National Association of Workers' Compensation Judiciary

Lex and Verum

Number XIII, 0910

"Second Fridays Seminars"

The National Association of Workers' Compensation Judiciary continues its program of monthly educational seminars, presented on the second Friday of each month at lunchtime program. In 2009, These programs were offerred in conjunction with the Florida Office of Judges of Compensation Claims, and included medical experts, nanotechnology, methycillin resistant staphyloccoci, leadership, and much more, all presented in live format via telephone, webinar, and by videoteleconference.

This year, the NAWCJ and Florida Office of Judges of Compensation Claims is joined by the Florida Workers' Compensation Institute (FWCI) to present an even more diverse and interesting 2010-11 program. The schedule for 2010-11 will include one hour continuing education programs beginning in October 2010. Topics will include multiple orthopedic issues, H1N1, Cultural Diversity, and Stress. Plan now to join us for these exceptional programs, at no charge to NAWCJ members.

October 8, 2010

H1N1 in the Working Environment: How Your Knowledge of the Virus Will Improve Patient Care and Provide a Safe Working Environment
Thomas Truncale, DO, MPH
University of South Florida, Tampa, FL

November 12, 2010

The Latest on Spinal Surgeries: A Discussion on Procedures and Outcomes
Trang H. Nguyen, Ph.D.
Fellow of Occupational and Environmental Medicine
University of Cincinnati College of Medicine
Cincinnati, OH

December 10, 2010

The Real Cost of Job Stress
Rashaun K. Roberts, Ph.D.
Research Psychologist
CDC-National Institute for Occupational Safety and Health (NIOSH) Division of
Applied Research and Technology (DART)
Cincinnati, OH

January 14, 2011

The Anatomy of The Injury
Bruce M. Berkowitz, M.D.
Orthopaedic Center of South Florida, Plantation, FL
Tim G. Joganich, M.S., CHFP, ARCCA Inc.
Penns Park, PA

February 11, 2011

What is Cultural Diversity in Healthcare? Increase Your Understanding for Improved Patient Outcomes
Adam Scott Middleman,
Vice President of Sales and Marketing, Black Diamond Services, Pompano Beach, FL

March 11, 2011

Tendinitis, Compressive Neuropathy and Trigger Finger in the Workplace
Tosca Kinchelow, MD, Miami International Hand Surgical Services, North Miami Beach, FL

April 8, 2011

Economic Advantages of Timely Orthopedic Subspecialty Care: Hand Surgery and Beyond
Alejandro Badia, MD, Badia Hand to Shoulder Center
OrthoNOW, Miami, FL

May 13, 2011

Rotator Cuff Tear in the Injured Worker
Avi Kumar, MD, Coastal Orthopedics & Pain Management, Bradenton, FL

June 10, 2011

Kneecaps - Therapy First: Treatments for Patellofemoral Joint Injury and Pain Syndrome
Theodore Evans, MD
South Dade Orthopaedic Associates
Miami, FL

A SUMMARY
FLORIDA WORKERS' COMPENSATION INSTITUTE EDUCATION CONFERENCE
AND
NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY JUDICIAL COLLEGE

August 16-18, 2010

I. Introduction

The exciting Florida Workers' Compensation Institute (FWCI) Educational Conference convened in Orlando this year from August 16 through 18, 2010. The venue, like last year, was the Marriott World Center. The recently-formed National Association of Workers' Compensation Judiciary (NAWCJ), which is led by the Florida Judges of Compensation Claims (JCC's), held its own three-day educational College in concert with that of FWCI. CLE credits for all states were available for attendees.

The keynote speaker was a familiar face – football star Dan Marino. He gave an inspiring speech, followed by tosses of autographed footballs to beaming audience members. The conference featured an immense trade show, and among the Pennsylvania representatives were the MSA-vendor attorneys of Burns White (Pittsburgh, PA).

A major presence at the conference was Florida's First District Court of Appeals. The "1st DCA" has jurisdiction over appeals from the Florida JCC's – no "intra-agency" level of review exists in Florida, as in Pennsylvania and most states. The court convened an actual workers' compensation appellate oral argument for the conference attendees to observe. Of special interest is the court's Workers' Compensation Unit, made up of clerks devoted to the field, with the goal of helping to make the court's decisions in workers' compensation appeals consistent from panel to panel.

A leading speaker at the conference was the hand surgeon and occupational medicine specialist J. Mark Melhorn, M.D. He addressed the judges and the conference at large in two separate presentations, with a focus on (1) the *AMA Guides*; and (2) his book, written with Dr. James Talmage, *A Physician's Guide to Return to Work* (AMA Press 2005). I had seen this book advertised the last few years, but only bought it a month before the conference. This text is a must to read, and it should be a part of your reference library. It will supply you with invaluable insights into the thought processes of physicians. My copy is now autographed!

Another outstanding speaker, for the Judges' College, was the leonine FSU Law School Professor Charles W. Ehrhardt. He gave an evidence presentation that focused on how courts are treating the admissibility of medical reports, medical records, and expert evidence in general. Professor Ehrhardt highly recommended two new treatises on the admissibility of electronic evidence. The first is a law review article, *The Admissibility of Electronic Evidence*. *See* Steven Goode, *The Admissibility of Electronic Evidence*, 29 THE REVIEW OF LITIGATION 1 (2009). The second is the 95-page federal court decision in *Lorraine v. Markel American Ins. Co.* (2007). *See Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007).

