

Lex and Verum



The National Association of Workers' Compensation Judiciary

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NAWCJ President's Page

By Hon. Jennifer Hopens



Hello, *Lex & Verum* readers.

Conference and curriculum planning is underway for the next NAWCJ Judicial College, which will take place at the World Center Marriott in Orlando, Florida, from August 7-9, 2017. We hope you will be able to join us then. More details on the program will be revealed in future issues of the *Lex & Verum*. August will be here before you know it. Unbelievably, 2016 is nearly in the books. The older I get, the more amazed and, at the same time, bewildered I am by time and, particularly, its fast-moving nature. *Tempus fugit* ("time flies"), as they say.

Among the many challenges facing us in our day-to-day professional lives in the early 21st century is how to maximize efficiency and productivity in the limited time we have available (and especially given all of the demands and distractions we encounter over the course of our days). As adjudicators, we often deal with multiple time-sensitive responsibilities related to our dockets, such as acting on pre-hearing motions, presiding over hearings, and drafting our decisions (not an exhaustive list, I know). Outside of the workplace, we strive to make the most of our time with our loved ones (and occasionally sneak in some time for ourselves alone). Strategies for effective time management and achieving the optimal work-life balance abound on the Internet and populate the bestseller lists. Gadgetry, apps, and computer software programs also offer assistance in keeping us on task.

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Time is also fleeting. Innumerable sayings and quotes exist on the subject of time, but perhaps no wisdom on the subject better encapsulates the value of time and its impermanence than the following from British novelist Robert Harris ("Fatherland," "Enigma," and "The Ghost Writer," among other works) –

"[t]he true currency of life is time, not money, and we've all got a limited stock of that."

This past month, the NAWCJ family lost a revered and cherished member – Commissioner Roger Williams of the Virginia Workers' Compensation Commission. By any measure, Roger spent the currency of life well, both personally and professionally, leaving behind a legacy of dedication, public service, and courage that will inspire others for many years to come. He embodied the best qualities of our organization and contributed immensely to the success of NAWCJ over the years. We will never forget him. More about Roger's remarkable life is found in this issue of the *Lex & Verum*.

While the setting of life's camera seems to be in perpetual time-lapse mode and the struggles with the clock continue, taking time each and every day for reflection and expressions of appreciation and kindness toward others goes a long way in giving indelible and lasting meaning to our lives; it is also a good use of time.

I wish you all a wonderful Thanksgiving holiday.

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Judiciary College 2016



Judges Hogan (FL), Anderson (FL) and Lott (MS) judged preliminary rounds of the Earle Zehmer Moot Court Competition at the 2016 Judiciary College.

Judges Massey (GA), Beck (FL) and Lovan (KY), judged preliminary rounds of the Earle Zehmer Moot Court Competition at the 2016 Judiciary College.



Judges Kellar (LA), Medina-Shore (FL) and Marshall (VA), judged preliminary rounds of the Earle Zehmer Moot Court Competition at the 2016 Judiciary College.

Spotlight on Associate Members: Robert C. Barrett of Rissman, Barrett, Hurt, Donahue, McLain & Mangan



By: Hon. Neal Pitts*

Robert C. Barrett is an outstanding AV-rated Orlando lawyer whose practice is the defense of employer/carriers in Workers' Compensation matters. Mr. Barrett is a graduate of the University of Illinois (B.A., with honors, Communications, 1974). He is a graduate of Fred Levin College of Law at the University of Florida (J.D., with honors, 1978) where he served on the Law Review. He was also listed on the Dean's List and was a member of the Phi Kappa Phi Honorary society at the University of Florida.

Mr. Barrett began his legal career in 1978 in Orlando with the law firm of Cooper, Rissman, and Weisberg, P.A. That firm later became known as Rissman, Barrett, Hurt, Donahue, McLain & Mangan, P.A., in which Mr. Barrett is a shareholder. This firm long has been considered one of the premier law firms in the state of Florida specializing in the defense of employer/carriers.

Mr. Barrett is an integral part of the firm's stellar reputation. He has been recognized as "Florida Super Lawyer in Workers' Compensation Corporate Counsel Edition" (2008-2010), he has been selected by his peers for inclusion in "Florida Super Lawyers" (2003-present), is listed in "The Best Lawyers in America" (1995-present) and has been named "Lawyer of the Year in Workers' Compensation Law Orlando" (2014). He has been selected by his peers as "One of the 55 Best Lawyers in Orlando" (2002- present), is recognized by Orlando's Top Lawyers (2010-present), and was recognized in "Florida's Top Attorneys" by The Wall Street Journal (2013).



Mr. Barrett has served as a lecturer for Continuing Legal Education Programs for the Florida Bar and is the author of newsletter articles on various Workers' Compensation issues. He has been very active with the programming for the premier educational program in workers' compensation in August of every year, put on by the WCI in Orlando, Florida.

Mr. Barrett has further served the Orlando legal community by serving on the Executive Council of the Section on Workers' Compensation of the Florida Bar, as a member of the Grievance Committee of the Florida Bar in and for the Ninth Judicial Circuit, and as Chairman for the Section on Workers' Compensation in Orange County.

Mr. Barrett is a licensed private pilot. He also has a passion for University of Florida athletics.

The NAWCJ appreciates the support of Attorney Barrett and all of the Associate Members. See the full list on page 32.

* Judge Pitts serves as a Judge of Compensation Claims in the Orlando, Florida district office. His full bio is on page 15.

BOOK REVIEW

The Story of Pain: From Prayer to Painkillers

by Joanna Bourke
Oxford University Press. 2014. 396 pp.



By: Hon. David Torrey*

Most controverted workers' compensation claims raise the issue, in one way or another, of the worker's suffering with chronic pain and its contribution to his or her inability to work.

And, if there is one staple of cross-examination surrounding these controversies, it is the defense attorney's invitation to the treating physician to acknowledge that an individual's pain is "subjective" in nature. Armed with this acknowledgement, the defense in turn argues to the judge that he or she may conclude that the worker is somehow not a *bona fide* case.

It is hence important for the workers' compensation lawyer and judge to be solidly grounded in the issue of chronic pain. And there is no shortage of titles on this issue that have been penned for the lay reader. In my newsletter for the Pennsylvania Bar, I have noted and summarized a number of such texts over the years. The most recent book, which I highly recommend, is the outstanding *Understanding Pain* (MIT Press 2012), by Fernando Cervero, M.D. (reviewed in the PBA Workers' Compensation Newsletter #117).*

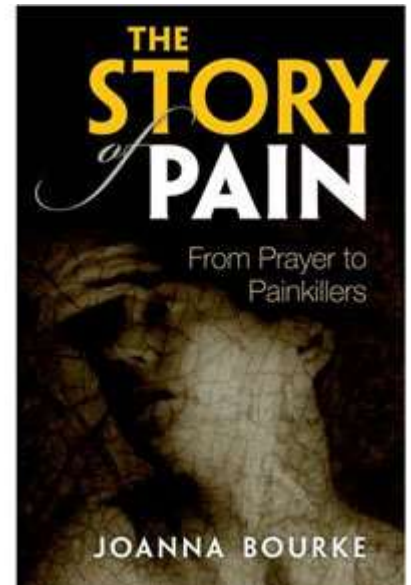
In 2014, the issue of pain and, particularly, its subjectivity, was reviewed in *historical* context by Professor Joanna Bourke in her book *The Story of Pain: From Prayer to Painkillers*.

Bourke, a history professor in England, explains, in her introduction, the modern thinking about the pathophysiology of pain, that is, the "gate control theory of pain" and how it displaced the previous "Cartesian" conceptualization of pain as "simply a sensual response to noxious stimuli ..." Under *that* thinking, of course, "the body was a mechanism that worked 'just as, pulling on one end of a cord, one simultaneously rings a bell which hangs at the opposite end.'"

The Cartesian model was displaced in 1965 with the development of "the gate control theory of pain, which introduced the idea of a 'gating mechanism' in the dorsal horns of the spinal cord that allowed the perception of pain to be modified." Crucially, she explains, "the gate control theory [insists] ... that sensory, cognitive, affective and motivational processes influenced people's experience of pain."

Bourke also reviews how the International Association for the Study of Pain has, in the modern day, defined pain, *however generated*, as "an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage."

After this helpful introduction, the author embarks on a historical analysis of how pain has been experienced, described, and understood. The discussion, which focuses on experiences in Great Britain and the United States, commences in the mid-19th century and continues to the present day.



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This analysis of pain in historical context focuses on how individuals and groups have interpreted, reported, and talked about pain. And as submitted above, the review is valuable because the phenomenon is still current in medical and workers' compensation circles.

