National Association of Workers' Compensation Judiciary

Lex and Verum

Number XV, 1110

Workers' Compensation Research Institute Issues Two Interesting New Reports

The Workers Compensation Research Institute ("WCRI") is an independent, not-for-profit research organization providing high-quality, objective information about public policy issues involving workers' compensation systems. Organized in late 1983, the Institute does not take positions on the issues it researches. The WCRI provides information obtained through studies and data collection efforts, which conform to recognized scientific methods. Their publications are subjected to peer review procedures as they strive for unbiased data reporting.

The Institute's work helps those interested in workers' compensation systems by providing new, objective analyses of how various workers' compensation systems compare to one another, and how they are individually and collectively performing. The Institute strives to provide insight into whether systems are serving workers' needs, and what factors drive the cost of claims overall and in various individual state systems, and/or groups of jurisdictions determined to share characteristics which differentiate them from others in the marketplace. WCRI collects and reports data regarding evolving trends in workers' compensation, particularly in regards to attempts at legislative and regulatory change in various jurisdictions.

The result of these efforts is often a report focused on a specific issue within the marketplace. There are occasions, however, when the Institutes' efforts provide more generalized information. In 2010, WCRI has recently published two fascinating reports on the workers' compensation marketplace.

One, Prescription Benchmarks for Minnesota,[1] is very specific, reporting an in-depth study of prescription medication provision and consumption in Minnesota. This report is certainly most pertinent to Minnesotans, but the study made comparisons between Minnesota and sixteen other states: California, Florida, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maryland, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas and Wisconsin. Therefore, the report provides insight not only into the prescription issues in Minnesota, but also these other geographically, statutorily, and economically diverse comparative states. Even if your state was not included, the variations demonstrated in the data are interesting both in factual terms and in the trends that they suggest.

Continued, Page2 , "WCRI"

"Second Fridays" 2011

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

"WCRI" from Page 1.

The statutory diversities of all of the states and some Canadian provinces is illustrated in a second WCRI study released recently. In Workers' Compensation Laws as of January 2010[2] the WCRI and the International Association of Industrial Accident Boards and Commissions (IAIABC) illuminate statutory frameworks, divided into specific categories for comparisons of macro issues including what is compensable, what benefits are afforded, and even processes.

In Prescription Benchmarks for Minnesota the authors focus on pharmacy fee schedules, patterns in physician practices regarding pharmaceuticals, the role of generic medications, physician dispensing impacts, and overall medical cost issues in workers' compensation. In some regards, trends demonstrated by this study in the workers' compensation microcosm may be indicative of overall medication trends in North American medical care generally. Certainly, however, there are co-dependent disability interactions in workers' compensation that might render outcomes skewed from outcomes in more pure medical service delivery systems that are not intertwined with a disability component.

The study concludes that the Minnesota reimbursement prices overall were lower than the median of the study states. An important reminder for non-statisticians is suggested by this conclusion. The "median" is not the average of the sixteen states in the study. The "median" value is the figure which is in the middle of all of the values such that an equal number of figures are higher than the median and an equal number is lower. Whether the median or the average is a more descriptive or relevant comparison is debatable, but the relevant point is to remain conscious of the distinction, and of the selected matrix used in a given context.

Prescription Benchmarks for Minnesota also concludes that generic pharmaceutical use in Minnesota is more prevalent than in other study states. Generic drugs are copies of brand-name drugs that have the same pharmacological effects as those of their brand-name drug counterparts. Generic drugs are often substantially cheaper than the brand-name versions, because the manufacturers have not had the expenses of developing and marketing a new drug, but are marketing the product after the developer's patent expires. The report illustrates the use of name brand pharmaceuticals when there is a "generic equivalent," which is the same chemical composition but not the "name brand." This is contrasted to situations involving the use of name brands when a "generic alternative" is used. An "alternative" is not the same chemical composition, but is an accepted substitute medication for the symptom being treated.

Physicians in Minnesota write fewer prescriptions than physicians in other states. That alone may account for lower prescription costs in Minnesota. The study also concludes that the number of doses or "pills" in those Minnesota prescriptions studied was also lower. For example, the 16 state median volume of Vicodin prescriptions was 132 doses, while in Minnesota it was 102 (in prescriptions in cases with more than 7 days "lost time."). The likely effect of this combination of less prescriptions and smaller volume prescriptions invariably lowers the overall volume of doses or pills delivered, and each therefore contributes to the lower Minnesota prescription costs demonstrated in the study.