Professor Ehrhardt discussed the now-familiar distinction between the *Frye* and *Daubert* treatments of expert medical evidence. He observed that Florida is, like Pennsylvania, a *Frye* jurisdiction. Ironically, however, in Florida, when a medical expert sets forth an opinion that is admittedly "pure opinion," even *Frye* does not apply and the opinion can be admissible. *See generally* Saqui, *Comparative Analysis of Florida's Admissibility Standards for Medical Causation Expert Testimony under Frye: Is It "Generally Accepted?,"* 34 NOVA LAW REVIEW 515 (2010). He also noted that in at least two jurisdictions, state and federal, the diagnosis of *fibromyalgia* has *not* survived the *Daubert* analysis. (See, respectively, *Grant v. Boccia*, 137 P.3d 20 (Washington Ct. Appeals 2006); *Vargas v. Lee*, 317 F.3d 498 (5th Cir. 2003)).

II. The Attorney's Fees Issue

Florida is a state where retractive reform has been hard on the legal profession, particularly lawyers representing injured workers. In this regard, a 2003 reform restricted attorney's fees that are payable by employers and carriers to claimants' attorneys.

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In Florida, notably, the carrier or employer pays the fees when claimant prevails. In 2008, some relief was afforded when the Florida Supreme Court held that claimant attorneys were entitled to *reasonable* fees. That case was *Emma Murray v. Mariner Health and ACE USA*, 994 So.2d 1051 (Fla. 2008).

In May 2009, however, the legislature overruled the decision and restored the fee restriction. (*See* 1-23 DUBREUIL'S FLORIDA WORKERS' COMPENSATION HANDBOOK, § 23.11A (Lexis-Nexis 2010) ("Point-Counterpoint Discussion of Claimant's Attorney's Fees")). At the same time, notably, the legislature refused to enact "a similar measure limiting the amount of fees insurance companies may pay their own lawyers to defend against paying benefits to injured workers." According to one claimants' lawyer blog, "The statute will be challenged as unconstitutional. However, it will take years for a final decision to be handed down by the Florida Supreme Court. Until then, injured workers' attorneys will be operating at a significant disadvantage to their better-funded opponents." *See* http://www.floridainjuryattorneyblawg.com/2010/03/injured-workers-harmed-by-flor.html#more.

The chair of the Florida Bar Association compensation section has agreed with this latter comment, writing that "[t]he 2009 legislation has manifested a chilling effect on an injured worker's ability to secure legal counsel and adequately present their case in court." Richard E. Chait, Annual *Report, Workers' Compensation Section, Florida Bar*, 84 FLA. BAR J. 26 (June 2010).

One JCC told me that more cases reach him with *pro se* claimants, given the inability of attorneys to earn reasonable fees. In addition, the current chair of the Florida Bar reported, in his formal remarks, that membership in the workers' compensation committee had dropped 18% in the recent past. (Remarks of Mr. Rick Thompson, Esquire, August 17, 2010). He attributed some of that drop to the 2003 reforms and its 2009 ratification.

Not everyone agrees that the "chilling effect" referenced above really exists. One Florida expert remarked to me, "I do not think that claimants have any more difficulty finding attorneys now than they ever did. What has happened, based on my empirical observation, is that attorneys are taking fewer cases to trial[,] which has resulted in quicker, but less valuable, settlements. In other words[,] if the issue is payment of an emergency room bill, the case now gets settled for $2000 to $5000 as soon as the petition is filed or at mediation shortly thereafter." This observer continued, "Before the amendment, the claimant's attorney would litigate that bill and get $5000 in fees if he prevailed and [would] then settle the case for $10,000…."

Of course, Pennsylvania has also experienced retractive reform. Our three business-friendly reforms (1993, 1995, and 2006), and our recent procedural reforms (2007), have not, however, featured measures specifically directed at reducing attorney involvement. (Surely such reduction was a motive of the Florida reformers.) The reforms *could have* included such things as:

- restricting fee levels (a 15% fee cap on attorney's fees was included in an early version of Act 57 (1996));
- forbidding fees out of certain recoveries; and
- making it more difficult to collect fees.

It is true that the 2007 amendments banned lawyers from charging more than 20% fees out of compromise settlement lump sums. That legislation, however, was directed at one particular regional situation, and was not part of a broader scheme to reduce attorney involvement. Indeed, the ban was *not* opposed by the Pennsylvania Bar Association.

We have not experienced controversy in Pennsylvania over the compensation of the *defense bar*, an issue that was and is current in the Florida debate. However, WCRI, in its annual assessments of the Pennsylvania Act, reliably reports that defense costs in our state are among the highest among the jurisdictions studied. However, this figure may include the costs of such things as medical depositions, which are not attorney's fees at all.

The chairman of the Kentucky Board told me that in his state, defense counsel fees are indeed capped. The statute seems to establish the fee limit at $12,000.00.[1] If the cap is exceeded in a case, defense counsel in essence "works for free."

III. Comparisons

The FWCI conference is attended by lawyers and other workers' compensation community members of many states (mostly from the South). A feature of the meeting, as a result, is the continuous exchange, via lectures and individual contacts, of comparisons of the systems of various jurisdictions.

For example, Judge Ortega, attending from California, briefed fellow judges on the drama of the recent California experience, where WCJ's were subject to furloughs. *See* Bob Egelko, *Court Rules Workers' Comp Furloughs Illegal*, SAN FRANCISCO CHRONICLE (June 13, 2010), available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/06/12/BASU1DU2SH.DTL.