Perhaps the most interesting historical analysis Bourke offers is how people have described their pain via *metaphor*. This issue was memorably discussed by Dr. Frank Vertosick in his 1996 book, *When the Air Hits Your Brain* (1996). In his opinion, patients who offered exotic descriptions via metaphor were usually head cases: "The more bizarre the description of the pain, the more likely it is to be a psychiatric delusion. Phrases like, 'I have little gnomes with branding irons running all over my face' or 'The hooves of a thousand angry horses are thundering in my head' ... should immediately make you suspicious that something else is going on."

We learn from Bourke that people in pain have *long* utilized metaphors to try to describe their pain to others. Among her many historical examples is one from a 1945 article in *The Pittsburgh Courier*: a patient "described the agony of appendicitis in terms of feeling like 'I was in a battle royal with four wild cats' inside him." She also persuasively establishes that metaphors morph with the times. Before anesthesia, religiously-inspired evocations of hell were typical, but these descriptions have faded as literal belief in such netherly realms has faded. In the late nineteenth century, meanwhile, railroad metaphors became common, and in the wake of never-ending war, militaristic analogies pervaded.

Bourke introduced her book in a 2014 *New York Times* opinion piece, in which she asserted that understanding how people have in the past thought, and communicated about, pain, is helpful to us in the *present* day. She declares, "We have made great strides in making patients more comfortable over the past few centuries. We may no longer believe that pain is sent by God to test us; and we may no longer need lengthy descriptions of pain to arrive at diagnoses. But pain will always be with us, and by listening closely to the stories patients tell us about their pain, we can gain hints about the nature of their suffering and the best way we can provide succor. This is why the clinical sciences need disciplines like history and the medical humanities. By learning how people in the past coped with painful ailments, we can find new ways of living with and through pain." See <http://www.nytimes.com/2014/07/13/opinion/sunday/how-to-talk-about-pain.html>.

Bourke explains how pain has been experienced, described and understood through six analyses. These are *estrangement* (some pain sufferers become isolated from communities and may repress pain complaints); *metaphor* (as noted above); *religion* (before the invention of anesthesia, many believed that pain came from God and was something to be willingly endured with an eye to salvation); *diagnosis* (before the advent of sophisticated diagnostic testing, how patients talked about their pain was critical to the physician); *gesture* (how have physicians reacted not to verbal complaints of pain but to what we would call today "body language?"); and *sentience* (that is, the capacity to perceive or experience things subjectively – are some individuals or groups by nature impervious – or oversensitive – to pain?).

Continued, Page 7.

Nebraska Elects New Presiding Judge



Judge John R. Hoffert has been elected as presiding judge of the Nebraska Workers' Compensation Court for a term beginning October 3, 2016 and ending June 30, 2017. The Nebraska Supreme Court approved the appointment on October 4, 2016.

Judge Hoffert will fill the unexpired term of Judge Lauren K. Van Norman, who will be retiring on January 5, 2017.

The Nebraska Workers' Compensation Court is composed of seven judges who are initially appointed by the governor and then remain on the bench for successive six-year terms upon approval of the electorate. Every two years one of the judges is elected as presiding judge by the judges of the court, subject to approval of the Nebraska Supreme Court.

To the inquiry with which this note commenced – whether the way pain feels to an individual is *subjective* – Bourke offers an unequivocal reply: “[P]eople *do* pain in different ways. Pain is practiced within relational, environmental contexts. There is no decontextual pain-event. After all, so-called ‘noxious stimuli’ may excite a shriek of distress (corporal punishment) or a squeal of delight (masochism). There is no necessary and proportionate connection between the intensity of tissue damage and the amount of suffering experienced since phenomena as different as battle enthusiasm, work satisfaction, spousal relationships, and the color of the analgesic pill can determine the degree of pain felt. ... [A]nd [e]xpectations influence whether a person feels ‘pain’ or simply ‘pressure.’”

* *See also* THOMAS DORMANDY, *THE WORST OF EVILS: THE FIGHT AGAINST PAIN* (Yale University Press 2006) ; MELANIE THERNSTROM, *THE PAIN CHRONICLES: CURES, MYTHS, MYSTERIES, PRAYERS, DIARIES, BRAIN SCANS, HEALING, AND THE SCIENCE OF SUFFERING* (Farrar, Straus and Giroux 2010); FRANK VERTOSICK, JR., M.D., *WHEN THE AIR HITS YOUR BRAIN: TALES OF NEUROSURGERY* (W.W. Norton & Co. 1996).

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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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.

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November: A Time to Celebrate “NAWCJGiving”



By: Hon. LuAnn Haley*

With the Thanksgiving holiday approaching, it seems the appropriate time to acknowledge the generosity of the members of NAWCJ. Our organization is proud of the members of NAWCJ who give much to the legal profession and their local communities across the country. So it is with pride and gratitude that I write about our members, by no means including all of the gifts of time, but instead recognizing the generosity of our NAWCJ judges who work hard in the field of workers' compensation across the United States.

Starting at the top, Judge Jennifer Hopens is the President of NAWCJ and leads by example of giving of her time and talent to our organization. Not only does Judge Hopens handle the business of running NAWCJ, she takes time to attend the national meetings as a representative of our organization, giving NAWCJ a national presence. In addition to handling the nuts and bolts of running this organization, she also writes an eloquent and entertaining “President’s Page” to open each monthly newsletter. We all say thanks to Judge Hopens for her hard work in support of our organization at the highest level.

Lending time and support to the President, the NAWCJ also has a wonderful group of officers that make up the executive committee of the NAWCJ. Those officers include: Jim Szablewicz, Bruce Moore, Robert Cohen, and Michael Alvey (Past-President). Our hats off to each of these busy judges as they give of their time and expertise to make sure the business of NAWCJ runs smoothly.

I would be remiss if I did not extend my personal thanks to the members of the *Lex and Verum* Editorial Committee: Shannon Bruno-Bishop, David Langham, and David Torrey. Each of these judges give generously of their time to insure that our readers receive a scholarly, interesting and timely publication each month. Judge Langham, who has a full plate without his work for NAWCJ, spends long hours each month laying out this publication and seeing that it is distributed timely. Judge Torrey, who also publishes a lengthy quarterly newsletter in Pennsylvania, always has a scholarly article, one which he has just completed, to add to our copy each month. Judge Bruno-Bishop, not last in any regard, works tirelessly to complete articles summarizing seminars despite her busy schedule at work and thereafter at home as a parent of two young children. Kudos to all on the Editorial Committee for the gift of their time to make the NAWCJ newsletter a respected national publication in the field of workers' compensation.

All members of the Board of Directors, you can see the full list on page 7, expend time and talent in making the NAWCJ an effective and efficient organization which serves workers' compensation judges across the United States. We extend our thanks to the Board for their dedication to NAWCJ.

Celebrating Thanksgiving will not be complete without acknowledging the work and generosity of the members of NAWCJ who are not now members of the Board. Below you will find only a few of the many contributions of our members and we acknowledge these judges with gratitude this holiday season.

Starting in my home state of Arizona, **Judge Paula Eaton** of Phoenix, sits as an advisory board member of Kid’s Chance of Arizona. Despite her ongoing personal battle with cancer, Judge Eaton has not only continued to handle her case load but also maintained her position as ALJ representative to Kid’s Chance of Arizona. With the Board of Kid’s Chance, Judge Eaton schedules monthly meetings with the ICA’s video conferencing system, reviews scholarship applications and participates in all decisions of the Board of Kid’s Chance. Judge Eaton we salute you and wish you well during your recovery.

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“NAWCJGiving,” from Page 8.

Arizona also is the home state for **Judge Gaetano “Guy” Testini**, who you may recall attended the Judicial College in Orlando two years ago. Judge Testini, in addition to a busy hearing schedule in Phoenix, gives much of his free time to the legal community. Importantly, he has served 15 years on the Board of Directors of Los Abogados, which included two terms as president, and is currently the regional President of the Hispanic National Bar Association. Judge Testini also lends his time and talents to the Gonzaga School of Law Dean’s Advisory Committee and he is church counsel for St. Peter’s Episcopal Church.

Moving to the great state of Kentucky, we come to **Commissioner Dwight T. Lovan**, the shining star and Commissioner of the Kentucky Department of Workers’ Claims. Commissioner Lovan has given generously of his time on a national level by serving first as President of SAWCA; and in 2014, President of the IAIABC. In 2016, he was honored with the Frances Perkins Award for his work in the field of workers’ compensation law by the IAIABC. In addition to his service at the national level, Commissioner Lovan has worked tirelessly in his state over the last few years implementing a paperless system for all workers’ compensation claims filed in Kentucky. Commissioner Lovan, your colleagues at NAWCJ salute you for your dedication and hard work in the field of workers’ compensation.