The Study compared prescription "frequency" in "lost time" cases. In Florida and California cases with more than seven days of "lost time," 80% of cases had at least one prescription written. Massachusetts and New York balanced the opposite extreme in the study at 42% and 43% respectively. The study recognizes that these conclusions may be skewed by workers filling work-related prescriptions paid by their "non-occupational" health coverage.

The report also notes that some physicians dispense medication in their practices, so that a patient has the medication upon departure instead of needing a stop at the pharmacy. The Report states that this was "not common" in Minnesota and that "prices paid to physicians were often much higher than process paid to pharmacies for the same prescription." There is not a great deal of data presented in the report on this "physician dispensing" factor. However, from the statements made, one might conclude that the smaller volume of "physician dispensing" in Minnesota contributes to the study conclusions of lower prescription costs there.

Not to minimize the scope and depth of the Prescription Benchmarks for Minnesota report, but the Workers' Compensation Laws as of January 2010 is a far more ambitious analytical undertaking. The authors note that it is "inherently difficult to summarize complex laws with complete accuracy for all applications of that law." Who knows the truth of this obvious understatement better than workers' compensation judges? With the help of the IAIABC, the WCRI makes a valiant effort at summarizing interesting similarities and differences between the multitude of programs that are generically referred to as workers' compensation, but which are highly divergent in the details. This study includes the fifty United States and several Canadian provinces.

Continued, Page 3

Interesting Articles on the NAWCJ website at http://www.nawcj.org/EdArtsandPubs_Articles.htm

"WCRI" continued from Page 2.

The report illustrates foundational differences, such as coverage. These include whether the law is elective (2 jurisdictions) or compulsory (57); what waivers there are to mandatory coverage, and whether coverage is through a market approach (33), or a market approach with a competitive state fund (15), or an exclusive state fund (4 U.S and all 6 Canadian). There are analyses of the permissibility of self insurance, and the "market of last resort." These results are provided in chart form in the report, which presents the data in a visually logical manner. The results are easy to read and compare.

There are differences illustrated in the coverage requirements for independent contractors, casual employees, volunteers, and professional athletes. Some states treat agricultural employers or domestic employers differently. There are distinctions noted in whether the employer or the employee has the right to select the initial physician, and discussion of the role of provider lists, managed care plans, and time parameters for selections. Medical care "change in provider" and "second opinion" options are also contrasted.

There are marked differences in available maximum temporary total disability compensation rates, with Iowa on top at $1,413 and Mississippi the lowest at $442.31, according to the study. There is as wide a divergence in the maximum duration of TTD benefit entitlement, with some states providing that benefits "for the duration." There are also a variety of "offsets" discussed, as well as a variety of circumstances in which TTD may be discontinued. The broad differences are as apparent in the Report's discussion of permanent partial and permanent total disability benefit descriptions, definitions, and calculations. Multiple jurisdictions also provide specific benefits for permanent injuries such as amputation and hearing or sight loss.

One of the most interesting portions of this report is the comparison of occupational disease, disfigurement, cumulative trauma and mental stress (without physical injury). Disfigurement is covered in 46 jurisdictions and not covered in 12. According to the report, only Michigan does not cover occupational hearing loss, and all states cover at least some forms of repetitive trauma. Mental stress without a physical injury is compensable, with various limitations and defined burdens of proof (such as "when risk factors are present," or "if it is an acute reaction to a sudden event," or "extraordinary stress"), in 39 of the jurisdictions and is excluded from compensability in only 18 jurisdictions.

Continued, Page 5

Cumulative Index to Past Editions

All available on www.NAWCJ.org

September 2009

The Future is Now, Don't Miss IT, By Hon. David Langham

October 2009

Workers' Compensation Law: Three New Course Of Employment Precedents Of Note, Hon. David B. Torrey

General Release Taken In Connection With Compromise Settlement Of Workers' Compensation Case Held Sufficient To Bar Discrimination Action, Even Without Additional Consideration, Hon. David B. Torrey

November 2009

Recusal and Disqualification: The Judge's Duty to Sit Hon. Gerardo Castiello and Edward Almyeda

December 2009

Evaluating Occupational Claims of Chemical-Induced Injury, By Raymond D. Harbison and James McCluskey

Making the Paperless Office Work, By Rick Jeffries, Esq.