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In Keeping with our mission to facilitate and encourage education, collegiality and interaction for those who adjudicate workers' compensation disputes, the National Association of Workers' Compensation Judiciary is pleased to provide the following information on the next meeting of the Southern Association of Workers' Compensation Administrators (SAWCA). You can learn more about SAWCA by visiting their website, *www.sawca.com*

SAWCA

The Southern Association of Workers' Compensation Administrators

The Southern Association of Workers' Compensation Administrators, Inc. (SAWCA) is a cooperative effort of nineteen jurisdictions; seventeen states, the District of Colombia and the Virgin Islands. The States are: Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. SAWCA was formed in 1949 and incorporated in 1980. The Mission of SAWCA is to make available and present instruction by means of forums, lectures, meetings, and written material regarding the administration of workmen's laws and to provide an avenue by which those interested in workers' compensation may interact with one another to share information and address issues common to the jurisdictions that are members of the association.

2010 ACC Registration

The Southern Association of Workers' Compensation Administrators Invites You to Join Them for the 2010 All Committee Conference Beginning November 8, 2010 at

The Greenbrier

White Sulphur Springs, WV

Summary: Attendee Convention Registration - $350; Companion Registration - $100; For More Convention Information: Visit www.sawca.com / call Gary Davis - (859) 219-0194 / email at gary.davis@sawca.com; Hotel Accommodations: $199 / Call The Greenbrier at: 800-624-6070. Wish To Arrive Early or Stay Late...Take Advantage of the Exclusive SAWCA Rate of $125.00 . Enjoy Two Extra Nights At "America's Resort… The Greenbrier.

Monday, November 8
Ex. Com. Meeting 2pm -5pm
Ex. Com. Dinner 7pm -9pm

Tuesday, November 9
Opening General Session 9am -12pm
Committee Meetings: 2pm - 5pm
Claims Administration
Admin. & Procedures
President's Reception 6pm - 8pm

Wednesday, November 10
Committee Meetings: 9am -12pm
Self Insurance & Insurance
Management Information Systems
Convention Lunch Noon - 1:30 pm
Committee Meetings: 2pm -5pm
Adjudication
Medical Rehabilitation
Coffee, Cordials, Confections 8:30 - 10pm

Thursday November 11
General Session 9am -11am

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She also told us that California has 174 WCJ's, with 23 offices. The chief judge for each office is a "presiding judge." Lawyers in Texas told us, meanwhile, that they could become Board-certified in workers' compensation law. (PBA is working on that here in Pennsylvania.)

Here are a few further highlights that should be of interest:

A. No Supersedeas Practice

The *major* difference between Pennsylvania practice and that of other jurisdictions can be stated succinctly at the outset. No supersedeas practice exists in most other states. An employer that receives a medical statement indicating that claimant is at MMI may effect a unilateral stopping of benefits. It is then up to the claimant, if he or she wishes, to advance a reinstatement attempt. National business groups, at least in the past, always criticized the Pennsylvania regime for its requirement of a due process deprivation hearing, that is, the supersedeas hearing we hold in employer adjustment petitions. A representative of WCRI, meanwhile, told me in September 2005 that Pennsylvania was the only state that he knew of that had such a requirement.

A North Carolina lawyer identified what seems to be a hybrid of sorts between unilateral stopping and due process deprivation hearing. In North Carolina, the employer or carrier in effect needs permission to suspend or terminate TTD. In this regard, unless there has been a return to work, the employer or carrier must file a "Form 24" with the Industrial Commission and send the same to the employee or the employee's attorney; payments may be stopped only after a decision by the Commission. A review of Form 24 shows that it is similar to our Notice of Suspension form, which prompts the worker to challenge the adjustment action, and demand a hearing, within a particular number of days. *See* http://www.ic.nc.gov/forms/form24.pdf.

B. Publication of Administrative Decisions

The state of Georgia is embarking on a plan to post its judges' and Board's decisions online, at its website. A number of states, including Connecticut, have already taken such action. This idea was considered in Pennsylvania ten years ago, and in fact LRP Publications selects certain Appeal Board decisions for publication, and they are available on Lexis. It always seemed to me, however, that the sheer volume of Pennsylvania WCJ adjudications made publication a questionable effort. The logistics have surely became easier in the present day, but the fact that WCJ decisions have no precedential value nevertheless makes such an enterprise questionable. Most lawyers and judges have a hard time keeping up with the hundred or so appellate decisions that are published every year, never mind reading judge decisions from across the state.

The Georgia plan, however, makes sense, as Georgia lawyers do not have that struggle. In this regard, the Georgia appellate courts only occasionally publish a workers' compensation precedent. This is because an appeal from the Georgia Board is taken to the county trial courts, and the appellate court only takes a workers' compensation case *thereafter* when it so desires. No appeal "as of right" exists as in Pennsylvania, where Commonwealth Court takes any and all appeals from the Board. Members of the Georgia workers' compensation community told me that appeals to the trial courts creates something of a challenge – the various county courts do not specialize in workers' compensation, and their review of compensation appeals generates something of a crazy-quilt of trial court interpretations of the same statute.

Of miscellaneous note is that Judge Stander identified this hazard as one of the *Pennsylvania* system prior to the 1972 reforms. Those reforms made the referee (now WCJ) the fact-finder and the Board a purely appellate body. Just two years before, meanwhile, the Commonwealth Court was created to take appeals from administrative agencies. Stander remarked:

> The next step in the earlier practice was an appeal from the board to the common pleas court of the county having venue, where additional delays were unavoidable[,] for the appellate review of the board's decision. This practice also created, in effect, 67 different appellate review bodies, one for each county, and a complete lack of uniformity resulted in the decisions involving the same subject matter.

Irvin Stander, GUIDE TO PENNSYLVANIA WORKERS' COMPENSATION, p. 347 (Packard Press 1979).

