Lex and Verum

The National Association of Workers' Compensation Judiciary

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May We Be your *vade mecum?*

You may well ask, "my what?" Well, read on. This month's feature is excerpted from the second in a series in the Barry University Law Review by Professor Jeffrey A. Van Detta. Professor Van Detta translates vade mecum as a "guide." A literal translation is "come with me" or "a constant companion." His perceptions on judicial writing are intriguing, and focus on the paradigm advocated by Professor Terrell of Emory University Law School, a key speaker at the 2009 Judiciary College. His partner John T. Salatti (see page 4) is a featured speaker at the 2010 College in Orlando. You be the judge, can we learn something from the esteemed Learned Hand, as focused upon by Professor Van Detta?

The National Association of Workers' Compensation Judiciary is striving to bring together all of us that focus our days and careers on that particular challenge that is the "slippery slope" of statutory construction. Statutes across the country have similarities, and differences. Some legislative bodies have striven to leave their statutes and codes unchanged, while other states make more frequent substantive changes. Certainly, the "ever changing" statute presents significant interpretational challenges for us. Sometimes, though, we may find assistance in the prior efforts of those in another state. This month we feature an article by a colleague in Oklahoma on "major cause." Reading Judge Leonard's perceptions of this reasonably recent Oklahoma statute brings back memories of the legislative and appellate court "give and take" that surrounded the "major contributing cause" interpretations and debates in Florida not so long ago.

We welcome your input, contributions and thoughts. We welcome the chance to help each other. We recognize that Worker's Compensation adjudication is complex and difficult, and welcome the chance to be a *vade mecum*.

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The Decline and Fall of the American Judicial Opinion, Part II: Back to the Future From The Roberts Court to Learned Hand – Segmentation, Audience, and the Opportunity of Justice Sotomayor

Jeffrey A. Van Detta*

Excerpted from 13 BARRY L. REV. 29 (2009)**

This is a continuation of the work I undertook in an article that appeared in Volume 12 of (Barry Law Review). There I made a close and exacting examination of representative opinions written by Judge Learned Hand during the midst of his fifteen--year Federal District Court tenure. That examination germinated from the attention recently garnered by the decline in influence of the opinions of American courts, including the Supreme Court of the United States, in the estimation of courts around the world.[1]

By understanding the challenges of trial court opinion writing and relating those to the writings of opinions by the courts that review them, we would achieve a more holistic vision of what contributed to the formerly high reputation of American court opinions, and what may have changed on the road to their decline and fall in international reputation.

The tools I used in Part I, and continue to employ in Part II, are those which Terrell and Armstrong have adapted from cognitive psychology and tailored to the arts of legal writing and editing.[4] Part I examined Hand's District Court opinions from the context and the congruence principles, two of the four foundational principles articulated in Terrell and Armstrong's work. I observed that the results evidenced a mixed bag, moments of strength and superior coherence intermixed with more stretches of a somewhat banal, work-a-day approach, lacking in the merits of establishing context and achieving congruence. What bringing to bear the segmentation and the audience principles will reveal about Hand as a trial-court opinion writer is the subject of the present article. Here, I will make holistic observations about Hand's trial-court writing, and will consider the complete picture painted from the perspective of all four foundational principles.

The principles of effective writing, "speak to fundamental purposes" and guide legal writers in, "assess[ing] the relative importance of specific rules (and techniques), to choose among them when they conflict, and to draw them together toward the single end of clear, persuasive prose."[6] These principles are the product of applied cognitive psychology.[7]

As explained in Part I, Terrell and Armstrong have distilled effective legal writing into four principles that apply at the level of the entire document (which they call macro-organization). First, the context principle: readers absorb information best if they understand its significance as soon as they receive it. Second, the congruence principle: the organization of the information should match the logic of the analysis. Third, the segmentation principle: readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. Fourth, the audience principle: readers are much more attentive and receptive if the writer approaches the material from the readers', rather than the writer's, perspective. An effective writer not only applies these principles, but does so with an informed perspective from having determined the identities, knowledge bases, and needs of each audience of the document.

The context and congruence principles were explained, explored, and applied in Part I. Here in part II, we explain the content, and consequences, of the segmentation and audience principles.

A. The Segmentation Principle

The segmentation principle is based on a fundamental observation from cognitive psychology. That observation is that, "[r]eaders absorb information best if they can absorb it in pieces."[8] The genesis of the segmentation principle however should not be misunderstood as a patronizing view of modern readers' abilities, nor founded on a defeatist attitude toward the products of our current system of education.

B. The Audience Principle

Although discussed last, the fourth principle is one that imbues and guides the implementation of the other three principles. "Readers pay more attention if you approach your material from *their* perspective, not *yours*," Terrell and Armstrong observe.[14] The challenge, they say, is *ab initio*, from the get-go, to "mak[e] busy, impatient readers pay attention throughout the document—not grudgingly, not just out of a sense of duty, but because you have shown that they will be richly rewarded."[15] To use modern business parlance, the first persuasion that must be achieved in any legal writing is to persuade the reader that working through all of your text "adds value" to him or her. Thus, Terrell and Armstrong liken the writer's preparation for a writing project to "preparing to negotiate" to "kno[w] as much as

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possible about" the reader's "business environment and background and, most importantly, about" the reader's "real needs, as distinct from his explicit demands." [16]

III. UNITED STATES DISTRICT JUDGE LEARNED HAND: HIS APPROACH TO THE TRIAL COURT WRITING TASK—SEGMENTATION AND AUDIENCE

A. Making the Digestible Indigestible: The Segmentation Principle in District Judge Hand's Opinions

Many of the observations made already about the context and congruence principles also apply to the way in which Hand approached the segmentation principle. Some of his writing, as in the *Masses*, does an effective job of presenting information to the reader in segments, or "chunks," that allow the reader to absorb it most effectively. In other opinions critiqued above, Hand has not assisted his readers as much as he might by scrupulous attention to the cognitive implications of this principle.

The cardinal tenet of segmentation is that readers absorb information best if it is presented to them in relatively short pieces that do not exhaust the reader's span of attention. In practice, this principle applies throughout a document on a macroorganizational level, large blocks of undifferentiated text are quite daunting to readers; in many opinions, Hand does not seem to notice this, and he, like many judges of the era, did not take advantage of ways to re-package of blocks of information to make them mentally digestible —e.g., by using subheadings, shorter paragraphs, and white space on the page. As previously noted, even paragraphs can be made more comprehensible to readers by employing these techniques;

Hand's paragraphs work better from a segmentation perspective —although primarily not by intelligent design, but rather by his realization of the segmentation principle at the micro-level, where he more often crafted sentences either to be shorter, or to be broken into mentally digestible segments, separated by effective use of punctuation.

Both intellectually and aesthetically, then, segmentation was for Hand primarily a function of his sentences. These were like unto the bricks from which he assembled his District Court opinions from the ground up. Thus, unlike some judges who appear to start from the "big idea" and work their way down to the sentence level, Hand's writing gives the appearance of a master mason at work on the wall of a cathedral, his ultimate objective—deciding a case—clear in his mind's eye, but his conception of the task emanating from the bricks—the individual quanta of ideas—that lay before him in his carefully crafted sentences. To paraphrase Emily Dickinson, Hand's "wars were laid away" in sentences.[23]

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Meet Your Board:

DAVID IMAHARA is a Trial Judge in Atlanta, Georgia in the Hearing Division at the State Board of Workers' Compensation. David has been involved in Georgia's workers' compensation system for close to 15 years, and employed in a number of positions at the Board, including Deputy Chief Judge, Director of ADR, Division Director of the Appellate Division, Legislative Director, and Editor of Georgia's workers' compensation rules. David is a frequent speaker on hearings, mediations, paperless/online processes, and workers' compensation. David obtained his undergraduate and law degrees from the University of Georgia, and is a member of the State Bar of Georgia, California, and the District of Columbia.

David is married and has three kids - Grant(8), Matthew (4), and Claire (2). In his spare time, David enjoys coaching his kids' sports teams - soccer, basketball, and baseball.

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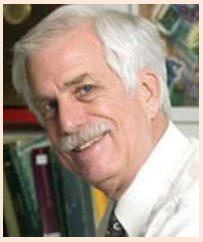
John T. Salatti has taught legal writing for twelve years. He was a Dean's Fellow in the Research, Writing, and Advocacy Program at Emory for four years. He also served on the *Emory Law Journal* for four years, two of them as an Associate Editor. From the *Journal*, he received the Red Pen Award for Excellence in Editing and the first Distinguished Service Award. In response to regular requests for his writing expertise, Mr. Salatti joined forces with Professor Terrell and formed LAWriters. In addition to his writing consulting, Mr. Salatti is a private practitioner, mediator, and mediator trainer.

He Wrote the Evidence Book!



Florida State University Professor Charles Ehrhardt wrote Florida Evidence, the leading treatise on the topic, and Florida Trial Objections. He has been cited as an authority by appellate courts more than 500 times. He taught Torts, Evidence, Trial Practice and Trial Evidence Seminar. After serving 35 years as the Ladd Professor of Evidence, he earned emeritus status in 2007, but continues to teach. He has served as a commissioner to the National Conference of Commissioners on Uniform State Laws, as faculty of the National Judicial College and the Federal Judicial Center. He has been a visiting professor at University of Georgia and Wake Forest.

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1. Segmentation in Aid of Fairness: *In re Denny*

In re Denny[24] presents a case of contemporary resonance, in which Hand uses cognitive segmentation in aid of a fair outcome. Born in Russia, having resided in the British Empire, and having petitioned to become a naturalized English citizen, Denny sought United States citizenship, but his lawyer erred in guiding his application and created a technical ground for denying his application.[25] His filings stated he was foreswearing loyalty to the Russian Czar, when in fact he needed to do that with respect to his most recent sovereign, King George V of England.[26]

Hand's organization of the opinion is a bit problematic from both the context and congruence perspectives. He begins the opinion by stating cases with which he disagrees, and their citations, but without explanation as to what issue they are relevant, what they hold, or why he is rejecting them (other than to say "none of these are authoritative" and to suggest they run counter to his "quite positive belief" that Denny "is entitled to" the benefit of his doubt).[28] Despite this inauspicious opening, Hand crafts the most important section of the opinion, the two well-constructed paragraphs setting forth the "reasons" which Hand determined it was "proper for [him] to give" in support of the ruling.[29]

The segmentation skills displayed by Hand in these two paragraphs operate at both the paragraph and sentence level. Grammatical cores contain the most important information and are clearly constructed; he observes the OI/NI sequencing; and he skillfully uses dependent and parenthetical clauses to make effective transitions, to set up points of emphasis, and to provide a rhythm, variety, and vitality that makes his writing in these two critical passages of the opinion both lively and memorable. To roughly paraphrase Cervantes, the proof of the segmenting is in the reading:[30]

> The question is whether, when in his declaration and petition an applicant has honestly mistaken the name of the sovereign whose allegiance he means to abjure, he may, upon final hearing, abjure the proper sovereign, and, if necessary, correct the declaration and petition. At the outset I may observe that, unless there be some particular jurisdictional reason, every reasonable motive should allow the relief, which would be allowed at the present day in every other form of legal proceeding, so far as I know. No one wants gratuitously to impose upon naturalization proceedings that technical spirit which easily follows a literal application of so detailed a statute, and which results in vexatious disappointment, and in needless irritation, to a defenseless class of persons necessarily left to the guidance of officials, except in so far as the courts may mitigate the rigors of their interpretation. The decisions in question have, therefore, all depended upon the supposed jurisdictional nature of the requirement.
>
> The section controlling the case is section 4, which provides the preliminaries upon which the citizen may apply for admission. The first formality is the 'declaration of intention' to become a citizen and to renounce his allegiance 'to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.' This must be at least two years before his admission, and must be followed by a petition, three months before his admission, which must repeat the earlier expression of his intention in the same words. Under our notions of national fealty, accepted in part by other nations, a subject may voluntarily and with the consent of his new sovereign change his allegiance. His own consent is to be manifested by his oath of abjuration and his oath of allegiance. Hence the critical fact for the change in allegiance is the oath; that is the definitive act by which the change takes place, and perhaps even an innocent mistake in that is fatal. At least that question may be reserved. However, the applicant's
> prior declarations, either in the 'declaration of intention' or in the 'petition,' are both mere preliminaries, designed to assure the new sovereign of the persistency of the applicant's purpose, and perhaps in a measure as well to identify him by his existing allegiance.[31]

The sentences sing, as does Chapman's Homer, and they build a strong analysis within an opinion that is otherwise rather undistinguished in its structure, despite the importance of its topic.