Heading south to the state of Louisiana, we find **Judge Pamela Moses-Laramore**, is a judge who also works with the Kid’s Chance scholarship program. Judge Moses-Laramore is the Court Liaison for the Workers’ Compensation Section of the Bar Association and participated in fundraising for Kid’s Chance for the last six years. Additionally, Judge Moses-Laramore is a local coordinator for SOLACE, a program which matches anyone with a connection to the legal community who needs help with someone from the legal community for assistance. The requests may include simply needing someone to watch a pet while in the hospital or a more substantial need of assistance with a medical condition, however, no direct requests for money are accepted by the program. The SOLACE program and Judge Moses-Laramore, through her work with this program, provide a vehicle for allowing the generosity of the legal community to shine while also assisting those in need in the legal profession.

Similar to the judges mentioned above, there are many in our organization who give generously of time and talents to the legal profession as well as their community. Thanksgiving is the perfect time to give our thanks to all of our members for your generous gifts of time throughout the year.

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

NAWCJ

National Association of Workers’ Compensation Judiciary

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NAWCJ Presents Joint Program at IAIABC Annual Convention



By: Deborah Wood Blevins*

On Monday, September 26, 2016, the NAWCJ co-sponsored a day long program with the International Association of Industrial Accident Boards and Commissions (IAIABC) Dispute Resolution Committee. Held in Portland, Maine at the IAIABC Annual Convention, this is the fourth year the groups have co-sponsored events.

The day began with a presentation by Commissioner Jeffrey Herwig of Maryland, who provided an in-depth look at “How Maryland Resolves Cases Quickly.” Known for rocket dockets and limited discovery, Maryland’s system has been stable for many years. Commissioner Herwig provided pictures of a courtroom and a video clip of a mock trial based on an actual hearing transcript. This “show and tell” presentation was both entertaining and informative.

Commissioner Herwig then joined a panel discussion of “Best and Worst Practices in Dispute Resolution,” moderated by Dispute Resolution Committee Co-chair Elizabeth Crum of Pennsylvania. Panelists Frank McKay of Georgia, Anne Green of South Dakota, and lawyers Doug Kaplan and Steve Moriarty of Maine compared and contrasted the systems of their respective states with the demonstration of Maryland’s system.

The afternoon session began with a panel on “The Role of the Adjudicator” moderated by NAWCJ Board Member Karl Aumann. Aumann discussed issues regarding salaries, terms, appointments, litigation structure, judicial atmosphere, and other judicial topics. He was joined by Allen Craddock of Texas and Jim O’Malley of Wisconsin.

The day ended with an interactive session moderated by Dispute Resolution Co-Chair Deborah Blevins of Virginia. Attendees were supplied electronic “clickers” by which they responded anonymously to a series of survey questions regarding how jurisdictions should use mediation or alternative dispute resolution programs to manage litigation. The responses were addressed in real time by panelists Abbie Hudgens of Tennessee, Paul Sighinolfi of Maine, and Ming Le Che of Washington.

Attendance was expected to be approximately eighty over the course of the day, and appeared to meet that goal. Comments were positive and encouraging for repeat co-sponsorship in the future, as the one-day seminar format enabled analysis of the role of the judiciary in workers’ compensation systems.

* Deborah Wood Blevins is the Managing Deputy Commissioner of the Virginia Workers’ Compensation Commission Alternative Dispute Resolution Department. She is a 1980 honors graduate from Swarthmore College and a 1983 graduate of the University Of Virginia School Of Law. Deputy Commissioner Blevins is Vice-Chair of the Joint ADR Committee of the Virginia State Bar/Virginia Bar Association and Co-chair of the Dispute Resolution Committee of the International Association of Industrial Accident Boards & Commissions (IAIABC).



Judiciary College 2016



NAWCJ Judiciary College attendees enjoy full access to the Mediation Institute Program on Sunday and Monday, as an alternative to judicial programming.

Judges Belcher (GA), Almeyda (FL) and Bishop (LA) judged preliminary rounds of the Earle Zehmer Moot Court Competition at the 2016 Judiciary College.



Your NAWCJ leadership (front, L-R) Judges Torrey (PA), Cohen (FL), Szablewicz (VA, Alvey (KY), Haley (AZ), Hopens (TX); (back row L-R) Langham (FL), Kellar (LA), Lott (MS), Belcher (GA), McKay (GA), Swisher (TN), Beck (SC), Moore (KS) (not pictured, Jane Williams (KY))

Using the American Inns of Court to Promote Professionalism and Civility in Your Workers' Compensation Jurisdiction



By Judge Neal Pitts*

For both workers' compensation practitioners and judges, an evolving and shaking landscape is occurring, and in some ways dramatically, in the workers' compensation arena from ever changing technology, public policy, economic pressures, and from political and social discourse. Additionally, the advent and the prevalence of electronic communication and social media is inevitably causing changes in the practice of law and in ways that do not enhance the overarching goal our adversarial system to allow well prepared and professional legal advocates to represent their parties' positions before an impartial judge to arrive at the truth of the case.

The purpose of this article is to introduce the judges who are members of the National Association of Workers' Compensation Judiciary (NAWCJ) to the existence of an organization which has been instrumental in affecting the practice of law and upholding and advocating values of professionalism, ethics, civility and excellence. It is hoped that by becoming aware of the existence of benefits of such an organization, that the members of the NAWCJ will consider becoming instrumental in developing such organization in their jurisdictions as part of the ongoing efforts to improve and promote excellence, civility and professionalism in the practice of law.

From our perspective as judges, we often observe unprofessional and discourteous conduct by the lawyers who practice before us. Often times, this conduct does not take place in front of us but is occurring in depositions and is discovered as we read through the deposition transcripts. This type of conduct is very difficult for us to influence or control from our positions as sitting judges.

As individuals, we are very limited in the type of influence we can exert. However, by joining with like minded colleagues and the bar, we can help shape these changes in ways that benefit and enhance the skills, practices, and both our individual and the system's reputation by upholding and advocating values of professionalism, ethics, civility and excellence.

One of the organizations whose historic mission is to not only uphold these values but also to inculcate these values in the rising generations of young lawyers is the American Inns of Court ("AIC"). The mission of the AIC is to "inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education and mentoring."

The AIC was first conceived in the late 1970's among the United States' members of the Anglo-American Exchange of Lawyers and Judges, including Chief Justice of the United States Warren E. Burger and Judge J. Clifford Wallace of the U.S. Court of Appeals for the



Ninth Circuit. After having concerns as to the deterioration of professionalism and civility in the American bar, Chief Justice Warren and others were given the opportunity to observe how barristers were mentored and trained in England through a system with origins that have been traced as far back as 1422. In 1980, a pilot program in Utah began in earnest with the formation of a small individual group of attorneys where the members met every month, broke bread together, got to know each other and conducted meetings in a way that provided an atmosphere of professionalism and civility.

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This movement now currently encompasses almost 400 chartered inns over 48 states, the District of Columbia, Guam and Tokyo. Membership in the organization consists of 30,000 active members encompassing various roles in the legal community including federal and state judges, lawyers, law professors and law students.

In Florida, the Orlando and Jacksonville areas have obtained charters to operate local Inns of Court and are operating local Inns. The Tampa Bay/St. Petersburg areas have just received a charter and will begin the process of developing an local inn within this geographical area.

Membership of these local inns is comprised of attorneys, mediators, judges, and law students interested in and whose practices are focused primarily in workers' compensation. The Florida Inns follow the 1980 Utah pilot by holding scheduled meetings throughout the year where members spend quality time over meals and listening to invited speakers on interesting topics. The purpose of these gatherings is to foster relationships and communication between all sides of the workers' compensation arena and to emphasize the importance of professionalism, competence, and civility. This includes pupillage groups which are assigned and charged with presenting educational programs and speakers and the mentoring of younger attorneys. A vital function of the Inns is the mentoring, training, and development of young attorneys who will continue in the traditions of the Inns in their practices.

As part of its outreach efforts, the Orlando and Jacksonville Inns held a luncheon during the last two workers' compensation conferences in Orlando and these luncheons are anticipated to be annual events. These luncheons were attended by the judges and court personnel from the First District Court Of Appeal, the Judges of Compensation Claims, the Workers' Compensation Section of The Florida Bar's leadership, and members of the local Inns. The invited speakers were federal district judge, Hon. Roy B. Dalton, and the chief judge for the 5th Circuit Court of Appeals, Hon. Carl Stewart, respectively.

Other benefits which the Inn movement brings to the profession include members being able to:

- Build and strengthen professional relationships in a setting of social interaction, education and skills development;
- Discuss fundamental concerns about professionalism, ethics and pressing legal issues of the day;
- Demonstrate/Promote/Elevate the significance of the practice to other practitioners and the public;
- Share experiences and advice;
- Keep experienced attorneys fresh and mindful of the need to set the example for others; and
- Advance the highest levels of integrity, ethics and civility.