C. Payments Without Prejudice

Like Pennsylvania, and many other states, North Carolina has a "payments without prejudice" statute. In Pennsylvania, we utilize the Notice of Temporary Compensation Payable, or NTCP, which can be "pulled" within 90 days. The NTCP may be used in "any instance where an employer is uncertain whether a claim is compensable under this act or is uncertain of the extent of its liability under this act …." Section 406.1(d)(1) of the Act, 77 P.S. § 717.1(d)(1).

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In Pennsylvania, fierce disputes have arisen over whether uncertainty regarding the "extent of ... liability" encompasses uncertainty over the *duration* of a claim. In this regard, some employers have utilized the NTCP to temporarily accept a claim where a serious question as to the injury does not exist, but where the employer has a concern over the willingness of the claimant to return to work promptly. This can be referred to as the utilization of the NTCP as a "risk management device." Use of the NTCP in this manner was perhaps not intended by the legislature. Still, "extent of liability" easily encompasses duration of disability, *i.e.*, *how long* an employer must make week-by-week disability payments. "Extent of liability," indeed, captures a large number of possible employer responsibilities. In one case, I denied a claimant's penalty petition in which he alleged that use of the NTCP as a risk management device was illegal under the law. *See* C. *Miller v. Cumberland Farms* (Bureau Claim No. 671815, Torrey, WCJ) (unreported administrative ruling) ("use of the [NTCP] as a 'risk management device' can be abused, though it was not in this particular case. In any event, however, the statute as written permits the employer in the present case to proceed in the fashion that it did.").

However, for an employer in North Carolina to revoke its acceptance, it must have a *bona fide* reason for questioning compensability. The leading case in this area is *Bradley v. Mission St. Joseph's Health System*, 638 S.E.2d 254 (Ct. Appeals North Carolina 2006). In North Carolina, the NTCP-like instrument is the Form 63. When an employer uses this form to make payments to an employee "without prejudice," it carries the burden of demonstrating that it had "reasonable grounds" at the time of issuance for its uncertainty about the compensability of the claim. The burden is on the employer to place in the record evidence to support its position that it acted on such reasonable grounds. If the defendant fails to offer such evidence, its use of a Form 63 will be deemed improper and a sanction may follow.

D. The WCJ and Adjudicatory Power

In most of the states represented, the first-level hearing officer is not the final fact-finder. This is the law in Pennsylvania,[2] of course, and also in Florida, Kentucky, and Louisiana.[3] However, in Maryland, North Carolina, South Carolina, Georgia, Mississippi, and Texas, a Board, Commission, or court will have considerable powers of review on appeal.

Such power is not always just *pro forma* – that is, the Commission is not just a rubber-stamp. A lawyer from North Carolina told me, for example, that the Commission is much more conservative than the hearing officers (deputy commissioners), and that the Commission will change the deputy commissioner's decision over half the time. A recent news story, meanwhile, reported that in Mississippi, the Commission – alleged to be very pro-employer – substituted its judgment for that of the judge in 80% of the cases.[4]

The case of Maryland is quite interesting. The first level hearing officer in Maryland is the Commissioner. In Maryland, a party can appeal to the civil court and receive a jury trial *de novo*. *Baltimore County v. Kelly*, 891 A.2d 1103 (Maryland 2006). However, the decision of the commission is entitled to a presumption of correctness:

> Workers' compensation cases, in some regards, occupy a special niche in Maryland civil law. One of those is the polyglot legal processes available to obtain judicial scrutiny of the decision of the administrative body, the Workers' Compensation Commission …, which considers such claims in the first instance. A party dissatisfied by the action of the Commission may seek review in a circuit court by either proceeding on the record made before the Commission (much like judicial review of the final action of most state administrative agencies) or receive a new evidentiary hearing and decision before a jury (much like an original civil complaint brought in a circuit court). Under either process elected in a circuit court by the party seeking to reverse or modify the Commission's decision in whole or in part, the agency's decision is entitled to a presumption of correctness that must be overcome. In the present case, we shall consider whether an essentially *de novo* jury process before the Circuit Court for Baltimore County was amenable to disposition on a motion for summary judgment filed by the petitioning party.

Baltimore County v. Kelly, 891 A.2d 1103 (Maryland 2006). According to Chief Commissioner Aumann, however, only 6% of commissioner decisions are appealed, and of these 50% are settled prior to trial.

Alabama and Tennessee, meanwhile, are unique in that litigation of contested compensation cases is still handled by civil courts. In Alabama, the trial judge is the ultimate arbiter of credibility, and the appellate court undertakes substantial evidence review. *See Chadwick Timber Company v. Charles Philon*, 10 So.3d 1022 (S. Ct. Alabama 2008). In Tennessee, in contrast, the appellate court "reviews the trial court's findings of fact 'de novo upon the record . . . accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.'"

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See Nichols v. Jack Cooper Transport Co., 2010 Tenn. LEXIS 692 (S. Ct. Tennessee at Nashville 2010) (citing TENN. CODE ANN. § 50-6-225(e)(2) (2008)).

In Pennsylvania, of course, the WCJ (then called the referee) was changed from being a mere master to the final fact-finder, in 1972. The reason usually accorded this change is that the legislature desired to comply with the National Commission recommendation that delivery of benefits be expedited. For litigation, that meant that the "first stop" should be the "last stop." Under this reasoning, the findings of the first-level hearing officer should be final, and the facts should essentially be engraved in stone. A party should have no ability to appeal "on the facts" – and thus defeat the value of expedition – and have the judge's decision overthrown.