U.S. Supreme Court Denies Review of Cassens Decision Workcompcentral.com

January 2010

Investigating Social Networking Web Site Pages, John P. Ratnaswamy, Esquire

The Art and Science of Medicine: A Judicial Dilemma or Criteria-Based Medicine: A Practical Approach For Making Determinations, Jerry Fogel

Department Appeals Decision Saving Comp Judges' Jobs Workcompcentral.com

Why Can't We Be "Friends?" Per Curium

February 2010

A View From the Other Side of the Bench, Richard S. Thompson, Esq. and Michael Cunningham, Esq.

Judges Assist with Scholarship Selections, By Hon. Alan Kuker

Does Physical Loading Damage the Disc?, By Dr. Steven D. Feinberg

Workers' comp research gives insight into curbing health costs, By Gary Stephenson, Johns Hopkins Medicine

NCCI: Claims Frequency Dropped Again in Accident Year 2008, Workcompcentral.com

Continued page 5

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 an upcoming program jointly sponsored by the Tort, Trial and Insurance Section and the Labor and Employment Law Section of the American Bar Association.

American Bar Association
2011 Workers' Compensation
Midwinter Seminar and Conference
Boston, MA
Intercontinental Hotel
April 7 – April 9, 2011

Tentative Topics:

Thursday, April 7, 2011

Health Care in the Obama age: a lightning strike look at health care topics affecting workers' compensation, including an update on 24 hour coverage, genetic testing under GINA, and the ABA's Taskforce on the American Medical Association's 6th Edition Guides for the Rating of Permanent Impairment.

The Business of Workers' Compensation: If you've ever wondered if you could learn anything from your competition, here's your chance to get an insider's look at the business of law, and specifically how to be more efficient and improve your performance and results, from each perspective. Topics will include the latest in law office technology that actually makes life easier. This will be presented from Claimant's, Defense, and Judicial perspectives.

Historical reflections on the origins, development and future of workers' compensation in the 21st century.

Friday, April 8, 2011

Employment Extravaganza: Update and practice tips on ADA, AADA, FMLA, Fitness for Duty Exams; Georgia's Mohawk case involving legal workers suit against their employer for allegedly using undocumented workers to reduce wages of legal workers; what employment lawyers wish that workers' compensation lawyers knew about employment law, and what workers' compensation lawyers wish employment lawyers knew about workers' compensation.

Medicare Set Asides: A dialogue about proposed solutions, what's being done to solve the problems surrounding MSAs? The latest developments and ideas, including proposed legislative remedies.

Mass Disasters: how workers' compensation responds.

Saturday, April 9, 2011

Cutting Edge Case Law Updates.

Immigration.

Judges' Panel: "Ethics and Professionalism in the Litigation and Adjudication of Workers' Compensation Matters."

"WCRI" continued from Page 3.

The Workers' Compensation Laws as of January 2010 report discusses waiting periods, denial time frames, vocational benefits, attorney fee sources, formulas, and approvals. And a variety or related and otherwise interesting data is included on Boards, Commissions, and others.

In all, these two recent reports are a vast supply of data that illustrates many similarities and differences among the systems in North America. The diversity of programs that provide these benefits is starkly illustrated. From a historical perspective, workers' compensation in the United States is nearing its centennial. Review of these reports provides great insight on how far the states have come in that relatively short time.

---

[1] Prescription Benchmarks for Minnesota http://www.wcrinet.org/studies/public/books/wcri_rx_bnchmk_1_mn.pdf

[2] Workers' Compensation Laws as of January 2010 http://www.wcrinet.org/WCLAWS2010/wcri_wclaws3.pdf

The WCRI mission is "to be a catalyst for significant improvements in workers' compensation systems, providing the public with objective, credible, high-quality research on important public policy issues." Whether these studies fulfill that lofty ideal is best left to the reader. The original reports are available using the links provided in the endnotes below. When you have digested the content, consider adding your perspective to the collective by submitting a letter to the editor at jjl@NAWCJ.org.

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/

Cumulative Index to Past Editions

All available on www.NAWCJ.org

March 2010

The Decline and Fall of the American Judicial Opinion: Back to the Future from the Roberts Court to Learned Hand, Jeffrey A. Van Detta

Effective Judicial Writing, John Salatti, LAWriters

Rutgers Researchers Show New Security Threat Against 'Smart Phone' Users

Electronic Lump-Sum Settlements Meeting Set for March 26, Workcompcentral.com

AG Sues Contractor For Cheating on Comp Premiums, Workcompcentral.com

Skydiver Sentenced for Comp Fraud, Workcompcentral.com
Vice, Virtue and "The Merchant of Venice," Michael P. Maslanka, Esq.