Other practical benefits for membership include:

- Building a stronger rapport and relationship with opposing counsel to enhance case outcomes.
- Attending Inn programs often result in easy CLE credits (usually ethics) for attorneys and associates
- Network, "Educate" and or Communicate with judges and mediators outside of the courtroom setting.

Continued, Page 15.



- Associate with and learn/hear from some of the finest practitioners and jurists in your community.
- Listing Inn Membership on resumes, profiles or the firm's website looks good for marketing purposes.

It is hoped that this article has provided the reader with a sense of purpose of the Inns of Court movement and how it could be used in your jurisdiction to improve and promote excellence, civility and professionalism in the practice of law. It has been the experience in Florida that these Inns have accomplished much in a short time towards these goals. We firmly believe that greater progress is ahead.

* Neal Pitts was appointed a Judge of Compensation Claims on November 1, 2009 to serve in the Jacksonville, Florida district office. Effective December 1, 2010, he was transferred to the Orlando, Florida district office. He received a BA degree in 1975 from Rhodes College, a JD degree from Ohio Northern University in 1978, where he was a member of the Law Review, and received a Master of Laws (in taxation) from the University Of Florida Levin College of Law in 1982. In law school, he was inducted into the Phi Kappa Phi and Willis Society honor societies and listed in Who's Who in American Colleges and Universities and the National Dean's List. He authored two articles published in the Ohio Northern University Law Review in 1978 and 1982 and received a Certificate of Merit for outstanding contribution to the field of legal journalism from the Ohio Northern University Law Review in 1982. Prior to his appointment as a JCC, he practiced law as a private practitioner in the Orlando, Florida area. He has been a member of the Florida Bar since May 31, 1979. He received an AV rating from Martindale Hubbell and is listed in The Bar Registry of Preeminent Lawyers. He is a member of The Florida Bar, Orange County Bar Association, Central Florida Association for Women Lawyers, the Hispanic Bar Association, an honorary member of the E. Robert Williams American Inn Of Court, currently serves as the President of the Judge William Wieland American Inn Of Court, and is president of the College of Judges Of Compensation Claims. He also serves as a member of the Advisory Board for the University of Florida College Of Public Health and Health Professions.

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Virginia Commissioner Roger Williams Passes

By David Langham

Virginia's workers' compensation system has suffered a great loss. On October 11, 2016 Commissioner Roger Williams passed after a brave and arduous medical battle. For the second time this year, I find myself writing to memorialize one of our nation's great workers' compensation leaders.

I remember meeting Roger Williams in July 2011 at a conference in Biloxi, Mississippi. I was there to speak on a panel. Karl Aumann of Maryland was running that event. He introduced me to Roger, who was welcoming and friendly. We spoke at length, and I felt fortunate for his attitude and openness about the challenges of worker's compensation, particularly on regulating and running it. Roger was a friendly, outgoing person.

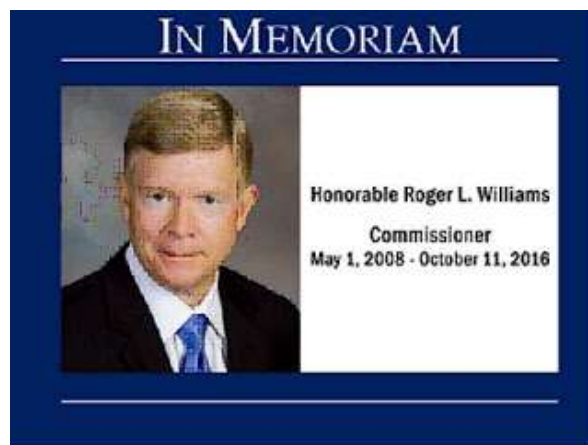
I next saw Roger at the Southern Association of Workers' Compensation Administrators (SAWCA) All Committee Conference (ACC) in New Orleans, Louisiana in November 2012. We were both engaged in the program, but somehow Roger made time to traverse the busy room to spend a few moments. He seemed to know the news in your state as well as his own. He was impeccably well informed. He was a gentleman who always found time to talk and listen.

Roger had been elected SAWCA Vice President the prior July. In SAWCA, you serve as VP, President-elect and then President. I remember the Thursday night SAWCA "coffee and cordials" in New Orleans. I joined a conversation with Roger and Dwight Lovan. Roger steered the conversation to his vision for the future of SAWCA. Out of the blue, Roger explained to me that I would be VP after him (he did not ask, he told). He had a plan. A few months into his journey through SAWCA leadership, Roger had a plan. Roger was a visionary, a planner.

I will always remember Roger's laughter and cheer that evening. He was in his element. I took Roger's comments about my leading SAWCA with a grain of salt. I was flattered and frankly embarrassed by his conviction that I should follow him. I rather thought he must be kidding.

I spoke with Roger a few times in the months after New Orleans. Kidding he was not. In July of 2013, at the Don Cesar in St. Petersburg Beach, I was nominated and elected to serve as SAWCA vice president. I believe that it's fair to say I was talked into this by Dwight Lovan, Gary Davis, and Roger Williams. And Roger wore that signature smile the whole time. Roger was persistent and committed to his goals.

In November 2013, I attended the SAWCA ACC at Saint Simons Island Georgia. The Executive Committee dinner was at a fantastic restaurant. In all of my workers' compensation travels, perhaps it was the best meal ever. After dinner, Roger arose to make some comments and announcements, and Roger is what makes the night stick in my mind, despite the fantastic food.



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Roger Williams, from Page 16.

That night we all learned (or perhaps others already knew) that Roger was an amateur magician, since childhood. Despite encouraging calls from the audience, no rabbit was produced from a hat. However, Roger regaled us for several minutes with multiple slight-of-hand tricks. In typical Roger Williams' style, the smile never left his face, and the jokes and quips flowed freely. It was like a routine at the Comedy Store, Roger's own brief HBO Special. Roger was again in his element, singling out attendees for this or that comment or joke. Roger was always genuine and openly engaged with people.

I was proud when Roger was inducted as a Fellow of the College of Worker's Compensation Lawyers (CWCL) in 2014. He was honored and pleased. He told me that this experience was all the better because he was inducted along with Judges Alvey, Belcher, Kellar, Lott, Lovan and Szablewicz. Roger was proud of his profession, his associations, and his friends.

Roger was a leader in designing and implementing the SAWCA Regulator College. The first year, he and Judge Belcher sat through both days, a full time job. The second year, he was scheduled to present, but did not make it due to food poisoning. We virtually sent out search parties when he did not show. His absence generated widespread concern (pronounced "panic") because it was so out of character. Roger was known for being dependable and reliable.

When I saw him last July, Roger was making jokes about cancer. He moderated the SAWCA Regulator Roundtable at the Annual Convention (to me it seems like he always did this). Roger really enjoyed the Roundtable; he liked preparing for it, moderating it, and his quips and comedy made it flow. He had become "Mr. Roundtable." As Mr. T might say, "I pity the fool" that has to try and fill Roger's shoes next July.

At the conclusion of that July roundtable, I presented Roger with a small acknowledgment of his effort, a framed picture of the Blue Angels. As I posed with him for a photo, he solemnly said he was going to take that picture home with him on the airliner. Then he dropped the punchline: that he would henceforth tell people "he flew with the Blue Angels." That was classic Roger. He was quick witted and sharp. Always on-cue and unscripted.

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Roger Williams, from Page 17.

I do little with Facebook. I understand Roger's Facebook friends received updates in recent months. I fortunately received a periodic email pasted from Facebook. I was up-to-speed, but sporadically. I really only got one theme from those posts: Roger was incredibly cared for and loved. I reflect on the last year, after learning of his condition last November, and I think how incredibly short a time he had. But he was never alone.

Selfishly, I lament Roger's passing October 11, 2016. Things won't be the same without Roger. I know he was suffering though, and that this is part of a larger plan. We will all process through our grief. Hopefully we will remember that Roger was always quick with a quip. He brightened a room. He was a good friend, a valued colleague, and an amazing intellect. I will miss you Roger, Godspeed.

P.S. I am tired of writing about friends lost though. 2016 has been one tough year. The rest of you better stick around.