However, making the WCJ the fact-finder has a second advantage: preserving judicial independence in the decision-making function. When the WCJ is the final fact-finder, little room should exist for a politically-appointed board or commission to substitute its own findings – based on political or policy-driven grounds – and reverse the decision of the judge. This writer, notably, has been a WCJ since 1993, and he has been reversed by the Appeal Board – intra-agency review – on credibility grounds only once during that period. On that occasion, I had made an award of benefits to a claimant, and the Commonwealth Court (true judicial review), on the worker's *further* appeal, restored the award.

E. Compromise Settlements

California. In California, a hearing is not usually held for C&R review. Instead, the analysis is done via document review. However, if the claimant is *pro se*, the WCJ will usually convene an "adequacy" hearing. ("Adequacy" of benefits is the statutory criterion of approval.)

The WCJ with whom I spoke, Judge Ortega, stated that she would not allow, in C&R agreements, any "hold harmless" clauses in which claimant purports to indemnify and protect the carrier upon later CMS attempts to claim reimbursement. She found no support for such clauses in the California Act. Readers may recall that the Boards of New York and Connecticut have previously expressed disapproval of hold harmless clauses. The Pennsylvania Department of Labor & Industry has no regulation or policy.

Georgia. In Georgia, the compensation judges do not review compromise settlements. Instead, the parties submit the request for settlement over the internet, and administrative personnel review the proposed arrangement. This administrative review is the "Stip Unit" of the Board. These individuals undertake principled review, but in many cases approval is often the same day. While the process usually moves very fast, most carriers know that they must pay promptly upon approval, lest they face an essentially automatic 20% penalty.

Alabama. In Alabama, litigation of workers 'compensation is handled in civil court. However, the state agency that provides oversight of the program does have an ombudsman service, and the ombudsman, having mediated a case, also has the power to approve the resultant compromise settlement. A trial judge can also review a proposed settlement, whether the case is in litigation or not. Judges apply a "best interests" analysis, and the judge may well try to talk a claimant out of settling, or outright deny a proposed settlement.

The NAWCJ "Second Fridays" Education Programs are Made Possible in Part by a Grant from the Florida Workers' Compensation Institute.

Thanks FWCI!

After all is said and done, we cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And if he once begins to believe it, he is a lost soul.

Harold R Medina, American Jurist

We must never forget that the only real source of power that we as judges can tap is the respect of the people.

Thurgood Marshall

Always bear in mind that your own resolution to succeed is more important than any other one thing.

Abraham Lincoln.

The Articles on Pages 10 and 11 are Reprinted Courtesy of WorkCompCentral.com. Their Generosity with such reprints helps make this publication possible.

Thanks workcompcentral.com

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Louisiana. In Louisiana, the WCJ must review a proposed settlement with a *pro se* claimant at a hearing. It is not unheard of for a WCJ to try to talk a *pro se* claimant out of a compromise settlement.

A Louisiana lawyer told a cautionary story: in a recent Louisiana case, a carrier entered into a settlement in which it agreed, in exchange for a medical release, to fund the still-pending, proposed MSA, regardless of its ultimate dollar amount. Dismayingly, CMS demanded, in the end, over a million dollars. Now, the carrier always uses an "escape clause" when making such agreements.

South Carolina. A few years ago, South Carolina went the way of Florida and eliminated judge (commissioner) review of compromise settlements when the claimant is represented. However, as in Florida, when claimant is *pro se*, a hearing before a commissioner is required. If claimant appears and states that he is giving a release for medical, yet further represents that he still plans to treat, the commissioner will likely turn down the proposal.

An articulate South Carolina lawyer pointed out one regional quirk, in that the Commission has developed a policy that its commissioners will not approve a compromise settlement (*i.e*., a "clincher"), when surgical hardware is still present in the claimant's body. The solution for the employer is to still seek a complete release, but to agree to keep the claim open for "replacement hardware only."

North Carolina. In North Carolina, the deputy commissioners will approve most settlements (also called "clinchers"), but in a serious case he or she will convene a hearing for settlement review.

One problem exists under the North Carolina practice that arises because of the employer's usual ability to be in control of all medical care. In this regard, in many settlements the claimant will have a collection of unpaid medical treatment bills from providers who were never authorized. The claimant, of course, wants all such bills to be paid as part of the settlement. One answer may be for the defense attorney to approach the providers and negotiate the amounts.

Tennessee. As in Alabama, the litigation of workers' compensation cases is undertaken in the trial courts. Proposed compromise settlements must be approved by a trial judge.

The settlement of future medical was limited by the legislature a few years ago. In this regard, the legislature became convinced that carriers were taking releases for medical when claimants were not really recovered, and then these injured workers were turning to state relief sources. To avoid this cost-shifting, the statute was amended to provide that medical could only finally close three years after approval of the disability settlement. In practice, carriers again approach the settled claimant some three years hence and propose a medical settlement. However, by custom and practice, some carriers simply "close the file" after three years if the claimant, as is often the case, stops treating after the lump-summing of the disability checks. The "file just goes to the archives."

Tennessee maintains an old-fashioned doctrine of election. Thus, if a worker gains workers' compensation rights in another state, and he accepts a compromise settlement in that state, he has elected out of any Tennessee rights and remedies.

What they said about Judiciary College 2010:

"The program was excellent!!"

"Support staff was excellent, very nicely organized seminar"

"Seeing the surgeries was an awesome experience. Please continue to present them."

"Can't wait to come again next year - tell folks to wear flat shoes - lots of walking."

Attendee's Advice for those that come to Judiciary College 2011?

Attend all sessions -they were all well worth our time - don't think of this conference as a vacation; you will need to take a vacation afterwards-we stayed so busy that I never had an opportunity to visit the Exhibit Hall!!!!