B. For Whom are You Writing? The Problem of Audience in District Judge Hand's Opinions

1. A Tale of Two Hands: "Razzle-Dazzle" and "The Importance of Being Earnest"

The Audience Principle,[59] discussed in Section II.D, *supra*, is implicated throughout our examination of principles relating to context, congruence, organizing patterns, and segmentation. The choices the judicial writer makes in these areas are important components in the sum total of his or her approach to the audience. To that list we add syntax as well.

Syntax—word choice—can often be a determinative factor in assessing the accessibility and cognitive effectiveness of prose.[60] While syntax may not change the ultimate meaning of a phrase, a sentence, or an opinion, it can change the efficacy of communicating the message – and in some cases, the message itself.[61] Syntax can be inviting and inclusive.

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Or it can be opaque and exclusive. A reader's cognitive reaction to syntactically difficult judicial writing might well be described in Franz Kafka's parable:

> [O]f a "man from the country" who seeks the Law. A doorkeeper stands at the entrance to the Law and bars admittance. The man sits down and waits for days, weeks, months, and years. He examines the doorkeeper with his eyes and cross-examines him with his questions. As the man grows old and death draws near, he asks one final question of the doorkeeper: why, during this long period of time, no one else has come to seek admittance to the Law. The doorkeeper roars into the man's nearly deaf ear that the gate to the Law "was made only for you. I am now going to shut it." [62]

Syntax serves as an implicit invitation, or exclusion, of the audience whom the writer wishes to engage. In a revealing remark made towards the end of his judicial career, Learned Hand observed that, "I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment."63 Hand's district court opinions reveal that, in the main, he seemed to be writing for lawyers representing the immediate parties to the case and for himself—occasionally with an eye, too, for an appeals court, but certainly not always.

a. "Razzle-Dazzle"

Hand did not seem to be especially dedicated to an inclusive approach to writing. Like the English attorneys who could not bear to give up their beloved French law even when the language was deader than a doornail, Hand demonstrated an unusual proclivity, at times, to restrict full understanding of his opinions to a smaller circle – a circle who, like himself, would have known the things that a classically educated young man at Harvard in the 1890s would have learned from professors such as the fabled Santayana.[64] In fact, Hand's greatest weakness in terms of audience was that he sometimes wrote in a cryptic, almost exclusionary sort of way—for the "guild." Second Circuit Judge Roger Miner, among the finest of our judicial writers, once referred to the writing of judges who like to sound important and make things look harder than they really are — or, as the English would say, are prone to making rather heavy weather of it — as "razzle-dazzle." At times, that phrase describes Hand's judicial writing as well.

Hand's clubby, collegiate mindset is perhaps best exemplified by one of his more curious writing idiosyncrasies. This being his fondness for the relatively obscure Latin phrase, *vade mecum,* which roughly means a handbook or a "bible" for some area of specialty. In an early personal jurisdiction case, that in some ways was a stepping-stone to *International Shoe*,[65] Hand offers us *vade mecum* in the denouement to his opinion. In that case, describing what would later come to be called the lack of a non-resident defendant's forum contacts for purposes of personal jurisdiction analysis, there occurs a passage that a few courts have quoted (adding to the already small number of times any federal judge since 1796 has used *vade mecum* in a published judicial opinion):

> None of this, and not all of it, seems to us a good reason for drawing the defendant into a suit away from its home state. In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no vade mecum.[66]

"*Vade mecum*," a 21st century reader might ask, "what does that phrase mean?"

Vade mecum[67] appears again in numerous Hand opinions and dissents in the Court of Appeals.[68] One might expect some judges to feel the need to write more learned-sounding prose in an appeals court capacity. Yet *vade mecum* also appeared in at least one of Hand's district court opinions.[69]

Among legal phrases, even in 1930, this was not one typically encountered. In fact, a search of the Federal Reporter series through 2007 reveals that the phrase has been used in twenty-three federal judicial opinions from 1796 until its last appearance in 1999, *eight of which (35%)* Hand authored as noted above.[70] That kind of syntax seems to be quite uninviting, even among the most narrowly conceived audience of judicial opinions; and it excludes many readers whose educations did not include a substantial amount of Latin instruction. While the education of many who became lawyers included some Latin, given the paucity of the use of *vade mecum* in the federal courts suggests that is not one of the helpful Latin legal phrases that many 19th and early 20th century lawyers and judges incorporated into their syntax. Further, considering how many attorneys of the day clerked their way into bar admission with a minimum of formal education. The use of such a Latin phrase could leave out many of the audience even in the legal profession. Indeed, when the Military Court of Appeals employed it in a 1954 opinion, the court felt the need to define it immediately:

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"This Court has, from the first, emphasized that the Manual for Courts-Martial constitutes the military lawyers' vade mecum, his very Bible."[71]

b. The Importance of Being Earnest

Perhaps Hand's greatest strength in terms of audience was his impressive and consistent earnestness in judicial writing. Hand understood, as we have seen, the terrors and tribulations of being a litigant.[72] Hand also held a modest assessment of his own corpus of judicial work that was focused on the parties before him: that "I confess when I look at my service it seems to have been for the most part trivial. It amounted to a good deal to the people at the moment."[73] Thus, in any of the opinions known to the author, Hand always treated the rendering of the opinion with the seriousness of purpose and sense of occasion for the litigants befitting the judicial role and the deconstructive suffering endured by all litigants as a result of the process, no matter how "due," itself.[74] While that may seem obvious to some, expected, *de rigeur*, it is not so simple.

Complexities abound from judges who become too literary, and use the opinion as an opportunity to impress in a manner usually reserved for creative writing classes. Judge John Brown, for example, whose maritime and admiralty opinions are deservedly celebrated for their clarity, did have a distracting habit of injecting "humor" into his opinions. His clerks reminisce fondly about it:

> Judge Brown's legal opinions are equally legendary. Judge Brown very much believed that the law and its language need not be dull and lifeless. Legal writing was his passion and ultimately, his legacy. As a result, he and his clerks made every effort to make his opinions entertaining as well as illuminating. In fact, when I began clerking for the Judge, I was told that the funnier the draft (in appropriate cases, of course) the more likely he was to accept it without changes. That proved to be pretty good advice. As a result, "Pac-Man" starred in one of our opinions, and even Dickens was employed as the voice of garbage to describe its landfill destination as the "far, far better rest I go to than I have ever known."[75]

Yet, the humorous school of judging takes little account of the sacrifice ofemotion, time, expense, resources, and orientation within the context of normal life that attends all litigation, even that involving "soulless corporations," for individual corporate agents have responsibility for the litigation and are typically among the witnesses; these sufferings Hand always seemed to be keenly aware of. Imagine then, what Hand's reaction might have been to the following anecdote about Judge Brown:

> Judge Brown's creativity in making his point through humor is shown in *Croft & Scully Co. v. M/V Skulptor Vuchetich.* The issue in the case was whether the $500 package limitation set forth by the Carriage of Goods by Sea Act (COGSA) applied to a 20-foot steel container that held 1,755 cases of a soft drink called Delaware Punch. In the context of a container that capsized during loading operations at Houston, Judge Brown declined to apply the [COGSA package monetary limitation.] He noted that "Pepsi Cola Hits the Spot-On the Pavement"; "during the Refreshing Pause between the arrival of the container and the arrival of the Skulptor"; "42,120 cans of soft drinks crashed to the ground, never a thirst to quench";

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PRECEDENT, n. In law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a judge may choose to give it, thereby greatly simplifying his task of doing as he pleases.

- Ambrose Bierce,

"Lawyers spend a great deal of their time shoveling smoke."

- Oliver Wendell Holmes, Jr.

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> "[i]n the Crush. . . . [t]he stevedore . . . was in no mood to have a Coke and a smile"; "the winds of judicial change Schwepped away the $500 shelter"; and the appellee's argument held "no water, carbonated or otherwise."[76]

The litigants—and lawyers —in this case spent considerable time, resources, and efforts arguing these points. To make their dispute the subject of corny humor that would not pass muster in even the remotest of Catskill Resorts[77] would seem to trivialize the gravity of the dispute to the parties, let alone the legal system. This is something Hand would never do.[78]

The Audience Principle is even more poorly served by judicial opinions that actually poke fun at parties. A most egregious example, now included in lawschool casebooks on contracts,[79] is the New York Appellate Division's opinion in *Stambovsky v. Ackley*.[80] Justice Rubin's majority opinion is a rollicking exercise in finding as many ways to work in words and phrases relating to the supernatural as possible; however, the jokes not only are demeaning to the parties (however skeptical one is of the world of the supernatural) but also interfere in communicating to a broader audience the nature of the case and the issues that required an appellate opinion to resolve them. In fact, it is only in the dissenting opinion of Justice Smith, who plays it straight, that we clearly learn what the case is about:

> Plaintiff seeks to rescind his contract to purchase defendant Ackley's residential property and recover his down payment. Plaintiff alleges that Ackley and her real estate broker, defendant Ellis Realty, made material misrepresentations of the property in that they failed to disclose that Ackley believed that the house was haunted by poltergeists.
>
> Moreover, Ackley shared this belief with her community and the general public through articles published in Reader's Digest (1977) and the local newspaper (1982). In November 1989, approximately two months after the parties entered into the contract of sale but subsequent to the scheduled October 2, 1989 closing, the house was included in a five-house walking tour and again described in the local newspaper as being haunted. Prior to closing, plaintiff learned of this reputation and unsuccessfully sought to rescind the $650,000 contract of sale and obtain return of his $32,500 down payment without resort to litigation.
>
> The plaintiff then commenced this action for that relief and alleged that he would not have entered into the contract had he been so advised and that as a result of the alleged poltergeist activity, the market value and resaleability of the property was greatly diminished. Defendant Ackley has counterclaimed for specific performance.[81]

It is rare that the dissent has to take on the tasks of setting forth the basic facts and claims in the case. But Justice Rubin's opinion left Judge Smith little choice. Justice Rubin opens the opinion with the first in a string of bad puns, "The majority opinion goes on to observe that 'no divination is required to conclude that it is defendant's promotional efforts in publicizing her close encounters with these spirits which fostered the home's reputation in the community."[82] But Justice Rubin was just getting his comedy-club audience warmed up, as we see him "top" himself in the next passage:

> While I agree with Supreme Court that the real estate broker, as agent for the seller, is under no duty to disclose to a potential buyer the phantasmal reputation of the premises and that, in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, *plaintiff hasn't a ghost of a chance*, I am nevertheless *moved by the spirit of equity* to allow the buyer to seek rescission of the contract of sale and recovery of his down payment.[83]

In their teaching notes on this case, Professors Brian Blum and Amy Bushaw of the Lewis & Clark School of Law posit troubling questions about this opinion, striking at the heart of the Audience Principle:

> We don't mean to spoil the fun, but think that it is worth raising the issue of whether it is appropriate, and not a lapse of proper judicial conduct, for a judge to write an amusing or facetious opinion. Although the facts may be funny to an outsider, the parties have spent considerable money and time, and have no doubt incurred some emotional cost, in litigating the case. Their perception of the system of justice may be diminished by an opinion that is not serious and judicious, even if the case itself seems silly. (There are more appropriate sanctions for frivolous or vexatious litigation.)[86]

Two of these points especially merit further development and emphasis. First, the diminution of the judicial system from such writing is not just in the eyes of the parties, it has toxicity for the judiciary (abasing general rules of decorum and

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sensitivity in adjudication), for the legal profession (where professionalism and decorum are already seriously at-risk), for the general public (to see courts having a laugh at the expense of non-lawyers and non-insiders) -and for law students (who read such cases in forming their own values, perceptions, and standards at a very critical time in their professional lives). Second, the suggestion that frivolous and vexatious claims (which this was not, given that the majority reinstated the rescission claim) can be better handled through established means is one that was lost on this court.