SAWCA All Committee Conference November 15-18 Kiawah Island Golf Resort

SAWCA may have had a crystal ball when it planned its programming for the upcoming SAWCA All Committee Conference November 15-18 at Kiawah Island Golf Resort. The conference theme is The Future of Workers' Compensation? On the second day of the conference there will be not one, but two sessions on "Continuing the Conversation on the Future of Workers' Compensation." Panelists for the first session will be Barry Dillard (Director, Claims Management at Walt Disney World), Matt Bryant, Chief Executive of WorkComp Strategies), Jennifer Horejsh, Executive Director of IAIABC, and Mark Arden (well-known plaintiff's attorney from Columbia, South Carolina). This session will be moderated by Dwight Lovan, Commissioner of the Kentucky Workers' Compensation Commission. The second panel will be moderated by Frank McKay (Chief Appellate Court Judge and Chair of the Georgia Board of Workers' Compensation) and panelists will be Wes Marshall (Chairman, Virginia's Workers' Commission), Karen McKinney (Commissioner, Arkansas Workers' Compensation Commission), Ron Jackson (American Insurance Association Vice President for State Affairs), and Mona Carter (Senior Division Executive, National Policy Development for the National Council on Compensation Insurance). It will be interesting!

Interesting Workers' Compensation Blogs

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Workers' Compensation

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Virginia remembers Commissioner Roger Williams

By contributors

Editor Note: The Lex asked for remembrances of our friend and colleague, Roger Williams. What follows are thoughts of some that worked with and around Roger at the Virginia Commission. Though there is sadness in his passing, there is joy from his life. Each comment is attributed to its author.

I interviewed with the firm of Williams, Lynch & Whitt after graduating from law school but before passing the bar. Following the interview, Roger called and told me to come to the office ASAP to discuss the job. He asked how long it would take me to get there. Because I was wearing shorts and a Grateful Dead t-shirt, I said an hour. Roger told me to come as I was. Fortunately, I didn't because he offered me the job, thus beginning my career in workers' compensation.

The day the bar results were to be posted, Roger walked into my office claiming to have bad news. He said a friend from the Supreme Court had told him I had not passed the bar. He was, of course, joking but entirely unprepared for my tears. He quickly came clean and later, when it was learned I passed, he hosted a party on my behalf. Of course, Annie did all the work.

When I applied to be a Deputy Commissioner, Roger was on the panel that interviewed me. He made me feel comfortable and we joked throughout the interview. I thought I had gained some measure of respect because I could keep up with and return his witty banter.

I recall the first SAWCA conference I attended. So very much of what I learned from that conference came to pass here at the Commission. Roger knew how valuable attendance and involvement in such organizations was for the Deputies and was instrumental in making the conferences available for the Deputies.

There are too many wonderful happy hours and dinners to count. The "gang" here at the Commission would meet for "coffee" at The Betty, our favorite watering hole. Christmas 2014 will remain my favorite memory – a legendary afternoon and evening about which no more will be said. Roger loved the meatballs at The Betty which was one of the few semi-unhealthy things I ever saw him eat. We still occasionally gather at The Betty but it will never be the same without Roger.

Brooke Anne Hunter, Deputy Commissioner

Even his most casual acquaintance was aware of Roger's passion for magic. Many have been entertained and amused by his slight of hand and witticisms. But that magic was merely an illusion. The real magic of Roger Williams was his ability to turn every challenge and problem, no matter how vexing, into an adventure to be savored. It was the way he made everyone regardless of station, from janitor to judge, feel like the most valuable player on the team. It was his constant inspiration to move "onward and upward." That was the real magic of Roger Williams and those of us who were fortunate to have come under its spell are forever the better for it.

Jim Szablewicz, Chief Deputy Commissioner

I have so many remembrances for Mr. Williams. I just can't put them to paper this week and hold it together too. I can quickly say that he wasn't your average boss. With his constant support and encouragement, he made me want to do my best work every day.

Lauren Hill, Roger's Staff Lawyer

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I joined the Commission about six months after Roger did. I remember when I came to Richmond on my very first day of employment, for training, Roger was standing at the top of the stairs, smiling and looking dapper as always, waiting to greet me. He really made me feel welcome and important! As Evelyn stated in her eulogy, he tried to make everyone feel special and important. Since I have been with the Commission, it really has become a family, and I think he was the father. Over the last 8 years, I also felt like Roger became a friend, not just a boss. His humor and infectious personality will be greatly missed.

Jimese Sherrill, Managing Deputy Commissioner, Manassas Regional Office

I had heard of Roger Williams for years before I met him. He and I actually had a few cases together, but we either settled them or he sent an associate to try them, as I live in the boonies. Sharp, smart, funny – that was my impression before meeting him face to face.

After I became a Deputy Commissioner, Roger had a case scheduled on one of my hearing dockets. When he walked in the back of the courtroom I thought, “That man has better hair than I do!” That day, and in the years to follow, my impressions of Roger were consistent. He was incredibly smart; he had a sharp wit and quick retort; he was funny and fun; and he consistently had better hair than me. I love him and miss him.

Deborah Blevins, Deputy Commissioner

Over the course of the last year, we have heard Commissioner Williams, Mr. Williams, and Roger (he has many names) mention that cancer is the gift that keeps on giving. What a profound statement from him as he courageously battled this disease. He looked upon it as a gift that made him a better man and a better person. But Roger was a gift to us at the Commission, which he loved as we loved him. Roger was the gift that keeps on giving. A gift is wrapped and valuable and voluntarily transferred from one person to another. As our gift, Roger was wrapped in starched shirts, sporting gold cufflinks, a perfectly placed handkerchief. He drove a convertible yet his hair was always in place.

Like a true leader, Roger worked alongside people as he led. He made you feel good even when you did not feel good. He never took credit but found joy in bringing credit back to the Commission team members. He would walk up to new employees, introduce himself and encourage them to talk about themselves. He did this with front line employees, managers, janitors, it didn't matter. His etiquette was perfect. He was a gentleman and a class act. On Thanksgiving he would send the entire staff a message, thanking us for the work we do. He made us laugh, made our work better because he appreciated what we did.

Roger led the effort to have the Commission become involved with SAWCA, IAIABC, the National Association of Workers' Compensation Judiciary and other organizations. As a result of his efforts, the Virginia Commission has been recognized across the country.

The second Book of Timothy, Chapter 4, verse 7 says: For I am already being poured out like a drink offering, and the time of my departure is at hand. I have fought the good fight, I have finished the race, I have kept the faith. Let there be no doubt, we loved Roger Williams. He was a blessing, a gift, and forever a member of the Commission's family.

Evelyn McGill, Executive Director

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Mr. Williams was the first supervisor at the Commission who approached his position similar as one would approach developing a successful private corporation: he emphasized a team effort and complimented everyone's contribution. Mr. Williams created a positive collaborative work atmosphere which we all continue to enjoy to this day. He was charismatic, intelligent, humorous and kind. Every holiday season, Mr. Williams treated his team to lunch and gave us presents...and performed magic at the table. And yes, I was the woman sitting in the balcony that noticeably lost her composure during the service.

Dana Dallas, Roger's Staff Lawyer

I was very fortunate to be one-fourth of Team Williams for 8½ years, and at one point early on, thought it was coming to an end. Mr. Williams was usually in control of whatever situation arose. However, on one occasion, his wife Annie and I were able to take over that control – and with great glee. Mr. Williams had been commissioner a little less than a year when Valentine's Day rolled around and Annie secretly sent the Sweet Adelines to serenade him for the occasion. My role entailed getting him to the front of the lobby in response to the Security Guard's call for immediate assistance. After trekking down the back stairs and the long hall, he preceded me into the front lobby. At that point, the Sweet Adelines burst into song, staff began to applaud and one of Mr. Williams' greatest moments of embarrassment occurred. Following their departure, Mr. Williams emailed Annie that they were divorcing and I was fired! I am very thankful that neither of those events occurred, and we continued to work together for another 7½ years.

Nancy S. Truman, Roger's Commission Secretary

There is something wrong with my dog. Before bringing 8-week old Winston home in early June of this year, I read the latest literature addressing the proper way to raise a puppy. On this subject, I am no neophyte. Like forty years ago, the foundation of canine psychology remains the relationship between the puppy and the owner. However, current thought focuses less on specific training techniques and more on the owner's role as the alpha dog. The theory is that social animals desire the security they find in the presence of a natural leader to whom they will freely submit. Therefore, behavioral problems are not the fault of a recalcitrant student but of the owner's deficiency as leader; something akin to a character flaw.

I have endeavored to be the calm, assertive leader described in the books I have read. For unknown reasons, however, Winston has refused to assume a corresponding submissive state. We have engaged in what would charitably be called a leadership negotiation. We will soon be entering the sixth month of that negotiation. Yet to be decided is who's the boss of who.

In the pre-dawn hours Winston pulls me through the streets of my neighborhood, while I struggle to find words for my feelings about Roger's untimely death. Nothing seems entirely adequate. Perhaps our relationship finds some context in this antidote. During a typical day here at the Commission, Roger would walk into my office at noon and say, "Okay big boy, let's get some lunch." I would arise, no less committed to follow his steps than were I tethered by a leash.