Be prepared to network with fellow adjudicators from different jurisdictions and discuss common issues and how others handle them. Go into the program expecting to learn and further develop your skills. LISTEN AND SHARE.

Thanks AGAIN to our 2010 Program Curriculum Committee:

Hon. Jennifer Hopens. TX
Hon. David Imahara, GA
Hon. Ellen Lorenzen, FL
Hon. Donna Remsnyder, FL
Hon. David Torrey, PA
Steven Rissman, Esq., FL

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Texas. The parties are not permitted to compromise settle cases in Texas, though limited lump-summing of disability benefits is permitted in certain instances defined by statute. As medical settlements are not allowed, the Medicare Set Aside issue is in fact not an issue in the state. Compromise settlements were banned as part of the 1989 reforms. Prior to that time, however, the settlement practice was quite robust. *See* David B. Torrey, *Compromise Settlements under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199, 224-25 (2007).

Mississippi. The compromise settlement in Mississippi is the "9(i)" settlement. A hearing is required in all cases where claimant is *pro se*. In one cases, a *pro se* claimant told the judge that she still had bad problems with her knee, and the judge as a result denied settlement approval, to the consternation of defense counsel. Soon thereafter, however, the carrier's approved orthopedic surgeon recommended knee replacement, and the carrier authorized the same. Thus, defense counsel reached the conclusion that, at least in some cases, paternalistic oversight is merited.

A charming quirk in Mississippi law is that compromise settlements are not, under the current version of the law, codified at section 9(i). However, this section did apply to such settlements in the original 1948 version of the law, and the nickname stuck.

F. Bad Faith Suits Outside the Act

In Pennsylvania, the State Supreme Court held that bad faith claims, outside the Workers' Compensation Act, are not cognizable. The leading case that most in Pennsylvania know by name is *Kuney v. PMA Insurance Co.*, 578 A2d 1285 (Pa. 1990).

A panel of lawyers from nine states addressed this issue. The discussion was led by Steve Tipton, an eminent defense lawyer from Austin. Mr. Tipton, who characterized bad faith claims as a big issue in Texas, has researched the issue and believes that approximately thirty-five states have disallowed bad faith tort suits outside compensation laws. Courts that have so disallowed cite the exclusive remedy. Thus, Pennsylvania appears to follow the majority approach, as do Tennessee, North Carolina, South Carolina, Louisiana, Georgia, and Alabama. Alabama does allow the tort of "outrage," which permits some bad-faith-type suits to survive exclusive remedy-based summary judgment motions.

Trial judges in Texas allow bad faith claims to go to the jury. In the recent past, a jury awarded $115,000,000 in damages in such a suit. The case is currently pending in the Texas Supreme Court. The defense community has some optimism for a favorable result, as the Texas high court is said to reverse in 90% of the cases that it chooses to accept and hear. In the meantime, workers' compensation carriers are understandably skittish about lawsuits sounding in bad faith and often rush to settle them. (Presumably the coverage here is under Part 2 of the policy.)

The Honorable David Torrey, is the creator and author of the four-volume treatise *Pennsylvania Workers' Compensation: Law & Practice* (West 3rd ed. 2008). He is a Workers' Compensation Judge for Allegheny County, Pennsylvania. He was appointed to his position during the Casey Administration. He is also a member of the Department of Labor & Industry WCJ Rules Committee. Since 1996, Dave has also been an Adjunct Professor of Law at the University of Pittsburgh School of Law, and a preceptor in the school's Student Externship Program. He has published seven law review articles dealing with workers' compensation topics, and he lectures frequently on the subject.

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[1] *See* KENTUCKY REVISED STATUTES § 342.320(8) ("Attorney's fees for representing employers in proceedings under this chapter pursuant to contract with the employer shall be subject to approval of the administrative law judge in the same manner as prescribed for attorney representation of employees. Employer attorney's fees are subject to the limitation of … $12,000 … maximum fees except that fees for representing employers shall not be dependent upon the result achieved. Employer attorney's fees may be paid on a periodic basis while a claim is adjudicated and the payments need not be approved until the claims resolution process is completed. Fees for legal services in presenting a claim for reimbursement from the Kentucky coal workers' pneumoconiosis fund shall not exceed one thousand dollars ($1,000). All such approved fees shall be paid by the employer and in no event shall exceed the amount the employer agreed by contract to pay.").

[2] The landmark case in Pennsylvania that defines the WCJ as the final fact finder is *Universal Cyclops Steel Corp. v. WCAB*, 9 Pa. Commw. 176, 305 A.2d 757 (1973).

[3] *See Duplessis v. Tulane University Med. Center*, 2010 La. App. LEXIS 1192 (Ct. Appeals Louisiana 2010) ("Appeals concerning the factual findings of a workers' compensation judge are subject to the manifest error standard of review. *Dean v. Southmark Constr.* 879 So.2d 112. Under the manifest error standard, the reviewing court is to assess not whether the fact-finder's decision was right, but rather, whether the decision was a reasonable one in light of the record. As such, reasonable evaluations of witness credibility and reasonable inferences of fact should not be disturbed by the appellate court.").

[4] Joe Atkins, *Workers' Compensation Decisions too Often Favor Employers*, HATTIESBURG AMERICAN (August 8, 2010), available at http://www.hattiesburgamerican.com/article/20100808/OPINION/8080315/Workers-compensation-decisions-too-often-favor-employers (lawyer complaining, based on a recent legislative study, "'You've got judges that collectively have the highest experience rate in the history of the [workers' compensation] act, and they are being reversed at the rate of about 80 percent'" in favor of the employer's position.