April 2010

Pulling Skeletons from the Closet: A Look Into the Work-Product Doctrine as Applied to Expert Witnesses, Charles W. Ehrhardt

Kids' Chance

Maryland Agency Action: Maryland Commission takes position on Medicare Set Asides, Pennsylvania Bar Association Workers' Compensation Section newsletter

Federal lawsuit: Federal authorities file action against parties and attorneys in mass tort settlement where interests of Medicare were allegedly not considered, Pennsylvania Bar Association Workers' Compensation Section newsletter

May 2010

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

Florida Workers' Compensation Trial Advocacy Workshop, Raymond Malca

Nanotechnology? What's That?!

Major Cause, What Does It Mean?, By Hon. Tom Leonard
Claims Characteristics of Workers Aged 65 and Older, Martin H. Wolf, Ph.D.

Football Teams' Arbitration Arguments Arrive at the WCAB California -- Football Teams' Arbitration Arguments Arrive at the WCAB, Workcompcentral.com

Continued, page 11

Pick Up the Phone - Use It - Save Thousands

by David D. Neiser, Esq.

"I don't answer the phone. I get the feeling whenever I do that there will be someone on the other end." Fred Couples

"An amazing invention-but who would ever want to use one?" Rutherford B. Hayes

Do you find yourself anxious on the telephone, constantly looking for an opportunity to say goodbye. Do you find that most telephone conversations are way too long and not overly productive. Let's face it, when the phone rings at work, you are immediately faced with the obligatory five minute phone introduction, the never ending conversation and epic goodbye - "JUST HANG UP ALREADY!"

Many are intentional in their phone avoidance techniques. Bob Parsons, the founder and CEO of GoDaddy.com preaches a no phone use philosophy stating "Never answer your phone. You're going to get lots of calls from people asking you for this or that, or trying to sell you this or that- that's got nothing to do with what you want to do...[O]nly return the ones that are important and critical to what you're doing."

Of course, if no one answered their phone...

So what's the point? Simple. While use of the telephone can be a time waster, it can also be a huge time saver. Early and good communication with the opposing attorney *should be* important and critical to what you're doing. This is especially true in litigation. Often times, initial pleadings are filed, discovery served and off you go. Little or no effort is made to discuss the case with each other. Six months to a year later, someone thinks mediation and the first real effort at good communication happens.

Early communication with opposing counsel should be the norm. This is the point that local seasoned trial attorney Tom Masterson emphasizes whenever he can. When Tom puts a case in suit, one of the first things he does is talk with the other attorneys about the case and explore whether any pending issues can be streamlined or resolved. If he doesn't know opposing counsel, Tom simply picks up the phone and introduces himself. Tom states from experience that simple communication by telephone can save time, expense, and aggravation in the long run.

In my own practice, I have put Tom's word's into action and have seen it pay great dividends. One of the first things I do in every case is pick up the telephone and talk to opposing counsel. After doing this for the last several years, I have never felt like the call was a waste of time. I have been able to resolve many cases quickly, and have been able to work with counsel to coordinate discovery, focus and refocus issues, and resolve disputes without having to resort to the court system. If you have a scheduling issue, pick up the phone. Want to settle the case? Pick up the phone. The last call should be to the Court to schedule a hearing.

Some lawyers think it is beneficial to be difficult and will rarely use the telephone. They must "fight for the client," and lack of communication is hailed as an effective battle tactic designed to delay, disrupt and wear the other side out. But what about the client? Certainly, good lawyering requires a proactive approach, and early communication is not only professional but efficient-- and that can't be all bad.

When you do use the telephone, a couple of simple tips will help. First, make sure that your call counts. While at the office, remember that a business call is not a casual conversation. This is true, even when you know the person you are calling. It deserves your full attention. Have a point and get to it quickly.

Second, have your staff clear important calls with opposing counsel ahead of time. One disadvantage with using the telephone is that phone calls are often inconvenient to the receiver. Unless you have previously made arrangements to talk at a specific time, the attorney you are calling may find the timing of the call awkward. And then there is the endless game of phone tag. To overcome this problem, you may find it worthwhile to have your staff schedule important calls.