V. SOME CONCLUDING THOUGHTS

It was Hand's very iconic status as an appellate judge that has made our critical —and mixed—review of his District Court opinions so much more useful and educational for the federal courts generally, and for Justice Sotomayor and her Roberts Court colleagues in particular, than any collection of gossamer phrases plucked from Second Circuit opinions with a meaningless exhortation to "write like B" so one might be "quote[d]" like B.[252] The exhortation must be *to struggle earnestlylike B*—and to recognize that the struggle is not with the law, nor with the facts, but rather with our own ability to write for a broad range of "others," rather than for ourselves.

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* Professor of Law, John Marshall Law School-Atlanta, Georgia. Professor Van Detta served as law clerk to Judge Roger J. Miner, U.S. Second Circuit Court of Appeals, 1987-1988. I wish to thank our Library Director, Professor Michael Lynch, and our Research Librarian and Head of Public Services, the incomparable Mary Wilson, for their extraordinary assistance throughout Parts I and II of this article. I also wish to thank *The Barry Law Review*'s Editor-in-Chief, Kevin Dilg, for suggesting that there might be two articles in my material, and the student editorial staff, for their tireless efforts and excellent work.

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1. Adam Liptak, *American Exception: U.S. Court Is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 18, 2008, at A1, *available at h*ttp://www.nytimes.com.
4. Using Terrell's and Armstrong's framework for evaluating the cognitive virtues and vices of judicial opinion wring makes much more sense than some of the recent efforts by professors at national law schools to set up citation frequency as a proxy for the quality of written opinions. *See, e.g.,* Stephen J. Choi and J. Mitu Gulati, *Choosing The Next Supreme Court Justice: An Empirical Ranking Of Judge Performance*, 78 SO. CAL. L. REV. 23, 48-49 (2004).
6. ARMSTRONG & TERRELL 1st, *supra* note 3, at 1-3.
7. Raffaele Caterina, *Comparative Law and the Cognitive Revolution*, 78 TUL. L. REV. 1501 (2004).
8. ARMSTRONG & TERRELL 2d, *supra* note 3, at 33; *see* ARMSTRONG &TERRELL 1st, *supra* note 3, at 5-21 to 5-23.
14. ARMSTRONG & TERRELL 2d, *supra* note 3, at 17 (emphasis added).
15. *Id.* at 126.
16. ARMSTRONG &TERRELL 1st, *supra* note 3, at 2-1.
23. EMILY DICKINSON, My Wars Are Laid Away In Books, Poem No. 1579 (1882) from THE POEMS OF EMILY DICKINSON: READING EDITION 581 (R.W. Franklin, editor 1998).
24. *In re Denny,* 240 F. 845 (S.D.N.Y. 1917).
25. *Id*. at 845.
26. *Id.*
28. *Id.* at 846.
29. *Id.* at 846–47.
30. MIGUEL DE CERVANTES SAAVEDRA, DON QUIXOTE, Pt. I, Book IV, Ch. 10. (Edith Grossman, tr. 2003).
31. *Denny*, 240 F. at 846-847.
59. ARMSTRONG &TERRELL 2d , *supra* note 3, at 128; ARMSTRONG &TERRELL 1st, *supra* note 3, at 2-1–2-8.
60. *See, e.g.*, Edward J. Eberle, *Comparative Law*, 13 ANN. SURV. INT'L &COMP. L. 93, 100 (2007).
62. George Dargo, *Reclaiming Franz Kafka, Doctor of Jurisprudence*, 45 BRANDEIS L. J. 495, 501 (2007).
63. Fifty Years of Federal Judicial Service, 264 F.2d 5, 27 (2d Cir. 1959) (special session to commemorate 50 years of service by Hand) (separately paginated section).
64. *See* GUNTHER, *supra* note 43, at 33-35.
65. *See* Jeffery A. Van Detta & Shiv K. Kapoor, *Extraterritorial Personal Jurisdiction For The Twenty-First Century: A Case Study Reconceptualizing The Typical Long-Arm Statute To Codify And Refine* International Shoe *After Its First Sixty Years*, 3 SETON HALL CIRCUIT REV. 339 (2007).

Continued, Page 10.

The Decline and Fall, from Page 9.

66. *Hutchinson*, 45 F.2d at 142.
67. A *vade mecum* is a useful reference, such as a handbook, OXFORD AMERICAN DICTIONARY 1027 (1980).
68. New York Trust Co. v. Commissioner of Internal Revenue, 68 F.2d 19, 20 (2d Cir. 1933); Catalin Corporation of America v. Catalazuli Mfg. Co., 79 F.2d 593, 595 (2d Cir. 1935); Kuhner v. Irving Trust Co., 85 F.2d 35, 38 (2d Cir. 1936); Pink v. U.S., 105 F.2d 183, 188 (2d Cir. 1939) (Hand, J., dissenting); U.S. v. Goldstein, 120 F.2d 485, 491 (2d Cir. 1941); U.S. v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).
69. Van Heusen Products v. Earl & Wilson, 300 F. 922, 929 (S.D.N.Y. 1924)..
70. *Compare* Roberts v. Cay's Ex'rs, 2 U.S. (2 Dall.) 260, 261 (1796).
71. U.S. v. Drain, 1954 WL 2443 (CMA), 16 C.M.R. 220, 4 USCMA 646, 648 (Ct. Mil. App. 1954).
72. *See generally* GUNTHER, *supra* note 43.
73. 264 F.2d 5, 27 (2d Cir. 1959).
74. *See, e.g.,* Anita Miller, Uncollecting Cheever: The Family Of John Cheever v. Academy Chicago Publishers (1999).
75. Collyn A. Peddie, *Lessons From The Master-The Legacy Of Judge John R. Brown*, 25 HOUS. J. INT'L L. 247, 250 (2003).
76. Gus A. Schill, Jr., *John R. Brown (1910-1993): The Judge Who Charted The Course*, 25 HOUS. J. INT'L L. 241, 243-244 (2003) (discussing *Croft & Scully Co. v. M/V Skulptor Vuchetich*, 664 F.2d 1277 (5th Cir. 1982)
(footnotes omitted)).
77. For those unfamiliar with the genre of "borscht-belt" humor, this cultural phenomenon is nicely surveyed at http://en.wikipedia.org/wiki/Borscht_Belt (last visited March 26, 2008).
78. Hand might well have shared the sentiments of W.S. Gilbert, the 19th century barrister best recalled as the pungent librettist for Sir Arthur Sullivan in their string of hit operettas. See generally Andrew Goodman, Gilbert And Sullivan At Law 9-10, 15 (1983).
79. *E.g.,* Brian Blum & Amy Bushaw, Contracts: Cases, Discussion, and Problems, 333 (1st ed. 2003).
80. 169 A.D.2d 254 (N.Y.A.D. 1 Dep't 1991).
81. *Id.* at 261.
82. *Id.* at 256.
83. *Id.* at 256 (emphases added).
86. Brian Blum & Amy Bushaw, Contracts: Cases, Discussion, and Problems, 156-157 (1st ed. Aspen 2003).
252. Charles E. Wyzanski, Whereas—A Judge's Premises: Essays In Judgment, Ethics, And The Law 82 (1965).

Florida Workers' Compensation Trial Advocacy Workshop

By: Raymond Malca, Miami

Beginning in 1988 the Workers' Compensation Section of the Florida Bar has sponsored a Trial Advocacy Workshop designed to enhance the advocacy skills of its participants. Participants learn to better perform direct and cross-examinations, lay foundations for admission into evidence, make proper objections, deliver opening and closing arguments and learn effective methods of impeachment. Participants benefit from instant feedback and critique of their live performances furnished by highly experienced faculty and judges of compensation claims.

Over four hundred attorneys have participated in the program since its inception. Each year twenty-four student/attorneys are accepted into the program. The twenty-four participants are divided into groups of four with a judge and two faculty attorneys assigned to each group. The four participants in each group are divided into teams of two, one team representing the employer/carrier and the other representing the employee.

On day one of the program the importance of professionalism and civility in the day to day practice is emphasized. In addition, members of the faculty demonstrate the proper way to conduct a direct and cross-examination of both lay and expert witnesses. During day one session, the faculty work with groups of students to address commonly encountered evidentiary issues which include the following: (1) how to lay the foundation for receipt into evidence of medical records, doctors' records, hospital records and lab reports; (2) the use of statements, written and recorded; (3)How to establish the existence of a business record; (4) the use of judicial notice; (5) introduction of evidence through the expert witness; (6) discussion of the evidence code; (7) cross-examination of experts; (8) use of depositions; (9) techniques of impeachment

The second day of the program involves a simulated workers' compensation trial with realistic documents and facts drawn from actual cases. Six distinguished judges preside over the simultaneous trials of the same simulated case. Each participant is given the opportunity to perform direct and cross-examination of lay and expert witnesses. Objections are made and the presiding judge rules on the objections as they would during an actual trial. After the participant completes their examination of the witness, the critiquing process takes place and the judge along with the assistance of the experienced practitioner provides constructive input designed to improve the skills of the participant. With time permitting the participant is given the opportunity to conduct a re-examination of the witness.

In certain respects the program offers an intense mentoring process, which young attorneys in particular are rarely provided today.

Though the continuing legal education program has primarily been utilized by attorneys with little or no experience in trying workers' compensation claims, a significant number of its participants have included highly experienced attorneys with the desire to improve their ethics and skill.

95 Days until NAWCJ Judiciary College 2010!

Nanotechnology? What's That?!

MADISON, Wis.--Nanotechnology is the big buzz word in the world of science. It's going to impact just about everything we do, touch and see. And this next big thing is extraordinarily small. You've heard the word, but do you know what nanotechnology is?

University of Wisconsin-Madison engineer Wendy Crone is on a mission. She and her interns are creating user-friendly exhibits to teach the public about the nanoworld. "Nanotechnology is already starting to affect our lives, and it's anticipated that over the next 20 years it's going to have major impact on everything around us," Crone tells DBIS. Nanotechnology means working at the scale of molecules. Crone's exhibits show just how small that scale is. "When you put nano in front of meter that means that's a billionth of a meter. So that means that you can fit 1 billion nanometers in one meter," she says. You'd have to slice one hair into 50,000 distinct strands to get a strand one-nanometer thick. Nanotechnology is the secret behind how self-cleaning windows work and why LEDs are so energy-efficient. "I think that nanotechnology, I mean, everyone continues to talk about it, is the next big thing," says intern Anne Vedder. It might even save your life. Drug-coated nanoparticles will soon precisely deliver therapy to organs and tumors. Crone says it's going to be everywhere, and you probably won't even know that it's inside the products that you're using. The National Science Foundation is giving $20 million to fund the national Nanoscale Informal Science Education Network (NISE Network), which will develop interactive exhibits to teach the public about nanotechnology. The network's goal is to have these exhibits in 100 museums across the United States in the next five years.