1st DCA Mandates Electronic Filing for Attorneys

Florida -- *Top* [08/10/10] By Michael Whiteley, Eastern Bureau Chief

The Florida 1st District Court of Appeal – the state's first line of appeal for all workers' compensation cases – will mandate the electronic filing of all documents by attorneys beginning Sept. 1. The court announced the requirement in an order issued Aug. 2 and warned it soon will stop mailing paper copies of opinions and related documents to registered users of its eDCA system.

The order, in effect, requires e-filing by all attorneys, who must be registered users of the eDCA system. Chief Judge Paul M. Hawkes said in an interview the impetus was the e-filing system launched several years ago by the Office of Judges of Compensation Claims (OJCC) – Florida's workers' compensation court system. The requirement will not apply to parties not represented by attorneys. "We don't think it's too much to ask you to be registered," Hawkes said of attorneys in the first appellate district. "We've done polls of our registered users and, so far, the system has gotten very high marks. We think this is very cutting edge."

The transition accompanies a pending regulatory initiative by the OJCC that would also require all attorneys in workers' compensation cases to fill documents electronically. Hawkes said the appeals court, which handles appeals of all circuit court rulings for most of North Florida and appeals of all 32 of the state's OJCC courts, has been building the system with money from appropriations made by the Florida Legislature. The 1st DCA will be the first appeals court in the state to mandate electronic filings. He said the mandate will save about $100,000 a year in court costs. To date, the 1st DCA has 3 million pages of electronic records on file and is receiving 80% of its filings electronically.

The court will require all electronic documents to be filed in Adobe portable document format (PDF). He said key to the system is how the documents are processed once they reach the court. All documents are processed through optical character recognition (OCR) software, which converts them from images to searchable text. Depositions and other key documents are then hyperlinked, so that researchers can instantly find key segments of depositions in their cases.

Integral to the system is use of a parallel email system called "Casemail" that alerts attorneys and judges when a document has been filed. It also tells users when a document has been picked up by a party. When the court issued a controversial ruling in McKenzie v. Metal Health Care on July 23, for example, Hawkes said he knew an attorney on one side of the case had retrieved the opinion one minute and 30 seconds after it was filed. Hawkes noted the opposing counsel picked up the opinion one second later. In the July 23 ruling in McKenzie v. Mental Health Care, the 1st DCA held that mental injuries can be compensable when they arise from an accident that also causes physical injuries. Previously rulings had limited awards for mental trauma to cases in which physical injuries are the major contributing factor. Casemail let judges on the McKenzie panel know how quickly the case was moving forward.

Hawkes said attorneys can respond more quickly to briefs from opposing counsel because they can get an alert when opposing counsel has filed a document. "This is a major different way of doing business," Hawkes said. "The nice thing about workers' compensation is that it lends itself so well to this experiment. About 98% of our workers' compensation cases have attorneys. The comp community is fairly defined. Usually, we see the same (attorneys') names over and over." Hawkes said about 500 of the 7,200 cases closed by the 1st DCA last year were workers' compensation cases. He said the Florida Bar has endorsed the system. It's being studied by the Florida 5th District Court of Appeal and the state Supreme Court. Hawkes said in the order that registered users filing between yesterday and Sept. 1 will retain the option of filing either electronically or by paper. The order drops a previous requirement that duplicate paper filings be made to back up the electronic copies.

As part of the conversion, the court also is dropping a requirement that paper filings with the court be accompanied by copies. The court order also states: Documents can be scanned into PDF format, but multiple documents must be scanned and filed separately; Users must scan and combine documents with attachments, such as an appendix; The court "shortly" will cease sending out paper copies of court orders, opinions and mandates to registered users. Non-attorneys will continue to receive paper documents; Documents filed up to 11:59 p.m. will be considered filed on that date.

Judge David Langham, chief deputy judge of the OJCC, applauded the move by the 1st DCA and said the state's workers' compensation court is trying to keep pace. Gov. Charlie Crist last session vetoed a bill that would have mandated electronic filing for all attorneys in the workers' compensation system. The provision was attached to a larger

Continued, next page

Continued from Page 10.
Department of Financial Services measure that Crist opposed.

Langham has scheduled a public hearing on a similar regulation for Aug. 18 beginning at 8 a.m. (EDT) at the Marriott World Center in Orlando as part of the annual convention held by the Florida Workers' Compensation Institute in Orlando. Similar to the 1st DCA order, the proposed regulation by the OJCC would require that all documents, except documents filed by parties who are not represented by an attorney," be filed by electronic means through the OJCC website. He said the 1st DCA and his courts are swapping ideas that have triggered innovations in both courts.
"It's become a kind of mental badminton," Langham said.

DWC Intends to Make EAMS E-filing Mandatory

California -*Top* [09/08/10] By Greg Griggs, Editor
OXNARD, Calif. — Workers' Compensation Appeals Board Court Administrator Kevin Star said Tuesday the court is in the process of crafting rules to require all attorneys involved in California workers' comp to begin efiling to the court's Electronic Adjudication Management System (EAMS) beginning next year. During a visit to the WCAB's district office in Oxnard, Star said his staff is "in the process of discussing and creating" new rules regarding the change, which is expected to affect 3,000 to 4,000 lawyers involved in workers' comp.