Being proactive on your cases dictate continued efforts to resolve and streamline issues. Pick up the phone - use it - save thousands! - Now doesn't that sound enticing?

David D. Neiser is a Board Certified Civil Trial Lawyer in St. Petersburg, Florida. This article was originally published in the St. Petersburg Bar Association *Paraclete*, and is republished here with the author's permission.

Letters to the Editor:

Dear Editor:

How about adding a "letters to the editor" section to the monthly newsletter? Just a thought.

Ed. This is a great idea. We never thought of if, because this is the first letter we ever received!

Dear Editor:

Great issue! BUT! How can you publish the history of comp without reference to Franz Kafka! You will enjoy this snippet (Wikipedia);

"On 1 November 1907, he was hired at the Assicurazioni Generali, a large Italian insurance company, where he worked for nearly a year. His correspondence, during that period, witnesses that he was unhappy with his working time schedule—from 8 a.m. (8:00) until 6 p.m. (18:00) as it made it extremely difficult for him to concentrate on his writing. On 15 July 1908, he resigned, and two weeks later found more congenial employment with the Worker's Accident Insurance Institute for the Kingdom of Bohemia. The job involved investigating personal injury to industrial workers, and assessing compensation. Management professor Peter Drucker credits Kafka with developing the first civilian hard hat while he was employed at the Worker's Accident Insurance Institute, but this is not supported by any document from his employer. ..... While Kafka often claimed that he despised the job, he was a diligent and capable employee. He was also given the task of compiling and composing the annual report and was reportedly quite proud of the results, sending copies to friends and family."

Ed. If you are not careful, you learn something new every day.

"People usually survive their illnesses but the paperwork eventually does them in. Filing a claim for insurance is terminal."

Erma Bombeck

"The art of medicine is in amusing a patient while nature affects the cure."

Voltaire

"Somewhere, in some law book, there must be a precedent to sustain me."

Clarence Darrow

"The computer is not intelligent at all, but very stupid indeed, and that, in fact, is one of its great values – its blind stupidity"

Sidney Lamb

"Litigation is a machine which you go into as a pig and come out as a sausage"

Ambrose Pierce

"Without justice, courage is weak."

Benjamin Franklin

"An appeal is when you ask one court to show its contempt for another court"

Finley Dunne

"Neither you nor I nor Einstein nor the Supreme Court of the United States is brilliant enough to reach an intelligent decision on any problem without first getting the facts."

Dale Carnegie

What can you find on the NAWCJ Website?

Newsletter archives : State resources : Dictionaries : Impairment Rating Guides : Physician's Desk Reference : Links to : National Judicial College : State Bar Associations : The College of Workers' Compensation Lawyers : American Bar Association : Video about 100th Anniversary of Workers' Comp : much, much more.

www.NAWCJ.org

10th Anniversary
workcompcentral®
Improving Workers' Compensation Through News and Education
1999-2009

SWCB Launches Panel to Review Attorneys' Fees

The chairman of the New York State Workers' Compensation Board (SWCB) appointed a 14-member panel to review both claimants' and defense attorneys' fees on Wednesday, saying too little is known about their impact on the system. "For too long, attorney fees have been a blind spot in the workers' compensation system," SWCB Chairman Robert Beloten said in a press release. "My hope is that this committee will shine some light on this area and make recommendations that will promote quality representation for all parties."

Creation of the panel, which will be chaired by the board's general counsel, Kenneth Munnelly, follows more than a month of talks between board staffers and the AFL-CIO over ways to cut system costs by eliminating unnecessary depositions and formal hearings. Those talks, in turn, were triggered by Beloten's plans, announced earlier this year, to divert some cases from formal hearings and assign judges to issue proposed "desk orders." Attorneys could contest the proposed orders and request formal hearings.

Last February, Beloten postponed plans to implement the expedited hearings plan, called the Streamlined Conciliation Process, after it encountered widespread opposition at a New York Senate Labor Committee hearing. The attorney fee panel includes Art Wilcox, chief of workers' compensation issues for the New York AFL-CIO. He said Thursday his primary target is fees employers and insurers pay to defense attorneys for hearings and depositions that could be handled by affidavit or other means. "I've seen too much money leaking out of the system because of the growth of defense fees," Wilcox said. Wilcox, who serves on the governing board of the New York Compensation Insurance Rating Board (NYCIRB), said NYCIRB also has referred a request for information from the Injured Workers' Bar Association on carriers' legal expenses to its Medical and Claims Committee. The panel has been asked to survey all workers' compensation carriers to determine whether they have legal management policies. Wilcox said about a third of the system's costs go to pay lost wages to injured workers. A third covers medical expenses, and a third is spent by insurers on claims adjusters, attorneys, independent medical examinations and other expenses.