BACKGROUND: The engineering faculty, staff and students at the University of Wisconsin, Madison, are working with some of the nation's top science museums to create hands-on exhibits about nanotechnology. The effort is part of the $20 million Nanoscale Informal Science Education Network, which aims to develop innovative materials and vehicles to increase the public's knowledge and understanding of nanotechnology through exhibits.

ABOUT NANOTECHNOLOGY: Nanotechnology is science at the size of individual atoms and molecules: objects and devices measuring mere billionths of a meter, smaller than a red blood cell. At that size scale, materials have different chemical and physical properties than those of the same materials in bulk, because quantum mechanics is more important. For example, carbon atoms can conduct electricity and are stronger than steel when woven into hollow microscopic threads. Nanoparticles are already widely used in certain commercial consumer products, such as suntan lotions, "age-defying" make-up, and self-cleaning windows that shed dirt when it rains. One company manufactures a nanocrystal wound dressing with built-in antibiotic and anti-inflammatory properties. On the horizon is toothpaste that coats, protects and repairs damaged enamel, as well as self-cleaning shoes that never need polishing. Nanoparticles are also used as additives in building materials to strengthen the walls of any given structure, and to create tough, durable, yet lightweight fabrics.

SIZING THINGS UP: The tiny size scale makes it a challenge to translate nanotech research into something museum visitors can see, touch and comprehend, especially in an interactive format. UW-Madison already has the Nanoworld Discovery Center, which does just that. Among the exhibit's features is a segment about ferrofluids: tiny magnetic particles that flow like a liquid. They are used to damp vibrations and eliminate excess energy in expensive stereo systems. Visitors also learn about such applications as stain-resistant clothing, as well as compare incandescent bulbs to light-emitting diodes to learn how nanomaterials can help conserve energy.

Republished from http://www.sciencedaily.com/videos/2006/0611-nanotechnology_whats_that.htm

May "Second Fridays Seminar" May 14, 2010

Do you want to know more about nanotechnology? Our May "Second Friday" features Dr. Charles Geraci, the Coordinator of the National Institute for Occupational Safety and Health (NIOSH) Nanotechnology Research Center. He has over 30 years of Industrial Hygiene practice experience that has included the federal government, consulting, and private industry. He is Certified by the American Board of Industrial Hygiene in both the Comprehensive Practice and the Chemical Aspects of Industrial Hygiene and is a Fellow of the American Industrial Hygiene Association. He manages a number of nanotechnology projects in the Institute and is responsible for the development of workplace guidelines, including the document "Approaches to Safe Nanotechnology. He sponsors the NIOSH nanotechnology field team that is conducting visits to nanomaterial producers and users to characterize exposures, evaluate controls, and develop best practices. In short, when it comes to nanotechnologies, Dr. Geraci is an obvious leader in the field and we are grateful he has agreed to present this program for our members.

Major Cause, What Does It Mean?

By Hon. Tom Leonard

"When I use a word," Humpty Dumpty said, in rather a scornful tone,
"it means just what I choose it to mean---neither more nor less."
Lewis Carroll, Through the Looking Glass

The more things change, the more they stay the same.
Jean-Baptiste Alphonse Karr

Five years after enactment of the 2005 reforms, we still don't know what the legislature meant by the term "major cause." The Oklahoma Supreme Court has not addressed the issue, and the only published case from the Court of Civil Appeals does not address the term's underlying meaning.[1] One approach to analyzing major cause is comparing the new term to the existing concepts that set causation boundaries for the compensability of an injury.

Oklahoma law has always limited workplace injuries to those arising out of and in the course of employment. However, the 2005 amendments to the Oklahoma Workers' Compensation Act ("the Act") changed the definition of "injury" to "compensable injury" and limited recovery of benefits to those employments that are the "major cause" of the injury or illness.[2] Has the amendment created a new element of proof that substantially changes the evaluation of compensability, or is it the same element in new clothing? It is an element of medical causation, but what does it mean?

According to the Act, "major cause" is the "predominate cause" of the resulting injury or illness. This description is not helpful. A quick check of the thesaurus reveals that major means predominant and predominant is a synonym for major. [3] The definition could just as easily have stated "the major cause is the major cause." Trying to craft a workable definition by this traditional means is fruitless, so we must turn to settled workers' compensation law to look for analogous theories.

The Oklahoma Legislature's decision to use the term "major cause" suggests it intended to make a comparison between a worker's work-related trauma or exposure and the worker's other physical conditions or activities that may have contributed to his or her current injury. Many times, this issue arises when the worker has a preexisting condition that is dormant or active, such as degenerative joint disease. Does the injury and the resulting need for medical treatment arise from the preexisting disease or from the workplace trauma?

The Act provides that workers with previous disability or impairment are not precluded from receiving benefits. Aggravation injuries have long been held compensable. With only minor changes the statute allowing compensability has remained in effect since the Act's inception in 1915.[4]

Consequential injuries arise after the initial injury-dealing trauma. They are compensable only if there is a causal nexus between an event that occurs after a work-related injury and a subsequent injury or death without breaking the chain of causation.[5]

Since aggravation injuries and consequential injuries are both linked to the medical causation issue, review of the evaluation method for these two types of injury may lead us to workable criteria for major cause.

Aggravation Injuries

In Oklahoma a worker's disability is compensable when a preexisting, dormant physical condition or predisposition, is aggravated or accelerated by injury.[6] Benefits are not limited to perfectly healthy workers even when evidence indicates the worker may be disabled by disease in the future even though accidental injury had not occurred.[7]

Stiles v. Oklahoma Tax Commission[8] involved a claim that stress and tension caused the claimant's rheumatiod arthritis to flare up. The Supreme Court reversed a three judge panel's order denying compensation for aggravation of the preexisting arthritis and held: "It is a general rule in Workers' Compensation Law that an employer takes an employee as he finds him. That is, if an employee has a predisposition to be sensitive to stressful situations, the employer cannot avoid liability when the stresses imposed by the employment situation result in disability on the part of the employee."

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A claim for heart disease was found compensable in *Refrigerated Transport, Inc. v.Creek*.9 The claimant had a prior history of heart disease, and employer argued that under the Supreme Court's prior ruling in the *Haynes v. Pryor High School*[10] claimant had to prove a change in heart pathology. The Supreme Court held that the claim was compensable as an aggravation injury because the change in heart pathology mandated by *Haynes* "antedate[d] the accident which consists of a traumatic aggravation."[11]

In his concurring opinion, Justice Opala pointed out the distinction between cases with a new injury (change of pathology) and aggravation injuries. When there is no underlying pathology, there must be proof of some internal failure or harm precipitated by work-trauma or exposure. Where the accident consists "of preexisting and known pathology being accelerated or advanced," it is sufficient that the medical proof "attributes an 'extension' or enlargement of the old, known and described condition to the proved efforts of on-the-job labor."

In *Dempsey v. Ballard Nursing Center*[12] claimant asserted that she was injured while lifting patients. At the time of her injury claimant had a preexisting spondylolisthesis in her back. Denial of her claim by the trial court was based on employer's medical evidence stating that her surgery was due to preexisting spondylolisthesis and not the incidents occurring on the injury date. Judge John F. Reif (now Justice Reif) summarized the extant law of aggravation injuries and then found the following:

"The problem with this opinion [from employer's medical report] is that it essentially says claimant needs surgery for the effects of the spondylolisthesis, and the injury of July 12, 2002, did not cause the spondylolisthesis. The question which the doctor did not address is whether the injury of July 12, 2002, aggravated the spondylolisthesis so that it requires surgery now, as opposed to surgery being the general medical treatment that would have eventually been needed to correct this condition." (Emphasis in original.)

Consequential Injuries

Consequential injuries occur after the initial compensable accident. Therefore the two-pronged test of arising out of and in the course of has been satisfied, and a different standard is applied to determine compensability of the post-accident injury.

A series of three Supreme Court cases delineate the rule for assessing the compensability of these injuries.

Matter of the Death of Stroer[13] involved a worker who became despondent after an unsuccessful surgery to his shoulder. His subsequent suicide was found compensable and affirmed on appeal. The Supreme Court held "[t]he act of suicide is not an
intervening cause of death and the chain of causation is not broken in cases where the incontrovertible evidence reflects that, **but for** the injury, there would have been no suicide."

In *Bostick Tank Truck Service v. Nix*[14] the worker suffered a compensable heart attack. Eleven years later while undergoing implantation of a temporary pacemaker, his heart began to fibrillate and he died. The widow's death benefits award was upheld, because "the medical proof shows that, **but for** the prior on-the-job heart attack, fibrillation would not have occurred." Further, the Court found the employer is liable for "all legitimate consequences of a compensable injury."

Matter of the Death of Gray[15] involved a worker who herniated a disc in his lumbar spine. Presurgical testing of his twenty-year old pacemaker resulted in a recommendation to modify it before the back surgery. Gray died while undergoing the pacemaker surgery. After the trial court denied the widow's death benefits claim, the Supreme Court reversed and held: "the employee had never suffered any significant problems with his pacemaker; the need to check the pacemaker and remove and replace it appeared only after the disabling back injury and because of the back injury; and the replacement of the pacemaker was a necessary precursor to the operation for the back injury and would not have occurred **but for** the injury.

Conclusion

Major cause requires claimants to prove a medical connection between the trauma and the claimed injury. While the legislature may have intend it to be something new, it is a codification of old, well-established concepts for evaluating medical causation. A workable test for determining whether employment is the major cause of the injury is the one used in pre-2005 reform cases to evaluate aggravation of a preexisting condition. The major cause question is another way of asking "has there been an aggravation of a preexisting condition that necessitates medical treatment now?" Taking this a step further by combining the tests for aggravation injuries and consequential injuries, we could ask "but for the work-trauma, does the claimant need medical treatment now?"

Judge Tom Leonard graduated from OSU and the OU Law School. Since 2004 he has served as one of ten judges at the Oklahoma Workers' Compensation Court. He is author of the website, Oklahoma Workers' Compensation, www.workerscompensationok.com. LexisNexis selected his blog, Judge Tom Talks at www.judgetom.blogspot.com, as one of the Top 25 in 2009 for workers' compensation.

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[1] In the case of *Irisndt, Inc. v. Brock*, 2008 OK CIV APP 5, 176 P.3d 370, Brock had a preexisting injury to his right knee resulting in two surgeries and degenerative arthritis with bone-to-bone contact. When Brock then twisted his bad knee at work, the parties agreed to a final, unappealed order of compensability. Six months later the treating physician recommended a total knee replacement. Employer argued that the Brock's employment was not the major cause of his need for medical treatment (TKR). The trial judge authorized the surgery, and the employer appealed. The COCA affirmed holding that major cause is an element of compensability, but not "of the need for a particular course of treatment for a compensable injury."

[2] 85 O.S.Supp.2003 §3, Definitions, provided: 12. a. "Injury" or "personal injury" means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom and occupational disease arising out of and in the course of employment as herein defined. Only injuries having as their source a risk not purely personal but one that is causally connected with the conditions of employment shall be deemed to arise out of the employment. 85 O.S.Supp.2005 §3 provides, in pertinent part: 13. a. "Compensable injury" means any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of the specific injury or illness. 16. "Major cause" means the predominate cause of the resulting injury or illness.