"Not everyone is yet mandated to be an e-filer, but we're poised for that," Star said. "We are working on the regulations right now with the commissioners from the WCAB. My team, the associate chief judges are working with the deputy commissioners to finish up the regulation change for e-filing." The original plan when EAMS was introduced in August 2008 was to make it an all-electronic system, but instead the DWC allowed attorneys, insurers and others to either place documents directly into the system electronically (e-file), or to use optical character recognition forms, which is the method of choice for most users. The division's goal is to issue a notice of the new rule-making by March, Star said, with plans to phase in the efiling requirement over a year to 18 months. "I need to incrementally push people into it. I can't just automatically mandate it," he said. "First of all, I needed to make sure that (EAMS) worked smoothly. We just spent the last two years making sure EAMS is running swimmingly."

The DWC issued an invitation in June to get additional participants in its e-filing pilot project, and was able to increase the number of trained users from about 300 to more than 400, Star said. Earlier concerns about the system not having the capacity to accommodate thousands of new users are unfounded, maintains Star, who said EAMS has been evaluated to be able to handle up to 18,000 users simultaneously. Star said the proposed regulations will provide detailed instructions for judges and for attorneys without being too cumbersome. "We're reviewing all the possible rules and issues that will be presented to judges. There are myriad of issues that confront a judge on a daily basis," he said. "My goal is to have something that is very concise and very easy to understand for all the practitioners. I don't want to weigh them down in minutiae, but on the other hand I want to provide enough guidance."

As part of the regulations, Star said the DWC is considering possible changes to certain statutory deadlines. For example, the court currently requires all exhibits in a case to be ready in time for the mandatory settlement conference, "but if you don't really need them until trial, why not change that? So, I'm looking at that," Star said. There will likely be resistance to requiring attorneys to submit all files electronically, Star admits, but he said that once new users get used to e-filing, the complaints will subside.

The transition to a paperless system was originally daunting for judges also, said Los Angeles Presiding Judge Jorja Frank. "It will be frustrating in the beginning. Everybody is frustrated by change. Everybody hates change. We went through that too," Frank said. "You think it doesn't work. Then someone shows you and pretty soon it's starting to work, you've got what you need and it's easy. And you almost don't want to admit, 'This is pretty cool, isn't it?'"

Star said the DWC is on track with its plan to permit bulk filing of six commonly used documents into EAMS and intends to test the new system by November. The forms DWC is including in its so-called "present-term solution" are the application for adjudication of claim, declaration of readiness to proceed (to hearing), declaration of readiness to proceed (to expedited trial), compromise and release, stipulations with request for award and notice and request for allowance of lien.

On Legal Writing:

Or,

Here's to "gravy stained placemats"

Ed. Note. Occasionally, you run across a piece of Judicial Candor so compelling that it must be shared. The following inspirations are from Bradshaw v. Unity Marine Corp. Inc., 147 F.Supp.2d 668 (U.S. Dist., S.D. Texas, 2001).

". . . . . Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact--complete with hats, handshakes and cryptic words--to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins."

"Defendant begins the descent into Alice's Wonderland by submitting a Motion that relies upon only one legal authority. The Motion cites a Fifth Circuit case which stands for the whopping proposition that a federal court sitting in Texas applies the Texas statutes of limitations to certain state and federal law claims. *See Gonzabs* v. *Wyatt, 157* F.3d 1016. 102 1 n. 1 (5th Cir. 1998). That is all well and good--the Court is quite fond of the *Erie* doctrine; indeed there is talk of little else around both the Canal and this Court's water cooler. Defendant, however, does not even cite to *Erie,* but to a mere successor case, and further fails to even begin to analyze why the Court should approach the shores of *Erie.* Finally, Defendant does not even provide a cite to its desired Texas limitation statute. A more bumbling approach is difficult to conceive- but wait folks, There's More!"

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A Look Back at Judicial College 2010

On "Gravy Stained Placemats," from page 12.

"Plaintiff responds to this deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument, although Plaintiff does at least cite the federal limitations provision applicable to maritime tort claims. *See* 46 U.S.C. § 763a. Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiffs citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Gordon Liddy aboard a cruise ship at sea) require the application of general maritime rather than state tort law. *See Wells v. Liddy.* 186 F.3d 505. 524 (4th Cir. 19991 (What the ...) ?!"

"The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiffs counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!). And though the Court often gives great heed to dicta from courts as far flung as those of Manitoba, it finds this case unpersuasive."

"Plaintiff has submitted a Supplemental Opposition to Defendant's Motion. This Supplement is longer than Plaintips purported Response, cites more cases, several constituting binding authority from either the Fifth Circuit or the Supreme Court, and actually includes attachments which purport to be evidence. However, this is all that can be said positively for Plaintiffs Supplement, which does *nothing* to explain why, on the facts of *this* case, Plaintiff has an admiralty claim against Phillips (which probably makes some sense because Plaintiff doesn't)."

"Now, alas, the Court must return to grownup land. As vaguely alluded to by the parties, the issue in this case turns upon which law--state or maritime--applies to each of Plaintiffs potential claims versus Defendant Phillips. And despite Plaintiffs and Defendant's joint, heroic efforts to obscure it, the answer to this question is readily ascertained."

"Take heed and be suitably awed, oh boys and girls--the Court was able to state the issue and its resolution in one paragraph ... despite dozens of pages of gibberish from the parties to the contrary!"

"After this remarkably long walk on a short legal pier, having received no useful guidance whatever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's Motion for Summary Judgment is **GRANTED"**

Kathy Shelton and her team make the NAWCJ and the Judiciary College possible. Here, she receives a token of our appreciation and admiration from Judge Lazzara.

The NAWCJ commemorated Judge Lazzara's unparalleled commitment and dedication with a plaque presented here by incoming NAWCJ President Judge Ellen Lorenzen and Judge Steve Rosen. Without Judge Lazzara, there would not and could not be a NAWCJ!

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