Paul Tauriello, director of the Colorado Division of Workers' Compensation, said the agency is now focusing on use of its medical treatment guidelines. The hope was that insurance companies would employ utilization review to ensure providers comply with the guidelines, which include recommendations on drug use, to manage medical treatment and control costs, he said.

"It hasn't gone as well as we had hoped," Tauriello said in an interview last week.

In response, DWC is creating quick reference guides on medical treatment for adjusters to use, for common or costly conditions.

But the state will take a closer look at formularies, Tauriello said, especially now that data is becoming available on the results of formularies in other states. "It's not off the table," he said.

The articles on pages 18-21, *Use of Medical Treatment Guidelines Split 50/50 Among States' Work Comp Systems* and *NCCI: Drug Spend Up 6% in 2014*, 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.

Notes from a Seminar: "The Demise of the Grand Bargain"

By: Hon. David Torrey*

Rutgers-Camden Law School, Friday, September 23, 2016.

The Pound Civil Justice Institute, in partnership with Northeastern University School of Law and the Rutgers Center for Risk & Responsibility, recently convened a one-day academic symposium, "The Demise of the Grand Bargain: Compensation for Injured Workers in the 21st Century." Some of the papers presented (most of them not in final form), can be found at http://poundinstitute.org/content/2016-symposium-papers.
The critical presentations (and their presenters) were as follows:

Work Injury and Compensation in Context,1900 to 2016
Emily Spieler, Northeastern University School of Law

Workers' Compensation at a Crossroads: Back to the Future or Back to the Drawing Board?
Alison Morantz, Stanford Law School

Can State Constitutions Block the Workers'-Compensation Race to the Bottom?
Robert F. Williams, Rutgers Law School

Outside the Grand Bargain: The Persistence of Tort
Robert L. Rabin, Stanford Law School

As one can infer from the title of the presentation, the focus was on the slow but unmistakable swing of the pendulum away from workers' compensation laws solicitous of worker interests and towards business. The most dramatic (nay, nihilistic) manifestation of that swing, of course, is the opt-out movement, which generates proposed laws that permit employers to opt out of the system if they establish private plans of their own design – while conveniently retaining the exclusive remedy.

The first major paper, presented by Professor Emily Spieler, traced the history of workers' compensation to 1972. In that year, workers' compensation largely rebooted (my term) and, in Professor Spieler's view, was reconceptualized by Commission leaders as one which depicted adequacy of income replacement as essential to an effective system. While most states responded to some degree and liberalized their laws (Pennsylvania is a major example), since 1980 *retraction* has, for the most part, been the major feature of legislation in the field.

As a commentator on the panel, I noted that Pennsylvania was a jurisdiction where we have, to date, avoided the harshest aspects of retraction. While benefits to all but the most severely impaired were limited in 1996, our injury definition and course of employment doctrine has not been the subject of retraction; Pennsylvania covers occupational diseases generously, and with presumptions; aggravations of pre-existing conditions can be compensated; *Frye*, not *Daubert*, guides the admissibility of expert opinions; and the rule of liberal construction endures. True, agents of change have promoted laws that would further limit employee choice of physician, and regulate physicians in how they treat injured workers, but to date these have not gained a foothold.

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I did agree that the increasing popularity of lump sum compromise settlements – and increasing lack of oversight of the same – coupled with the ubiquitous demand that workers resign or agree not to reapply, signaled loosening of the idea that the system should focus on worker rehabilitation – another ideal of the National Commission. It seems in the modern day, rightly or wrongly, that most claims have become, via C&R, commodified, and rehabilitation is not even given lip service. (Here I can only speak for my state.) One of my co-panelists, the distinguished Louisiana lawyer Chuck Davoli, seemed less concerned on this point. Settling and resigning, he noted, gives the worker a chance to put his claim behind him and move one.

Finally, her analysis (and those of others, particularly Professor Burton), that retractive legislation in many states has been facilitated by the decline of the labor movement, rang true to me. Burton, notably, stated that unions have little voice in state legislatures, and the "AFL-CIO nationally does not have workers' compensation on its agenda." "Workers' compensation," he insisted, "used to be a much more important item for labor." As a result of this apparent decline, it seems that in many legislatures, trial lawyers now play a key role in protecting worker interests.