[3] *Thesaurus.com.* Inexplicably the drafters of the legislation used "predominate," the outdated version of "predominant." The modern version will be used throughout the rest of this article.

[4] 85 O.S. §22(7); "Where an accidental personal injury, arising out of and in the course of employment and within the terms of the Workmen's Compensation Act, aggravates and lights up a pre-existing physical condition, the injured employee is, nevertheless, entitled to compensation therefor." *Patrick & Tillman Drilling Co. v. Gentry,* 1932 OK 241, 9 P.2d 921.

[5] *Matter of the Death of Stroer*, 1983 OK 94, 672 P.2d 1158; *Matter of the Death of Gray*, 2004 OK 63, 100 P.3d 691; *Bostick Tank Truck Service v. Nix*, 1988 OK 128, 764 P.2d 1344.

[6] *Refrigerated Transport Inc. v. Creek*, 1979 OK 11, 590 P.2d 197.

[7] *Halliburton Services v. Alexander*, 1976 OK 16, 547 P.2d 958.

[8] 1987 OK 85, 752 P.2d 800.

[9] 1979 OK 11, 590 P.2d 197.

[10] 1977 OK 1, 566 P.2d 852.

[11] Id @ paragraph 18.

[12] 2004 OK CIV APP 18, 84 P.3d 1071.

[13] 1983 OK 94, 672 P.2d 1158.

[14] 1988 OK 128, 764 P.2d 1344.

[15] 2004 OK 63, 100 P.3d 691.

Claims Characteristics of Workers Aged 65 and Older

by Martin H. Wolf, Ph.D.

A December 2006 NCCI study, *Age as a Driver of Frequency and Severity*, examined how frequency and severity vary by age of worker, focusing on workers between ages 20 and 64. Events since that study was published - especially the plunge in the stock market and the decline in home prices - have sparked interest in the implications for workers compensation claims of persons working beyond age 64. Simply put, for many persons in their late 50s and early 60s, whose life savings have been severely depleted and whose homes are now worth far less than anticipated, the idea of a - normal retirement is now more in the realm of wishful thinking than an achievable reality.

Workers aged 65 and older comprise a small share of employment and injury and illness cases, which is why the previous study limited its analysis to persons aged 64 and younger. However, the labor force participation rate of older workers (those aged 65 and older) has increased by nearly 50% since the late 1980s (from 11% to 17%), and the rate for workers aged 55 to 64 has also increased (from 55% to 65%). Further increases are likely in coming years in light of recent financial and economic disruptions.

This paper examines how workers aged 65 and older differ from all workers in terms of their share of claims; indemnity and medical payments; frequency; and indemnity and medical severity (i.e., cost per claim). It also explores the implications for workers compensation claims management and loss costs.[1] Our key conclusions are:

- •Falls/slips/trips are by far the greatest cause of injury among older workers.
- •Indemnity severity is less for older workers, largely because of the lower average weekly wage of such workers. There is a distinct (downward) break in indemnity severity between ages 60–64 and 65 and older.
- •Medical severity is higher for older workers, although the differential between workers aged 65 and older and nearby age cohorts is small.
- •Shares of indemnity and medical payments of older workers have a close relationship to their share of claims.
- • Frequency is less for older workers, especially in the more hazardous manufacturing and construction-related industries and occupations. In contrast, claim frequency is higher for older workers in the leisure and hospitality industry and food preparation and service occupations (as well as in sales and related occupations).

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Claims Characteristics, from p. 14

Share of Claims and Cases.

There are distinct differences between the claim shares of workers aged 65 and older and all workers when claims are grouped by cause of injury, nature of injury, and part of body. NCCI claims data (from its Detailed Claim Information [DCI] database) and BLS (Bureau of Labor Statistics) data on injury and illness cases also indicate significant differences when compared across industries and occupations.

Cause of Injury. Nearly half (47%) of workplace injury claims among workers aged 65 and older result from falls, slips, and trips. That is nearly twice the share as that for all workers (see Exhibit 3). In contrast, claims involving strains (largely back-related) account for 38% of claims for all workers versus 23% for older workers. These differences partly reflect a lower share of employment among older workers in industries and occupations requiring heavy lifting, such as construction, manufacturing, and installation and repair.

Nature of Injury. Consistent with the higher percentage of falls, workers aged 65 and older have a higher share of injuries involving fractures, concussions, and related Injuries. In contrast, sprains and strains, more associated with back injuries, account for a third of claims—well below the 45% for all workers.

Part of Body. Workers aged 65 and older have a higher share of claims involving multiple body parts and hip/thigh/pelvis injuries and a lower share of claims for lower back and hand injuries than do all workers. Again, this appears to be consistent with differences in the cause and nature of injury. For both groupings, arm and shoulder injuries account for the largest share of claims.

Industry. NCCI categorizes covered workers into five broad industry groups. Those groups are manufacturing, contracting, office and clerical, goods and services, and miscellaneous (largely logging, utilities, and transportation services). The shares of claims for workers aged 65 and older are less than for all workers in the more hazardous manufacturing and contracting sectors (see Exhibit 6). In contrast, workers aged 65 and older have a much larger share of claims in the goods and services industries, where physical demands are much reduced. (The ―Goods and Services‖ sector includes retail and wholesale trade as well as service-sector industries such as education and healthcare, leisure and hospitality services, and ―other services.). Detailed BLS data on the share of cases with days away from work by industry and age shows a pattern similar to NCCI's claims data, with the share of such cases for workers aged 65 and older being substantially lower in the more hazardous industries (e.g., manufacturing and construction) and higher in goods-and-services-related industries, especially retail trade, and leisure and hospitality services.

Occupation. The BLS also provides breakouts of injury and illness cases by occupation and age. As shown in Exhibit 9, transportation and material-moving occupations have the highest share of injury and illness cases, both for workers aged 16 and older and for workers aged 65 and older.[2] However, there are marked differences in the share of cases for older workers in other sectors. For example, in the construction/extraction and production occupations, older workers have a much lower case share than workers aged 16 and older, while in sales and food preparation/service occupations, older workers have a substantially higher share of cases than do workers aged 16 and older.

Frequency of Injury and Illness Cases

The BLS provides estimates of the frequency of injury and illness cases by age of worker. The BLS defines claim frequency in terms of the ―incidence rate‖ of claims per 10,000 full-time workers. As shown in Exhibit 10, incidence rates average 122.2 cases per 10,000 full-time workers over all age categories. They are well above average for workers aged 20–24 (with an incidence rate of 134.4) and well below average for workers aged 65 and older (with an incidence rate of 96.2). Interestingly, incidence rates for ages 25–64 show only small differences between the various age categories. Age-related differences in incidence rates are reflective of differences by industry and occupation. The incidence rates for workers aged 65 and older are lower for most industries, especially for more hazardous sectors such as manufacturing, construction, and agriculture/fishing/hunting, where older workers would be expected to have less hazardous job responsibilities. The notable exception is leisure and hospitality services—the result of relatively high incidence rates in the accommodation and food service subsector. Lower incidence rates are also evident on an occupational basis, especially for construction and extraction occupations, possibly reflecting the higher percentage of supervisory employees in the age 65 and older category as well as a difference in occupational mix with the construction sector (e.g., proportionately fewer older workers in roofing and carpentry occupations, which tend to be among the more hazardous occupations in that sector). Consistent with the industry results for the leisure and hospitality sector, incidence rates for older workers are relatively high for food preparation and service-related occupations.

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Claims Characteristics, from p. 15

Shares of Indemnity and Medical Payments

Shares of indemnity and medical payments for older workers are largely consistent with the claim share data. That is, payments at the second report for workers aged 65 and older represent a small share of indemnity and medical payments (2.0% and 2.6%, respectively—consistent with the 2.1% of claims attributable to older workers). In addition, payments are greatest for falls, slips, and trips, which, as noted previously, account for 47% of claims for workers aged 65 and older. Note that the data reflects cumulative payments made during 2000–2006 and that the numbers in parentheses are shares of claims for workers aged 65 and older.

Indemnity and medical payments are also highest for injuries associated with slips and falls (mainly fractures and concussions and related injuries). As above, the figures in parentheses are the share of claims for workers aged 65 and older.

Medical and indemnity payment shares by age of workers and NCCI industry group display a similar pattern to that for claim shares. That is, older workers have a relatively smaller share of payments for more hazardous industry groups (i.e., manufacturing and contracting) and a relatively higher share of payments for less physically demanding sectors such as office and clerical and goods and services.

Indemnity Severity

For the period 2000–2006. Indemnity severity is seen to increase steadily with age through age group 45–49. It then stays relatively flat through age group 60–64, after which it declines (by roughly 20%). Viewed relative to all age groups, indemnity severity for workers aged 65 and older is roughly 4% less than that for workers of all ages.

This pattern, of older workers having lower indemnity severity, is also evident for most categories of workplace injuries. For 96% of claims, older workers have relatively lower indemnity severity. The differential averages –7% for the four injury categories, comprising roughly 85% of claims for older workers (fractures, sprains, concussions, and other traumatic injuries).

Median time away from work for a lost-time injury tends to increase by age of worker, according to BLS data. The steady rise reflects both the increased healing time needed as persons age as well as the likelihood that older workers may have more tenure on the job and, hence, a greater number of sick days available.

The AWW also tends to increase with the age of the worker. However, the AWW reaches a maximum when a worker reaches his/her early 50s and then declines gradually through age group 60–64. It then plummets, by some 30%, for workers aged 65 and older, possibly reflecting older workers taking part-time jobs or working a shortened work schedule after their retirement from full-time employment (although, as discussed in the endnote, this differential may narrow in the future if the percentage of older workers working full-time continues to increase).[4]

The longer duration of injuries for older workers offsets, in part, the impact of the lower AWW for older workers. As a result, the decline in indemnity severity is substantially less than would be the case based solely on wage differences. This suggests that indemnity severity for older workers would have been 24% less than that for all workers based solely on the lower AWW of older workers. However, with longer durations taken into account, the differential is far less—4%.

Medical Severity

Medical severity (medical payments per claim) show a steady increase by age of worker, with workers aged 65 and older having only slightly higher claim costs than their neighboring age cohorts. For the 65 and older age category, medical claim costs are roughly 26% higher than claim costs for all workers.

Medical severity for older workers is higher than that for workers of all ages for most categories of workplace injuries. For 88% of claims, older workers have relatively higher medical severity.

Implications for Loss Costs and Safety/Loss Prevention

The small share of indemnity and medical payments for persons aged 65 and older (noted previously to be 2.0% and 2.6%, respectively) suggests that older workers are not a key cost driver for workers compensation. Although the costs for such workers may well increase as a share of total in coming years, any such increases are likely to be incremental and not of a nature to have a material impact on total loss costs. For safety and loss prevention managers, the increase in the number of older persons in the workforce presents both challenges and opportunities. The challenges reflect the fact that as people age there appears to be a deterioration in factors such as eyesight (in terms of acuity, peripheral vision, and depth/ color perception), hearing, muscle tone (strength, flexibility), reaction time, and mental processes (slower recall rates and less effective short-term memory).[5] The opportunities involve steps that can be taken to reduce the risks in the workplace for older workers that take into account these changing circumstances.

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Claims Characteristics, from p. 15

For example, to reduce the risks of falls, employers can enhance lighting where necessary, install slip-resistant flooring, and provide handrails (steps that would likely benefit the safety for all workers as well). The installation of noise dampening materials may also help where hearing may be an issue (e.g., on the factory floor). Employers can also provide wellness and exercise programs and provide information and support for common health problems that may affect older workers (such as arthritis and adult-onset diabetes).