Ferrell Newman, Virginia Commissioner



Can We Change the Culture of Comp With a Single Word?



By: Robert Wilson*

This will not be a new idea from me, but after proposing it at numerous presentations around the country over the last three years, I know it is an idea that bears repeating. It is a concept that has been universally well received by audiences and blog readers alike, and it serves as a pivot point in our ongoing national discussions regarding the future of workers' compensation.

The word, of course, is "recovery", which I have been advocating be used in place of the word "compensation" in our industry masthead. Simply stated, I have been proposing that the industry known as "Workers' Compensation" be renamed; to the more aptly titled and more easily defined, "Workers' Recovery."

The concept first started its gestation with the realization that those people who were newly injured and completely lost within the matrix of workers' comp were focusing on the word compensation; usually without fully understanding it in terms of how we are statutorily defined to provide it. As I originally wrote in 2013:

Our website is open to all, and while we primarily serve employers and the workers' comp industry that serves them, we have a healthy dose of injured worker traffic as well. The injured workers are very active on our Discussion Forum. Over the years I have been bothered when I see a new injured worker find their way to the forum, give a general description of their accident, and then often ask the question, "How much will I make?"

The better question would be, "How do I get better?", or "How do I manage this complex and frustrating system and get back to work?" Our office receives a steady stream of phone calls from people who do not understand what workers' compensation is. Their questions are sometimes centered on receiving compensation, even if they have never had an on the job injury. Some have been injured at home or elsewhere, but hold out hope that compensation is available to them, since they were a "worker". One young lady, gainfully employed, simply had financial issues and wanted to know how she could get workers' compensation to help in her predicament. When informed what workers' comp was, she responded with, "Oh, I have to get hurt first?" The industry name conveys the wrong message to those people.

The industry itself is influenced by this notion. We spend a vast amount of time and resources managing and litigating both medical and compensation, with comparably little effort toward restoring the value and purpose of the workers' we deal with. You are far more likely to hear from today's overworked adjustor the stated desire to "settle and close" rather than to "recover and return".

I have had the intense honor of speaking at a fair number of conferences and seminars over the last three years. I've been asked to speak on numerous topics; technology in the industry, misperceptions that hurt the quality of our outcomes and cost us money, even what the future of comp may look like. I always, however, manage to work the idea of "Workers' Recovery" into the session. And it is always well received, with numerous positive comments from people that hear the concept.

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While I realize that such an endeavor is a herculean task, and I may never see the results in my lifetime, it is beginning to get some traction from a working perspective. I know of one state agency that has adopted the “Recovery” theme for its training sessions and other activities. I’ve had the head of another agency tell me they would like to be the Chair of the “Workers’ Recovery Board” in their state. We’ve even had a legislator in one state inquire of their workers’ comp agency on the practicality of making that change.

Using the word “Recovery” in our title would immediately change the dynamic for newly injured workers entering the system. Today, they are told by their boss they must complete a workers’ compensation FROI. They are assigned a workers’ compensation adjuster. In many states they are sent to a workers’ compensation doctor. Compensation is the common word, and, as previously noted, with our “process and close” mentality, recovery is often a happy coincidence when it does occur.

Imagine if that worker, ignorant of who we are and what we do, is told they need to complete a Workers’ Recovery Claim. They are assigned a Recovery Specialist. And they are not a claimant, or even an injured worker. They are, from day one, a “Recovering Worker”.

Could that make a difference in their focus, and the trajectory of the claim? I think, in many cases, it would. And this is where the idea serves as a pivot point in our “National Discussions” on workers’ comp. At the Dallas meeting of the Workers’ Compensation Summit, one point of disagreement arose when some members objected to our group addressing what they saw as “cultural issues” in workers’ comp. They maintained that the group could only approach those issues which could be addressed legislatively, maintaining that we had no ability to change the cultural elements of the industry.

While I consider one of the people making this argument a good friend, and understand his concerns, I disagree on the point that culture cannot be affected through legislative action – and the “Recovery” concept is the best example of my argument. No state will be able to rename their workers’ comp system without legislative action making it possible. “Workers’ Recovery” will require such in virtually every jurisdiction if it is to become a reality. And it is an example of how legislative action could have immediate and dramatic impact on the culture of our industry.

Change the name. Change the culture. While much more work would follow that action, it is a singular point of transformation that could bring dramatic effect in its own right.

Workers’ Recovery. Finally, change we can really believe in.

The foregoing was originally published on From Bob’s Cluttered Desk Blog, and is 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. He is available for conferences, corporate events, children’s birthday parties and Bar Mitzvahs.



An Interesting Review of Separation of Powers in Oklahoma

By David Langham

Recently, the *Tulsa World* reported on the relationship between the Governor of Oklahoma and the Chair of its Workers' Compensation Commission in *Workers Comp Commissioner Defies Governor Fallin's Demand for Resignation*. On Friday, WorkCompCentral reported on this in *Senator Condemns Governor's 'Intermeddling' With Comp Commission*.

The story may be fairly familiar by this time. In addition to making the workers' compensation news last week, commentators like Bob Wilson have discussed it, with a touch of humor, *Oklahoma Workers' Comp: Stranded on Gilliland's Island*. Other commentary is bound to follow. This story is simply too interesting to ignore. Much interest will be for the intrigue, but it is also interesting legally.

The *Tulsa World* story Thursday started the attention. It revealed that in late August Governor Fallin of Oklahoma corresponded with Robert Gilliland, the Chair of the Oklahoma Commission, and requested that he resign. Chair Gilliland purportedly replied in writing and declined to resign. He says that the Governor's request was "inappropriate and illegal."

Reportedly, Gilliland feels his resignation was requested "because of 'dissatisfaction with a decision the Commission made in a case.'" There is speculation that the decision in question was the Commission's declaration that the workers' compensation opt-out, commonly referred to in industry circles as the "Oklahoma opt-out" is unconstitutional. When the Commission made that decision, there was discussion about its authority to do so. However, as reported by WorkCompCentral, Governor Fallin's spokesperson has said the governor "had 'multiple reasons' for being dissatisfied with Gilliland's performance." The spokesperson also said that "the specifics have been conveyed to the chairman."

As explained in other posts, there is a general proposition that executive branch agencies lack the authority to make decisions about constitutionality. The Florida Judges of Compensation Claims, for example cannot decide if a statute passes constitutional muster. Such decisions in Florida are left to the constitutional courts. I remain astounded at how many practitioners and even judges refer to this administrative office as a "court," when it is so clearly not one. *In Re Amendments to the Rules of Workers' Compensation Procedure* ("The Office of the Judges of Compensation Claims (OJCC) is not a court of this State").

The Florida OJCC is not a "court," and the Florida Supreme Court has clearly held so. When referring to this Office, the appropriate terms may include "the Office of Judges of Compensation Claims" or "the OJCC" or "this Office," or "the Judge," but not "the Court" or "this Court." Use of that term is inaccurate and therefore confusing.

So, there was much discussion about the Oklahoma Commission ruling when it was rendered last February. Did the Commission have such authority as an Executive Branch agency? From high school civics, most will remember that American government is generally divided into three branches, the executive, legislative, and judicial. This division of responsibility is a product of our constitutional form of government and is delineated in both the United States and various state constitutions. It is referred to as "separation of powers," a fundamental element of this constitutional republic.

The Oklahoma legislature, however, in creating the Oklahoma Workers' Compensation Commission in 2013 declared that agency to be a "court" for the purposes of making decisions. Such a declaration is dependent upon the powers conveyed by a particular state's constitution. Florida's constitution does not empower the legislature to make such a declaration, to create such a "court." In Florida a "court" can be created only by constitutional amendment. But in Oklahoma, the constitution empowered the legislature to make such a declaration, to create a court, and the legislature did so.

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The 2013 workers' compensation legislation was a dramatic change for Oklahoma on several levels. Until 2013, workers' compensation disputes were decided by a specialized bench or "court" for such disputes. That court was housed within the judicial branch of Oklahoma's government. At that time, a handful of states had such an arrangement, and both Oklahoma and Tennessee created administrative agencies for dispute adjudication that year. Currently, only Alabama still uses its constitutional courts for adjudication of new workers' compensation disputes. In Oklahoma that court still exists, now called "the court of existing claims," and adjudicates only the disputes regarding accidents prior to the 2013 change. It is expected to diminish over time in terms of workload and personnel.