And, of course, when it comes to the *litigated* case, the claimants' bar is the injured worker's only advocate. Retractive reformers know this, and have advanced laws in other states designed to limit lawyer participation. While too much lawyer and judge involvement undoubtedly exists, the unfairness of depriving injured workers from legal counsel is obvious if for only one reason – the employer and carrier will *alway*s have insurance and legal experts on their side.

The presenters at the conference were mostly of one mind that retractive reform threatening demise was unsatisfactory. Some presenters, however, were only presenting data or, for example, explaining state constitutional provisos, and I did not detect their opinion on the overriding – sometimes passionate – theme of the conference. Perhaps the most remarkable presentation was by articulate Rutgers law professor Adam Scales, who suggested dismantling the system, promoting universal insurance, and allowing some level of employee tort actions against their employers.

When the final versions of these papers are published in the *Rutgers Law Review*, I will summarize them here. For now, here are five points that I found of particular interest.

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Thanks to our 2016 Moot Court Judges!

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Wilbur Anderson (FL)
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Scott Beck (SC)
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Kenneth Switzer (TN)
James Szablewicz (VA)
Jack Weiss (FL)
Nolan Winn (FL)

Grand Bargain, from Page 30.

1. Professor Burton, in a reprise to prior advocacy, insisted that state workers' compensation programs can still work better with a pro-active agency. *See* John F. Burton, Jr. & Monroe Berkowitz, *Paean to an Active Workers' Compensation Agency*, JOHN BURTON'S WORKERS' COMPENSATION MONITOR, Vol. 2, No. 7 (Sept./Oct. 1989) (available at http://workerscompresources.com/wp-content/uploads/2013/07/WC-Monitor-Vol-2-No-7-Paean.pdf).

2. Professor Burton (as he has in the past) questions whether contingent fees for attorneys in workers' compensation are the best method of compensating lawyers. He stated that he believes that lawyers should indeed be paid, but he suspects that the contingent fee awakens in the lawyerly mind an inappropriate desire to compromise-settle and lump sum cases. Perhaps, he ventured, the most generous fees should be payable to lawyers in cases where his or her representation has facilitated a *return to work* for the injured worker.

3. Professor Williams, of Rutgers Law School, an expert on state constitutional law, encouraged lawyers fighting drastic workers' compensation reform to use state constitutional resources. Of course, such an approach was employed aggressively by Attorney Bob Burke in Oklahoma, who, armed with the Oklahoma Constitution, achieved the striking down of opt-out. (The state constitution was also employed in Oregon, where the state supreme court applied the Oregon Constitution's "Open Courts" proviso, which has its genesis in the Magna Carta, to declare that an injured worker's rights under both the compensation act and in tort could not be abolished.)

4. Professor Justin Long, of Wayne State University Law School, encouraged the audience to conceptualize "retrenchment" in workers' compensation law as another example of a larger attempt of employers (and others individuals) to escape the public system. Mandatory arbitration clauses are another example. This strategic effort of employers to detach themselves from traditionally acknowledged social responsibilities to this writer reflects the decline in commutarianism about which so much has been written.

5. Professor Burton does not believe in promoting federal standards anymore. Of course, this was his theme in his Pennsylvania Centennial address in June 2015. *See* John F. Burton, Jr., *Keynote Address for the Centennial Celebration of the Pennsylvania Workers' Compensation Program*, Hershey, PA (June 1, 2015), available at http://workerscompresources.com (last visited October 3, 2016). Burton insisted that the "playing field is very different now" than it was in the 1970's, when the Commission, which he headed, published its nineteen voluntary recommendations. Federal standards are currently "not a practical solution."

Governor Rauner Announces Arbitrator Appointments

In September, Illinois Governor Rauner reappointed eleven arbitrators at the Illinois Workers' Compensation Commission:

Kurt Carlson,
Brian Cronin,
Carolyn Doherty,
Gregory Dollison,
Barbara Flores,
William Gallagher,
Christina Hemenway,
Edward Lee,
Molly Mason,
Douglas McCarthy
Deborah Simpson.

Dave Torrey has been a Workers' Compensation Judge in Pittsburgh, PA, since January 1993. He teaches the workers' compensation law courses at the University of Pittsburgh School of Law. He is a past-president of the National Association of Workers' Compensation Judiciary (www.NAWCJ.org). His treatise on Pennsylvania Workers' Compensation, published by West, is in its Third Edition.

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