Conclusion

Since the late 1980s, there has been a gradual rise in labor force participation rates among persons aged 65 and over. That increase may well accelerate in the near-term, as the recession and related financial and real estate market declines may cause many workers to reconsider their retirement plans.

Although the share of workers compensation claims and payments for workers aged 65 and older is relatively small, the thrust of recent developments as concerns older workers suggests taking a closer look at their workers compensation characteristics. This study has done that, describing how workers aged 65 and older differ from all workers in terms of their distribution of claims, claim frequency, and indemnity and medical payments and severity.

"Falls/slips/trips" were seen to be the greatest cause of injury among older workers (versus sprains and strains for all workers). Older workers were also shown to have a smaller share of their claims in the more hazardous industries and occupations than workers in general. BLS data indicated that claim frequency is generally less for older workers, although older workers had substantially higher frequency in the leisure and hospitality industry and related food service occupations. Indemnity severity was also less for older workers, largely because of the lower average weekly wage of such workers. In contrast, medical severity was shown to be higher for older workers, although the differential between workers aged 65 and older and nearby age cohorts is small. Finally, shares of medical and indemnity payments of older workers were seen to have a close relationship to their share of claims.

This Article is reprinted with the permission of the National Council on Compensation Insurance (NCCI). The diagrams and graphics were omitted due to space constraints. The study can be reviewed at www.ncci.com/documents/Claims-65andOlder.pdf.

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[1]This report uses data on lost-worktime claims from NCCI's Detailed Claims Information (DCI) database and information on injury and illness cases with days away from work from the US Bureau of Labor Statistics. The DCI is a stratified random sample of approximately 50,000 claims per year collected from all NCCI states and participating independent bureaus. The actual data used is for the period 2000–2006, as of the second report—that is, 18 months after the injury is reported to the insurance carrier. The claims data was grouped because of the relatively small number of claims for persons 65 and older when the data is viewed on an annual basis. The US Bureau of Labor Statistics' Survey of Occupational Injuries and Illnesses produces annual estimates of the number of lost-time injury and illness cases and related incidence rates (that is, the number of cases per 10,000 full-time workers). The latest data at the time this research was performed was for the year 2007. The survey data is provided by responding employers (roughly 176,000 establishments are surveyed), based on Occupational Safety and Health Administration logs. Note that for the BLS, a lost-time case involves at least one day away from work, unlike NCCI data, where a waiting period threshold first has to be met (with the length of the threshold varying from state to state).

[2] Within the "Transportation and Material Moving" occupational category, the two largest subcategories for both workers aged 16 and older and workers aged 65 and older are "driver/sales workers and truck drivers" and ―moving freight stock and other material by hand.‖ Nearly 44% of injury and illness cases among workers 16 and older involve drivers/sales workers and truck drivers versus 48% for workers aged 65 and older. For ―hand-related‖ material moving occupations, the respective percentages are 35% and 21%.

[4] BLS data (for the year 2007) indicates that 92% of men and 79% of women aged 55–61 are employed full-time. In contrast, the full-time percentages for men and women decline to 70% and 53%, respectively, for ages 65–69 and to 55% and 41%, respectively, for ages 70 and older. Interestingly, however, the percentage of older persons working full-time has increased substantially since the Social Security earnings cap was eliminated for persons reaching their ‖normal‖ retirement age. For example, the percentage of men aged 65–69 working full-time increased from 57% in 1999 to 70% in 2007. For women, the increase was from 44% to 53%. All of this suggests some narrowing in the difference between the AWW for workers aged 65 and older and that of workers in nearby (younger) age cohorts going forward. For additional information on hours worked for older workers, see Gendell, Murray, "Older workers: increasing their labor force participation and hours of work," *Monthly Labor Review*, January 2008.

[5]These physical effects of aging are discussed in a joint publication of the American Society on Aging and the National Highway Traffic and Safety Administration, *DriveWell, Promoting Older Driver Safety in your Community*, January 2007 (see in particular page 10).

Football Teams' Arbitration Arguments Arrive at the WCAB California -- Football Teams' Arbitration Arguments Arrive at the WCAB: [04/07/10]

By John P. Kamin, Legal Editor

The question of whether former football players' workers' compensation claims can be compelled into arbitration has been the subject of much litigation during the past year, as teams attempt to avoid the gridiron of California's workers' compensation system.

In 2009, California saw the arrival of two workers' compensation cases featuring the hotly-contested issue of whether players' claims can be compelled into arbitration under collective bargaining agreements. The cases pit former Arena Football League (AFL) and National Football League (NFL) players against their former teams and involve the collective bargaining agreements in both leagues.

The AFL case, Brache v. Tampa Bay Storm, is pending at the Workers' Compensation Appeals Board's reconsideration unit. In that case, an AFL arbitrator originally ruled that Brache was compelled into arbitration. Brache challenged the ruling in federal district court, but a federal judge dismissed the suit because the arbitrator's decision was not a final award. When the case returned to arbitration, arbitrator Jack Clarke ruled that the agreement did not bar Brache from filing in California, which Brache subsequently did. Richard Berthelsen, general counsel for the National Football League Players' Association, said the Brache case is analogous to the NFL case, which features approximately 30 former players who filed claims against the Miami Dolphins.

Robert Buch, a defense attorney arguing on behalf of the Dolphins, has used a similar argument in both the Brache and the Dolphins' cases, which asks the WCAB to compel the applicant players into arbitration. Buch said the Dolphins' case was consolidated and bifurcated, which means that the players' claims will be heard together on the issue of whether the players' claims can be compelled into arbitration. The case is currently scheduled for a status conference as the parties prepare for discovery.

Before the case was consolidated, WorkCompCentral reported on Buch's brief in the case, which based the motion to compel the claims into arbitration on two U.S. Supreme Court cases: Preston v. Ferrer and 14 Penn Plaza v. Pyett. In the 2008 Preston decision, the high court enforced a private arbitration agreement that requires the plaintiff to submit his California Labor Code claims to arbitration rather than to the California labor commissioner.

The 2009 decision in Penn Plaza held that a collective bargaining agreement term that waives employees' rights to file statutory discrimination claims is enforceable on the employees covered by the labor contract. When asked about the Dolphins' arguments to compel the former players' claims into arbitration, Berthelsen said that they were "legally baseless."

"We made an agreement in the mid-1980s with the Dolphins, because the Dolphins up to that point had refused to provide workers' comp benefits for NFL players, because the state of Florida exempts professional athletes from coverage," Berthelsen said. "We filed a grievance against them and reached a resolution, where because the Dolphins don't voluntarily participate in the system in Florida for workers' comp – we had to devise a special grievance procedure under the collective bargaining agreement for Dolphins' players who want to file workers' comp claims in Florida, and I underscore 'in Florida' – because the Dolphins chose not to be covered by the state law. "Now the Dolphins are contending that that very agreement precludes and prevents players from filing in other jurisdictions. And that is absolutely not the case, and there is no basis whatsoever for them claiming that."

Berthelsen also pointed out that in the Brache case, the Florida teams took a position that was similar to the Dolphins'. That is why he believes it is noteworthy that the arbitrator's decision that the collective bargaining agreement did not bar Brache from filing elsewhere was significant. Berthelsen said that it is well-established that workers cannot waive their right to file workers' compensation claims in California. He cited the 1935 U.S. Supreme Court decision of Alaska Packers v. IAC, where the U.S. Supreme Court upheld a California Supreme Court ruling that a person cannot waive his right to file workers' compensation claims in California.

Continued, Page 19

Football Teams', from Page 18

"That was upheld by the U.S. Supreme Court in the decision authored by Justice (Louis) Brandeis, saying that a state -- when it is trying to protect public safety and protect employees and people within its borders -- has the right to assert jurisdiction, and that cannot be contracted away either in an individual employment contract or in a collective bargaining agreement," Berthelsen said. He noted that since then, there have been other U.S. Supreme Court decisions with similar holdings.

The New York Times reported Tuesday that more than 700 NFL players have filed for workers' compensation benefits in California, thanks to a state law that allows athletes to file claims as long as they have played at least one game in the Golden State.

However, players from other leagues – such as Lonnie Shelton of the Cleveland Cavaliers – have also sought benefits in California. In 2009, the California Supreme Court declined to disturb a decision holding the basketball team solely liable for his permanent disability award of $72,135 and a life pension, citing the fact that its insurer was not authorized to write coverage in California.

One of the most recent players to file a workers' compensation claim in California was documented in the New York Times on Tuesday. The newspaper reported on the case of Ralph Wenzel, a former lineman for the San Diego Chargers, who is alleging that his three years of work as a football player caused his dementia.

Ronald Feenberg, the attorney representing Wenzel and his wife, said that Wenzel's dementia claim is analogous to any other cumulative trauma claim, and that Wenzel's dementia was caused by repeated blows to the head. He plans to cite a number of studies showing a causative link between high-velocity blows to the head and football players who develop a protein cluster in their brains, causing advanced dementia. While studies have linked the protein, tau, to Alzheimer's disease, Feenberg explained that autopsies of 11 former professional football players have all shown that the players had significant levels of tau.

The Boston University physician who conducted that research, Dr. Ann McKee, testified before the House Judiciary Committee in October 2009 about legal issues relating to football head injuries. Feenberg explained that he will use McKee's research; medical studies from Harvard University, the University of Michigan, and the University of North Carolina; and Wenzel's medical records to prove his claim.

It is likely that other attorneys will be watching Feenberg's case. Berthelsen pointed out that the NFLPA has panels of attorneys in every state that monitor the legal system for notable legal developments. The NFLPA does this, he explained, because a timely-filed claim can provide much-needed medical care for disabled players with medical needs.

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Time for Modern Variation on a 500 Year Old Theme?

The Florida First District Court of Appeal recently reviewed a case in which the Plaintiff filed a 34-count 77-page complaint against appellee attempting to assert causes of action for negligence, fraud, breach of fiduciary duty, equitable and promissory estoppel, intentional infliction of emotional distress, violations of the Florida Deceptive and Unfair Trade Practices Act and the federal Racketeer and Corrupt Organizations Act, and a claim for loss of consortium. The Court was drawn to Gordon v. Green, 602 F.2d 743, 747 n.13 (5th Cir. 1979), "where, chastising a plaintiff's attorneys for their utter disregard for the Federal Rules of Civil Procedure in drafting a complaint, the court said that '[c]ounsel as scrivener would have been fair game for the discipline meted out by' an English Chancellor in 1596--ordering a hole cut through the center of a particularly prolix document, and then ordering that the drafter's head be stuffed through the hole and the drafter led around to be exhibited to all attending court at Westminster."

http://opinions.1dca.org/written/opinions2010/04-13-2010/09-4521.pdf

Workers' Compensation Resources

Florida Workers' Compensation Institute
www.fwciweb.org

Workers' Compensation Service Center
www.workerscompensation.com

Judge Tom Talks
http://judgetom.blogspot.com/

Judge Torrey
http://www.davetorrey.info/

The National Institute of Occupational Safety
http://www.cdc.gov/niosh/

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
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THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR.
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Tallahassee, FL 32302-0200
850.488.2110 850.922.3661 (Fax)
Email: jjl@nawcj.org

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Email: jjl@nawcj.org

Warren Buffet said "price is what you pay, value is what you get." Do not confuse the two. The NAWCJ College 2010 is an exceptional program and an exceptional value. This program delivers diverse national experts in the field at a fraction of the cost of most national programs.

Our 2010 program is presented three sections. Section one is the "New Judges" program. This is intended to ease the transition to public service for new adjudicators. The adjudicatory role presents new challenges to most; the role of adjudicator is far different from advocacy. Likewise, the transition from private employment to government service is challenging in itself. The "New Judge" program is a unique opportunity for adjudicators with less than two years of service to work in a close interpersonal environment with exceptional judges from throughout the country. This program begins Monday morning and concludes in time for the keynote speech of the Workers' Compensation Institute by quarterback Dan Marino at 11:00 a.m.