The decision of the Oklahoma Workers' Compensation Commission, declaring the Oklahoma Opt-Out unconstitutional, received a fair amount of discussion in the workers' compensation industry. There were those that perceived the Commission's decision contradictory to its own earlier decisions about the scope of its authority. Others found it curious that an executive branch administrative body, at the time composed of one business person, one doctor, and one lawyer, could make constitutional decisions. But, the authority of the Commission has been accepted as an appropriate legislative delegation of power. And, the state's Supreme Court has since affirmed the Commission's decision and authority. In doing so, some believe that the Court has accepted and/or endorsed the state's adoption of the administrative workers' compensation process.

The issue of separation of powers is now back in the news following this letter in August, in which the Governor sought Chair Gilliland's resignation. This has been characterized variously. Some conclude that a Governor seeking resignation of an administrative agency head is merely engaged in the appropriate management of the executive branch. Others perceive this as meddling in the affairs of a "court," which is nonetheless still part of the executive branch. And thus, there is the current return to the discussion of "separation of powers" in the Oklahoma situation.

I am reminded of an old series of television commercials that focused us upon differing perspectives. In each commercial, through some contrived collision between a lover of chocolate and a lover of peanut butter, the two commodities would become intermixed. One party would claim "you got peanut butter on my chocolate," while the other would argue instead that "you got chocolate in my peanut butter." It was a wildly popular ad campaign, and the solution of course to all the argument was purported to be a candy bar containing both elements.

I wonder aloud if it matters whether one is on the other (peanut butter on my chocolate) or in the other (chocolate in my peanut butter). The fact is that how you perceive the current situation (of chocolate and peanut butter mixed) may well depend a great deal on whether you individually prefer chocolate or peanut butter. Is the Oklahoma Commission an administrative agency with court powers, or is it a Court within the executive branch? And that determination may well flavor how a particular individual sees the outcome of this current dispute.

The point of the debate may be moot in time. According to the *Tulsa World*, Governor Fallin has already decided that Chair Gilliland "will not be reappointed when his term expires in August 2017." Thus, there may be conjecture and discussion as to whether an appointed official such as Commission Chair Gilliland can be removed from office. Or, it is possible that the conversation will become about leadership being marginalized, as we have seen in Iowa.

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In 2011 Iowa Governor Branstad first sought workers' compensation administrator Godfrey's resignation. When that was rebuffed he cut Godfrey's pay significantly. A lawsuit remains pending regarding that executive agency dispute.

But, in the end, Gilliland's effectiveness as Chair may be impaired by the simple conclusion that regardless of future performance his tenure will close in ten months. Whether he can or cannot be forced to withdraw, it seems clear that the Governor can elect not to reappoint him when his term expires. Though Commissioner Gilliland concluded in his letter to the Governor that he believes "it is in the best interest of the injured workers, employers, insurance carriers, employees of the Commission and the people of the State of Oklahoma" that he "remain at the Commission," it appears as clearly that this conclusion is, at best, up to him for the next ten months. And, it is possible that all of this publicity and discussion alone may itself impair the Commission in coming months.

So, some believe that the Governor's request for a resignation was a normal administrative action, in which an agency head would be replaced. A Gubernatorial spokesperson said "it is perfectly appropriate and legal for the governor to request any appointee's resignation at any time." And there is ample support for that contention across the continent regarding administrative agencies generally.

Others perceive this request as executive branch meddling with a state court. One community leader quoted by the *Tulsa World* said that "under the tradition of separation of powers, it is inappropriate for people to try to affect those decisions" (of the Commission). I certainly think that everyone is entitled to their own opinion(s), but the characterization of "separation of powers" as a "tradition" is curious; separation of powers is a constitutional construct that is at the foundation of American constitutional government. The question, really, is whether this situation actually implicates separation of powers.

According to WorkCompCentral ("WCC"), the governor's request for Commission Chair Gilliland's resignation has drawn criticism, some of which comes from those who oppose the 2013 workers' compensation reforms, including the very creation, and empowerment, of the Commission. One critic told WCC that "it seems the governor's office has 'a very clear idea of the results they expect' from commission decisions, and 'if you don't give them what they want, you will be removed from the process.'"

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Letter to the Editor

I read with great interest David Langham's article "Judge Disciplined for Ex Parte Communication" in the October 2016 *Lex and Verum*. I noted Judge Langham's tocsin about ever using court stationery for letters of recommendation and the reasoning behind it. Virginia's Canons of Judicial Conduct have a slightly different twist. Our Canon 2B states a judge should not lend the prestige of judicial office for the benefit of others. Yet, in a different analysis than Judge Langham's, the commentary to the Canon states:

"Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. When using court stationery for letters of reference an indication should be made that the opinion expressed is personal and not an opinion of the court. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such person information for the record in response to a formal request."

So the Canon and the commentary together may represent some fine hair-splitting. A judge should not lend the prestige of his office for the benefit of others. However, a virtually anonymous recommendation letter might have little or no value to the recipient. Perhaps this is a compromise to preserve the judge's credibility in writing a reference while emphasizing the need to avoid an "official" reference. I wonder whether it might stem from the need for judges to give recommendation letters for law clerks, where employment with the judge would likely be known to those in the bar.

Wesley Marshall,
Chair
Virginia Workers' Compensation

Commission Chair Gilliland's refusal to resign drew praise from some of those same system and reform critics. One said "he considered it 'a serious miscarriage of justice to try to influence a judge,' and that Gilliland was praiseworthy for "having the courage to resist attempts to influence decisions in workers' compensation cases." This system-critic also said that Gilliland is "one of the most respected lawyers in Oklahoma City, and his integrity is unquestioned." Not faint praise from any perspective.

It is important to remember that there is a certain element of criticism in any change. We as human beings do not traditionally react positively to change in many instances. And, it seems that our propensity to accept change may be affected by how accustomed we have become to the current status quo when change comes our way. There are changes advocated constantly in American society, business, government, and more. And, how we each react to those changes is critical to both our function and our psyche. In that context, the 2013 change in Oklahoma was significant, and it is perhaps inevitable such systemic change will bring disagreement and discord.

I met Robert Gilliland at a meeting of the Southern Association of Workers' Compensation Administrators (SAWCA) in Williamsburg, Virginia. It was July 2015 and he happened to sit next to me at the annual Regulator's Roundtable. Discussion centered initially on the variety of issues and constitutional challenges to statutes around the country, and I delivered a short update on the Florida litigation in *Padgett* (A Rose by Any Other Name), *Castellanos*, and *Brock*. Workers' compensation for the last few years has been interesting here in Florida too after all.

I recall feeling like there were many active challenges and issues in Florida at that time. And then Robert Gilliland delivered an overview of Oklahoma's creation of a whole new agency, and the challenges, legal and logistical. They were two years into a whole new administrative process at that time, and facing multiple constitutional challenges to it and to the revolutionary concept of an opt-out that included employer immunity. I remember after he spoke of those challenges, I leaned over and told Robert "thanks for being here." I found the Oklahoma experience and challenges intriguing and educational.

As an industry, we witness innovation and effort in various jurisdictions. There are attempts to streamline processes, innovate with technology, and deliver services to injured workers and employers. I have been fortunate to know a great many state workers' compensation administrators, board members, commissioners, directors, judges and more. I have been consistently impressed with how focused they all are on serving their states and the constituents of their workers' compensation systems. I do not always agree with them, but on the whole I find them sincere and well-intentioned. We learn a great deal from each other, and from the events in each other's states.

I will be watching Oklahoma's current discussion, as I have watched it for years regarding the opt out. I will be interested to see how the current contentions and disagreements work out in time.

The foregoing originally appeared on the Florida Workers' Compensation Adjudication Blog. It is reprinted here with the permission of the author.

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From the Pages of workcompcentral®

NCCI: Medical Severity, Utilization Fell Last Year

Thursday, October 20, 2016

The medical severity of workers' compensation claims fell last year in states administered by the National Council on Compensation Insurance, driven by a reduction in medical utilization per claim, NCCI said.

NCCI said in a quarterly economics briefing released Tuesday that medical inflation increased 2.6% in 2015. Medical severity is driven by the combination of the price and utilization of services. Because prices went up last year, utilization must have fallen to result in an overall decrease in severity, NCCI concluded. "The surprising decline in utilization is an area we are currently researching," the NCCI authors said in the report. More details are expected in an NCCI report next month.

At least one insurance company in an NCCI state is seeing the trend. Pinnacol Assurance in Colorado noticed a decrease in utilization of medical services per claim last year, Amy Newton, vice president of claims, said through a company spokesman. The decrease is "not huge," but it's noticeable, although the company has not yet pinpointed a cause.

The NCCI economics briefing provides forecasts for economic factors expected to have an impact on workers' compensation. It uses Moody's Analytics and U.S. Department of Labor data as sources.