The second section begins with Mr. Marino's speech to the Institute, followed by a transition into the "judges only" program, starting with an informal luncheon and comparative law discussion, followed by an exceptional evidence seminar by Professor Charles Ehrhardt, and capped off with the Code of Judicial Conduct and Judge James Wolf. Every attendee will end this day with valuable "take away" perspectives from extraordinary speakers. The second section continues on Tuesday morning with an all-day program including two live surgeries, Deputy Chief Judge Poindexter will provide tips and guidance on working with pro-se litigants, Dr. Melhorn will address the use of impairment guides as only one of their authors could, Mr. Salatti will provide intensive insight into effective order writing, and there will be a live oral argument before the First District Court of Appeal. The second section will conclude Tuesday evening with a reception for all attendees, NAWCJ members, and associate members.

The final section on Wednesday provides three distinct and intense opportunities. Attendees may choose the multi-state program with specific state breakouts, or the Medicare set-aside program, or the Advanced Mediation Techniques program. Each provides advice and insight from leading experts in these fields.

Don't let the price fool you. This program delivers unprecedented value. We look forward to meeting you there.

NAWCJ Judicial College 2010

Section One
New Judges Program

Monday, August 16, 2010

8:30 – 11:00 NAWCJ New Judge Program

8:30 – 8:45 PM Welcome and Announcements
Honorable John J. Lazzara
Tallahassee, Florida
Florida Office of Judges of Compensation Claims

8:45 - 9:15 Advocate to Adjudicator
Honorable R. Karl Aumann
Baltimore, Maryland
Maryland Workers' Compensation Commission

9:15 - 9:45 Judicial Independence and Relating to the Bar
Honorable David Torrey
Pittsburg, Pennsylvania
Pennsylvania Department of Labor and Industry

9:45 - 10:15 The Motion for Recusal, conflict Disclosure and the Code
Honorable Ellen Lorenzen
Tampa, Florida
Florida Office of Judges of Compensation Claims

10:15 - 10:45 Transition to the Bureaucracy of State Government
Honorable David Imahara
Atlanta, Georgia
Georgia State Board of Workers' Compensation

10:45 - 11:00 Break and Transition to Dan Marino Speech

The Florida Workers' Compensation Institute (FWCI) also has a morning program. NAWCJ College attendees are welcome to attend these.

9:00 – 11:00 Workers' Compensation Conference Welcoming Speeches

9:15 - 9:40 AM Scholarship and Award Presentations

9:40 – 10:00 AM Alex Sink, Florida CFO

11:00 – 12:00 AM Guest Speaker, Dan Marino

11:00 - 5:00 PM Exhibit Hall Open

NAWCJ Judicial College 2010

Section Two
Main Program, Day One (Monday)

Monday, August 16, 2010

11:30 – 1:20 PM **NAWCJ Welcome Lunch and Multi-Jurisdiction Comparative Law Panel**

Honorable R. Karl Aumann
Baltimore, Maryland
Maryland Workers' Compensation Commission

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

Honorable Linda A. Thompson
Jackson, Mississippi
Mississippi Workers' Compensation Commission

Honorable Gwendolyn Thompson
Covington, Louisiana
Louisiana Workforce Commission

Honorable David Torrey
Pittsburg, Pennsylvania
Pennsylvania Department of Labor and Industry

1:20 - 1:30 PM **Break**

1:30 - 3:30 PM **Evidence in Workers' Compensation**

Charles W. Ehrhardt, Emeritus Professor
Florida State University College of Law

The trials and tribulations of evidence, or the tribulations of trial evidence; states differ in their workers' compensation evidentiary standards, rules, and approaches. Professor Ehrhardt will bring the subject to the table with wit and wisdom for dealing with difficult objections to hearsay, authentication, relevance and prejudice.

3:30 - 3:40 PM **Break**

3:40 - 4:30 PM **Code of Judicial Conduct**

Hon. James R. Wolf, Tallahassee, Florida
Florida First District Court of Appeal

Whether your state applies the Code of Judicial Conduct to you or not, these are great standards to live by on the bench. Judge Wolf brings experience, insight, and clarity to the canons that define appropriate judicial behavior. The Independence of the Judiciary is dependent upon the faith that litigants, counsel, and the public have in the impartiality and fairness of the process. That perception is in turn dependent upon each or our actions every day, and learning to apply the canons to shape the perceptions of your behavior on and off the bench is a great benefit to any Judge.

4:30 - 4:45 PM **Break**

4:45 - 5:15 PM **NAWCJ Annual Business Meeting and Elections.**

7:00 - 11:00 PM **Reception and Entertainment**

NAWCJ Judicial College 2010

Section Two
Main Program, Day Two (Tuesday)

Tuesday August 17, 2010

8:45 - 9:45 AM LIVE SURGERY

Two Live Surgeries: Carpal Tunnel Release And Arthroscopic Meniscus

Moderator and Speaker:
Eric G. Bonenberger, MD
Orlando Orthopaedic Center

Surgeries Performed by:
Carpal Tunnel Release:
Lawrence S. Halperin, MD
Orlando Orthopaedic Center

Arthroscopic Meniscus:
Bryan L. Reuss, MD
Orlando Orthopaedic Center

Wait until you see what we have in store for you this year!!! This just keeps getting better. Watch and learn as two of the most renowned orthopaedic surgeons in Central Florida perform LIVE two of the most common surgeries in workers' compensation claims today. Dr. Lawrence S. Halperin, a board certified orthopaedic surgeon with over 20 years of experience in hand/upper extremity surgery will perform a carpal tunnel release. Dr. Halperin currently sits on the Board of Directors for the American Academy of Orthopaedic Surgery and Florida Orthopaedic Society. Dr. Bryan L. Reuss, a board certified orthopaedic surgeon who specializes in Sports Medicine and has extensive experience in shoulder and knee surgery will perform an arthroscopic meniscus surgery. Dr. Reuss has treated many athletes both in the professional and amateur arena, such as NFL, UFL, PGA, collegiate and high school. Although this presentation takes place as part of the Adjusters' Breakout, everyone is invited to attend.

9:45 - 10:00 PM BREAK AND TRANSITION

10:00 – 10:50 AM THE STRENGTHS AND WEAKNESSES OF IMPAIRMENT GUIDES

J. Mark Melhorn, M.D.

Witchita, Kansas
Orthopedic Surgeon, Hand Center

Dr. Melhorn is a nationally recognized expert in medicine and more specifically the causation of injury and return to work dilemmas. A hand surgeon by training and practice, he has edited two books for the American Medical Association: *A Physician's Guide to Return to Work* and *The Guides to the Evaluation of Disease and Injury Causation*. Dr. Melhorn has participated significantly in the editing of the American Medical Association Guides to Impairment that are employed by many states in their workers' compensation statutes and codes. Dr. Melhorn will provide insight on the purpose of such guides, their effectiveness as tools, and the academic debate surrounding the medico-legal decisions that are rendered each day using them.

10:50 - 11:00 AM BREAK

Continued, next page

NAWCJ Judicial College 2010

Section Two

Main Program, Day Two (Tuesday) Continued

11:00 -11:50 AM **EFFECTIVELY WORKING WITH PRO SE LITIGANTS**

Mark D. Poindexter, Deputy Chief Judge
Washington, D.C.
Office of Administrative Hearings

Does it seem like some cases take more of your time, staff time, and resources than others? This program will define some of the difficulties presented by the pro se litigant in workers' compensation. Deputy Chief Judge Poindexter, a national speaker on the subject, will provide insight into the conflict between effective litigation by pro-se litigants and the impartiality of the Judge.

11:50 -1:00 PM **FLORIDA BAR WORKERS' COMPENSATION SECTION JUDICIAL LUNCHEON**

1:00 - 2:00 PM **ORAL ARGUMENT**

Panel:

Honorable Paul M. Hawkes, Chief Judge
First District Court of Appeal
Tallahassee, FL

Honorable Charles Kahn
First District Court of Appeal
Tallahassee, FL

Honorable Joseph Lewis
First District Court of Appeal
Tallahassee, FL

Jon S. Wheeler, Clerk
First District Court of Appeal
Tallahassee, FL

Stephen M. Nevels, Marshal
First District Court of Appeal
Tallahassee, FL

Two actual cases will be argued live before a panel of Judges of the Florida First District Court of Appeal. The decision of the Court will be posted on the Court's website several weeks after the oral arguments take place. Although this presentation is part of Breakout for Adjusters, everyone is invited to attend

2:00 – 2:15 PM **BREAK AND TRANSITION**

2:15 – 5:00 PM **EFFECTIVE LEGAL WRITING FOR JUDGES**

John T. Salatti, Esq.
Washington, D.C.
LAWriters

Many have been credited with the quote "dying is easy, comedy is hard." In the same vein, perhaps adjudicating is easy, writing is hard, and editing is harder still. Judges struggle, sometimes unwittingly, with classic writing conflicts; who is our audience?, how much background is enough or too much? Mr. Salatti will apply years of writing and lecture skill to guide us through a step-by-step process for editing our orders, after which he and the group can discuss how better forethought *preceding* the original drafting may reduce editing time. This program will help us produce clear, concise, and effective rulings of value for the litigants before us, any reviewing courts or agencies, and the broader marketplace we serve.

5:00 – 5:15 PM **BREAK AND TRANSITION**

5:15 - 6:15 PM **NAWCJ RECEPTION**

Invited Guests, NAWCJ Members and NAWCJ Associate Members

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday)

Wednesday Breakout Option One:

9:00 - 12:00 PM BREAKOUT ON ADVANCED MEDIATION TECHNIQUES FOR MEDIATORS, ATTORNEYS AND ADJUSTERS

Moderator:
Stuart F. Suskin, Attorney
State Mediator, Office of the Judges of Compensation Claims
Gainesville, FL

Panel:
Christine L. Harter, *Attorney*
Sheldon (Shelley) B. Forte, *Attorney*
Edward Almeyda, *Attorney*
Judith S. Nelson, *Attorney*
Anthony J. (Skip) Beisler III, *Attorney*

Mediation has become an integral part of any workers' compensation system. Regardless of the jurisdiction, all cases are mediated in some form prior to the final hearing. This program will address tactics and strategies that have been employed by mediators to deal with difficult situations. The format of the program will be a Q & A session, with a roving moderator in the audience, soliciting audience participation. This program is targeted for mediators, attorneys, adjusters and risk managers/employer representatives who are interested in resolution strategies for difficult cases. The panelists will endeavor to incorporate ethical, cultural diversity, and domestic violence considerations in each topic. This 180 minute program is designed to provide 3.6 hours of general mediation education, with some portion devoted to ethics, domestic violence and cultural diversity. Attendees should consult their state's mediation regulatory agency for CME requirements/hours.

Wednesday Breakout Option Two:

9:00 - 3:00 PM MEDICARE BREAKOUT, THE BOLD NEW WORLD OF TAKING MEDICARE'S INTERESTS INTO ACCOUNT

With millions of baby boomers about to become retirees, an unstable economy and 10% unemployment, continued higher costs for medical services, an unknown and untested federal legislation, and studies indicating Medicare is projected to be insolvent by 2019, the federal government has turned to the Medicare Secondary Payer Act to force litigants to take Medicare's interests into account when monetary funds are being provided to the injured party to cover past and future medical expenses associated with the claimed accident and resulting injuries. This breakout will explore when and how litigants must take Medicare's interests into account, including in-depth panel discussions on mandatory insurer reporting, Medicare conditional payments, and Medicare set asides. The breakout will also explore Medicaid related issues, including resolution of Medicaid liens and the creation and administration of special needs trusts.

Program Moderator:
Rafael Gonzalez
CEO of the Center for Lien Resolution and the Center for Medicare Set Aside Administration
Clearwater, FL

Wednesday Breakout Option Two:

9:00 – 9:10 am Introductions

Rafael Gonzalez
CEO of the Center for Lien Resolution and the Center for Medicare Set Aside Administration
Clearwater, FL

Michael Wescott
NAMSAP President
Maitland, FL

9:10 – 10:05 am **Taking Medicare's Interests Into Consideration: Mandatory Insurer Reporting**

Panel:
John Williams, President and CEO
Gould & Lamb
Bradenton, FL

Mark Popolizio, Attorney
Vice-President, NuQuest
Longwood, FL

Todd Belisle
Vice-President, The Center for MSA Administration, LLC
Clearwater, FL

This panel will present a comprehensive overview of the current and projected mandatory insurer reporting landscape as set out by Section 111 of the Medicare/Medicaid SCHIP Extension Act of 2007. The panel will discuss the contextual background of the Act, which entities are required to report to the government, what information is necessary for reporting, the penalties for incomplete submissions or non-compliance, as well as the effects of such reporting on the litigants and their case.

10:05 – 10:20 am **Break**

10:20 – 11:10 am **Taking Medicare's Interests Into Consideration: Medicare Conditional Payments**

Panel:
Roy A. Franco, Attorney
Corporate Director, Risk Management Services, Safeway, Inc.
Pleasanton, CA

Rochelle Lefler, Attorney
Corporate Counsel, PMSI
Tampa, FL

Floyd Faglie, Attorney
The Law Office of John Staunton, PA
Clearwater, FL

Panel members will go through a comprehensive overview of Medicare conditional payment subrogation rights. Within this context, the panel will review the governing articles of the Medicare Secondary Payer Act concerning payment subrogation, the conditional payment process and payback timeline, entity responsibility, and the applicable waiver and appeals process.

Wednesday Breakout Option Two, Continued:

11:10 – 12:00 pm **Taking Medicare's Interests Into Account: MSA Allocations, Approvals, and Administration**

Panel:
Angela Wolfe, RN, Attorney
Med-Fi
Bradenton, FL

Jacqueline Green Griffin, Attorney
Eraclides, Johns, Hall, Gelman & Goodman, LLP
Jacksonville, FL

Danny Alvarez, Attorney
The Center for MSA Administration, LLC
Clearwater, FL

The panel will analyze Medicare Set Aside (MSA) allocations, the MSA approval process, and MSA professional administration. Within this context, the panel will discuss the Medicare Secondary Payer Act and the various CMS Memorada. Problems arise in cases because after the MSA is submitted to CMS, CMS rejects those numbers and substitutes its own numbers. What do you do now? Our panel of experts will guide you through this maze. Lastly, the panel will address the benefits and drawbacks of private and professional administration and what they mean to the Medicare beneficiary, the employer/carrier, and even the attorneys representing the parties.

12:00 – 1:00 pm **Lunch (on your own)**

1:00 – 2:00 pm **Protecting Supplemental Security Income and Medicaid Eligibility: Special Needs Trusts**

Panel:
Jana McConnaughhay, Attorney
Waldoch & McConnaughhay, PA
Tallahassee, FL

John Staunton, Attorney
The Law Office of John Staunton, PA
Clearwater, FL

Leo Govoni,
The Center for Special Needs Trust Administration, Inc.
Clearwater, FL

Supplemental Security Income (SSI) is a cash assistance program administered by the Social Security Administration, providing financial assistance to needy, aged, blind, or disabled individuals. Medicaid is the federally funded, but state run program, designed to provide medical benefits to needy, aged, blind, or disabled low income people. The panel will provide personal injury and workers' compensation professionals with basic information about both programs. The panel will also provide those in attendance with key information that will assist the parties in resolving claims in which such benefits are at stake, while maintaining eligibility for SSI and Medicaid.

2:00 – 2:15 pm **Break**

Wednesday Breakout Option Two, Continued:

2:15 – 3:00 pm **The Unknown Frontier of Medicare Set Asides: MSAs and Liability Claims**

Moderator:
Michael Wescott
NAMSAP President
Maitland, FL

Panel:
Tom Basserman
CMS San Francisco Regional Office
San Francisco, CA

Sally Stalcup
CMS Dallas Regional Office
Dallas, TX

Since 2001, CMS memos have made it very clear that in workers' compensation cases, an approved MSA will satisfy the parties' burden to take Medicare's interest into consideration when settling future entitlement to medical care as a result of the claimed accident. However, without any such CMS memos on liability/personal injury cases, the litigants in liability matters have been left to decide for themselves what the thresholds are for liability MSAs, whether MSAs are at all necessary in such matters, and if so, whether they need to be approved by CMS. This panel, made up of CMS regional office managers, will venture into the unknown frontier of MSAs and liability claims.

Wednesday Breakout Option Three:

8:45 - 3:00 PM **BREAKOUT ON MULTI-STATE WORKERS' COMPENSATION LAWS**

Program Moderator:
R. Briggs Peery, Attorney
Swift, Currie, McGhee & Hiers, LLP
Atlanta, GA

We are bigger and better this year with new jurisdictions participating. In addition to the Southeastern states of Alabama, Georgia, North Carolina, Mississippi, South Carolina and Tennessee, the state of Texas, a first time member of the Breakout in 2009, is back by popular demand. Furthermore, we are pleased to welcome Louisiana to our group in 2010. Legal experts from this broad spectrum of states will assist claims' handlers and employer management teams in the recognition of important jurisdictional trends, case law, cost saving techniques, and litigation strategies as a means to reduce workers' compensation exposure. Ours is an exceedingly unique format that is not to be missed. At the conclusion of the afternoon general session, the 2010 Multi-State Book of Workers' Compensation Laws will be provided to all break-out attendees. The book includes the workers' compensation statutes from each of the eight (8) participating states.

Wednesday Breakout Option Three, Continued:

8:45 - 9:35 AM OPENING GENERAL SESSION: LEGAL TRENDS AND ISSUES FOR 2010

State Regulators:

Andrea Pope Roche (invited)
Chairperson, South Carolina Workers' Compensation Commission

Teresa Bullington (invited)
Director of Specialists, Tennessee Department of Labor

Liles Williams (invited)
Chairman, Mississippi Workers' Compensation Commission

Honorable Pamela Thorpe Young
Chair, North Carolina Industrial Commission

Honorable David Imahara
Administrative Law Judge, Georgia State Board of Workers' Compensation

Honorable Rick Thompson
Chairman, Georgia State Board of Workers' Compensation

Honorable Robert Lang
Deputy Commissioner for Hearings, Texas Department of Insurance, Division of Workers' Compensation

Honorable Sheral Kellar
Chief Judge, Lousiana Office of Workers' Compensation

9:35 - 9:45 AM BREAK

9:45 - 11:30 AM INDIVIDUAL STATE OVERVIEWS WITH Q&A

(Move into individual breakout rooms)

Alabama – Grand Ballroom 1
Georgia – Grand Ballroom 2
South Carolina – Grand Ballroom 3
Tennessee – Grand Ballroom 4
Mississippi – Grand Ballroom 5
North Carolina – Grand Ballroom 6
Texas – Boston (Hall of Cities)

11:30 - 12:30 PM LUNCH (PROVIDED FOR ATTENDEES BY MULTI-STATE COMMITTEE)

NAWCJ Judicial College 2010

Section Three

Breakout Programs, Day Three (Wednesday), Continued

Wednesday Breakout Option Three, Continued:

12:30 - 2:20 PM REPEAT OF INDIVIDUAL STATE OVERVIEWS WITH Q&A (CONCURRENT SESSION)

12:30 - 2:20 PM **So You Think You Have It Bad? Comparing And Contrasting How Differently The Same Legal Issues Are Handled By Multiple Jurisdictions**

Panel Discussion to include attorneys from the participating states.

2:20 - 2:30 PM BREAK

2:30 - 3:00 PM CLOSING GENERAL SESSION: CONCLUDING REMARKS AND SUGGESTIONS FROM THE REGULATORS/DOOR PRIZES/RELEASE OF 20010 MULTI-STATE STATUTE BOOK

What they said about NAWCJ College 2009:

"Fabulous concept and program. Very useful information and wonderful to meet with judges from other states."

"Overall, the seminar was extremely worthwhile. The hard work of everyone involved is greatly appreciated."

"Very dynamic and compelling presentation."

"Top-notch writing instructors like this year are always welcome."

Last year's attendees requested:

"How to best deal with pro se claimants"

"a Multi-state discussion"

"Evidence"

"More judicial writing"

The 2010 Curriculum above delivers all this and much, much more!

NAWCJ College 2010 Registration Form

Name First Name for Badge

Agency Name (as you wish it to appear on name badge) Title

Business Mailing Address

City State ZIP

Telephone Number Fax Number Email Address

Continuing Legal Education License Number State/Association

Hotel Accommodations:
For your convenience a block of sleeping rooms has been reserved at the Orlando World Center Marriott for this event. Please complete the following information and a reservation will be processed for you. The sleeping room rate is $163. Cut-off August 1, 2010.

Number of Rooms_____ □Smoking □Non-smoking Arrival Date 08/_____/2010 Departure Date 08/_____/2010
□Check here if you have special needs that require attention.
College Registration Fee:

NAWCJ Members:

$200.00 if paid on or before July 31, 2010
$225.00 if paid on or after August 1, 2010

Non-Members

$240.00 if paid on or before July 31, 2010
$265.00 if paid on or after August 1, 2010

Method of Payment: □ Check □ Mastercard □ VISA □ American Express □ Discover

Credit Card Account Number Expiration Date Signature

Make Checks Payable To:
The National Association of Workers' Compensation Judiciary, Inc.
FEIN # 26-4598530
Online Registration Is Available on May 15, 2009 At www.nawcj.org.
Registration: To register, mail the completed registration form, along with credit card information (VISA/MC/AmX/Discover) or a check made payable to: The National Association of Workers' Compensation Judiciary, Inc., P.O. Box 200, Tallahassee, Florida 32302-0200; fax form to (850)521-0222; or register online at www.nawcj.org. Registration for the Judiciary College will include conference handout materials, access to the exhibit area, Monday night reception, and participation in the Annual Workers' Compensation Educational Conference. Onsite Registration is $225.00 for NAWCJ members, or $265.00 for non-members. For more information, contact the National Association of Workers' Compensation Judiciary at (850) 425-8156 or 425-8155.

YOU MUST BE AN ADJUDICATOR OR ADJUDICATION ADMINISTRATOR TO ATTEND.
Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

NAWCJ College 2010 Scholarship Application

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Agency Name Title

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Required Information:

I certify that I have contacted the agency for which I work and have accurately reflected the funding available below.

	Source	Amount Provided
Tuition	_____	$_____
Lodging	_____	$_____
Meals.Per Diem	_____	$_____
Travel	_____	$_____

I am requesting financial assistance from the NAWCJ for the following:

Tuition	_____	$_____
Lodging	_____	$_____
Other	_____	$_____

I have received financial assistance from the NAWCJ in the past for the following programs:

_____
Program Date

_____
Program Date

_____
Judge's Signature Date

Mail your application to:

Hon. John J. Lazzara, NAWCJ President
P.O. Box 200,
Tallahassee, FL 32302-0200
850.488.2110 850.922.3661 (Fax)
Email: jjl@nawcj.org