Medical inflation is expected to hit 3.9% this year and rise at a slightly slower rate of 3.7% next year, the NCCI report said. Medical inflation is expected to outpace general inflation, which is projected at 1.2% this year and 2.4% in 2017. "However, if medical utilization continues to decline, as it did in 2015, then the overall change in workers' compensation medical severity could be quite different from medical inflation," the NCCI report said.

Job growth is slowing after peaking in 2015, when private, nonfarm payrolls added 221,000 jobs on average each month for a 2.4% growth rate, the highest since the recession. From January through September of this year, employment growth has averaged 162,000 new jobs each month. Private employment actually fell by 1,000 jobs in May.

The report predicts that 2016 will conclude with an employment growth rate of about 2%, and job growth will further slow next year to about 1.7%. Of note for workers' comp is that employment in manufacturing is declining, according to NCCI. "The manufacturing industry group accounts for 16% of manual premium in NCCI states, so the drop in manufacturing employment is concerning for workers' compensation," the report said. The contracting industry group, which makes up 24% of premiums in NCCI states, showed a slight increase in employment this year.

Interest rates for 10-year Treasury notes dipped to 1.6% as of June, but are expected to head upward to 2.6% in the second quarter of 2017. Low interest rates have been dampening insurance companies' investment income.

Experts Stumped Over Modest Drop in Premiums

October 17, 2016
By J. Todd Foster

The median cost of workers' compensation premiums dropped less than 1% between 2014 and 2016, a national study released last week says, but stakeholders around the country are hard pressed to explain why the decrease wasn't larger, given the national trend of declining costs.

Joe Paduda of Health Strategy Associates in New York state has a theory. "California." "You have to look at California, where claim frequency has actually increased recently. California is a unicorn. About 21% of national premium goes through California," Paduda said Friday in a telephone interview. "California is the anchor on the rate fixture and preventing that decline in premiums from being 3 or 4 or even 5%."

The Oregon Department of Consumer and Business Services produces its premium rankings summary every two years, and its latest report shows that California remained the most costly state in the nation for workers' comp coverage, at an average cost of \$3.24 per \$100 of payroll.

The study cited average premiums in each state using a mix of 50 classification codes reflective of Oregon's economy, but it is not an exact comparison. Nevertheless, the report is widely used as the best possible cost benchmark for interstate comparisons.

The National Academy of Social Insurance in a report released earlier this month found a growing gap between employer costs per \$100 of payroll and benefits per \$100 of payroll, "but this is in large part because of a lag between benefits paid and employer costs as employment increases." The report used data up to 2014. "As employment increases, costs (including premiums) immediately increase because they are based on expected future costs of coverage, whereas benefits paid often cover injuries that occurred in previous years," Chris McLaren, workers' compensation senior research associate at NASI, said in an emailed statement. "The fact that premiums stayed relatively the same between 2014 and 2016 in the Oregon study doesn't mean that insurers are hoarding profits," McLaren said. "There are a number of factors that influence premium rates, and they are set prospectively based on expected future costs."

The 2016 report shows three states had significant premium increases, and each jumped up the list 11 spots. The report ranks all 50 states and the District of Columbia from most expensive to least expensive. Mississippi, which had the 38th-lowest premiums in 2014, jumped to the No. 29 spot. "I'm surprised. You mean premiums went down, right?" asked Alan Goodman, a senior attorney at the Mississippi Workers' Compensation Commission. "The rate dropped about 3% or so in 2015. I was under the impression it was still having a steady decline." He referred WorkCompCentral to the Mississippi Department of Insurance, which approves the annual rate filings by the National Council on Compensation Insurance. Mississippi Insurance Commissioner Mike Chaney said workers' comp costs have decreased in 23 out of the past 28 quarters and said he found the numbers on the Oregon report to be a head-scratcher. In March, he approved NCCI's 7.9% recommended decrease following a 3.2% decrease in 2015.

The Oregon data does not take recent experience into account, however. "Something is not jiving," he said. "I just don't give much credit to these reports. Sometimes you're No. 1 in the nation on some list and then you go to the bottom overnight. People publish things all the time trying to justify what they've done. We've got a very good rate in Mississippi." Rhode Island and Wisconsin also moved up 11 spots — Rhode Island from 20 to ninth, and Wisconsin, 23rd to 12th place.

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“Authors of the Oregon study recognize that each state is unique and their study ‘isn’t a report card’ and ‘isn’t an overall evaluation of the states’ workers’ compensation systems,” Tyler L. Tichenor, spokesman for the Wisconsin Department of Workforce Development, said, referencing this article. “Wisconsin’s nationally recognized program, as validated by the Worker’s Compensation Research Institute, boasts low administrative costs, low litigation, fastest return to work and high employee satisfaction,” Tichenor said in an emailed statement. “It is also worth noting a 3.19% rate reduction for Wisconsin employers, and a 5% rate reduction specific to (the) manufacturing industry, went into effect on Oct. 1,” Tichenor said. “The bottom line is that when it comes to worker’s compensation, Wisconsin is a great state for employers and workers.”

“I do not know why Wisconsin’s costs increased relative to other states, and Idaho dropped,” said retired Professor John F. Burton Jr., who chaired President Nixon’s 1972 National Commission on State Workmen’s Compensation Laws. “I looked at the Annual Statistical Bulletin published by the National Council on Compensation Insurance ... and neither state made significant changes in their statutory level of benefits. “My general view is that such changes at the state level should not be taken too seriously, especially over short time periods,” Burton said.

Longtime Oregon study co-author Mike Manley was hesitant to comment on the report because his department is vetting a press release targeting today for publication. “We always get questions when the rankings come out. People ask, ‘does it really apply to my state’ and why the ranking moves,” Manley said. “We always emphasize that the number that states should look at are how their numbers change relative to the median. Costs are one piece as to what’s an effective workers’ compensation system. There might be things that are cost-effective but cost more.”

Idaho dropped 14 places on the list, from No. 28 to No. 14, while Tennessee moved down eight places, to No. 30 from No. 22. Tennessee remained at 105% of the national median for both 2014 and 2016, but its premiums dropped from \$1.95 in the 2014 report to \$1.68 in the current summary. NCCI has recommended a 12.8% decrease in voluntary loss costs for next year in Tennessee following a special 2.7% decrease that went into effect Aug. 28.

The Tennessee Workers’ Compensation Reform Act of 2013 was implemented in July 2014 and moved the dispute-resolution process from civil courts to the newly created Court of Workers’ Compensation Claims, leaving Alabama as the only state to use trial courts as the first legal venue of remedy. Senate Bill 200 did more than create a purely administrative system, however. It redefined and tightened the causation standard, and created an ombudsman program to help injured workers without legal representation. The big-ticket items, however, were evidence-based medical treatment guidelines and a closed drug formulary.

The Oregon report does not yet take those reforms into account, said Abbie Hudgens, administrator of the Bureau of Workers’ Compensation. “Clearly something has been going on in Tennessee in addition to the reform laws,” Hudgens said. “We are hopeful that all the signs point to increasing the lowering of costs, but in a positive way.

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We're much more efficient, effective and have better medical treatment through guidelines, and have reduced the use of opioids. "All of those things should make the costs lower but in a positive way. It's not that we're trying to strip benefits for workers. This [report] reaffirms that we're headed in the right direction," Hudgens said.

Nashville defense attorney Stuart Scott of the Dickinson Wright law firm said a big factor in lowering Tennessee costs was changing a causation standard that favored injured workers over employers. "There was quite a bit of complaining from Tennessee businesses that premiums were increasing dramatically," Scott said. "A number of businesses refused to come to Tennessee, and some left. So they scrapped the old system, and now it's purely administrative. We took the courts completely out of it and evened the playing ground instead of having one tilted against employers." The Tennessee Bar Association had no one from its workers' compensation section available to respond Friday.

Indiana once again was 50th in the nation for premium rates, behind North Dakota. Ron Cooper, president of the Indiana Compensation Rating Bureau, said the Hoosier State has kept a stable system by not inundating it with reforms in recent years. "We've been 50th for years and years," Cooper said. "It really comes down to the structure of our statutes. In Indiana, we have pretty low attorney involvement. And our return to work is a lot quicker than other states. We seem to have a pretty big return-to-work initiative by employers in the state."

Retired Professor Emeritus Ed Welch, the former director of the Workers' Compensation Center at Michigan State University, was surprised that premium decreases did not keep pace with benefit reductions. "There could be a lot of reasons premiums didn't go down much," Welch said. "Insurers could be making more money. Overhead could be going up and adding costs into the system. You would think that if benefits are doing down, costs should also be coming down."

The articles on pages 21-24, *NCCI: Medical Severity, Utilization Fell Last Year* and *Experts Stumped Over Modest Drop in Premiums*, 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.



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