Peter Walsh, an Albany defense attorney and member of an ad hoc workers' compensation panel of the New York State Bar Association, said defense attorneys adamantly object to the board's intrusion into what has been the private domain of insurers and their counsel. Walsh said the new study was a joint initiative by Munnelly and Wilcox, who also is pushing legislation that would provide cost-of-living adjustments (COLA) to the widows and dependent children of workers killed on the job and for workers receiving permanent total disability benefits.

Walsh said Wilcox is using the initiative to cut costs out of the system and to secure $150 million to finance the COLA bill. "I have to question the board's jurisdiction and to question what this is all about," Walsh said. "In my opinion, this is to secure funding for COLA. Art Wilcox is using this as a stalking horse."

Defense attorneys are paid by the hour and generally bill for each hearing and deposition in a case. Claimants are paid based on a share of the award ultimately determined by the administrative law judge in the case. Generally, claimants' attorneys are paid 10%, 15% or 20% of awards, based upon the complexity of each case. But Walsh and Robert Grey, chairman of the New York Workers' Compensation Alliance and a member of the new panel, said workers' lawyers' share of awards can be significantly less than 10% in the case of small awards. Claimants' attorneys are paid nothing in medical-only cases, although a return-to-work task force created as part of the state's 2007 workers' compensation reforms has recommended changing that.

Walsh said recent data indicates claimants' attorneys earn an average of 5.6% of all awards. From that standpoint, Grey said, the new committee may represent a positive step for the claimants' bar. Grey said the Alliance sent Beloten a letter several weeks ago warning that rising costs in law offices with no corresponding increase in fees is threatening to drive attorneys from the system. He said the Alliance has joined the AFL-CIO in supporting a reduction in unneeded litigation. "We don't have a position regarding defense attorneys' fees. They are not a constituency of the Workers' Compensation Alliance," Grey said Thursday. "But we do have a position regarding litigation, and our position ... is that there are some areas in which there is too much litigation in the workers' compensation system."

Continued, Page 9

Attorney's Fees, from Page 8

He said the Alliance letter warned that, as SWCB has grown more efficient, it has shifted its workload to attorneys in the system. Claimants' attorneys also argue that they should be in line for a fee change because Beloten has ordered a 30% increase in some fees for treating physicians effective Dec. 1. But Grey said fees should be based on outcomes for injured workers. "My interest as a claimants' attorney is completely aligned with the client. He or she wants a fair award in the shortest period of time with the least amount of friction," Grey said.

The new committee includes three claimants' attorneys, including Grey, and three defense attorneys. It also includes James Hall, an actuary for Liberty Mutual Insurance Co.; New York State Assembly Labor Committee Chairman Susan John, D-Rochester; Margaret Moree, federal affairs director of the Business Council of New York State; Wilcox; and Michael Ross, a Manhattan attorney specializing in ethics. Among the defense attorneys is Christopher Lemire, chairman of the workers' compensation subcommittee of the New York State Bar Association. Walsh said the panel should have included representatives of Attorney General Andrew Cuomo, who handles the board's legal issues, and New York State Insurance Superintendent James Wrynn. He said the panel has too many attorneys. "This is like asking the fox, 'How many eggs do you want out of the hen house?'" Wilcox said.

The panel is tentatively scheduled to hold its first meeting on Nov. 9.

Constitutional Amendment on Workers' Comp Appeals Passes

Louisiana voters have approved a constitutional amendment on how workers' compensation cases are decided in appellate courts, passing the proposal by 57% to 43%. Constitutional Amendment 9 by Sen. Edwin Murray, D-New Orleans, requires a panel of at least five appellate court judges to rehear a workers' compensation case if one judge on the original three-judge panel dissents in the initial ruling.

The change makes the procedure for workers' compensation appeals the same as for other civil cases. In Louisiana, workers' compensation cases are not heard by district judges but by hearing officers from the Louisiana Workforce Commission. Currently, for civil cases, when a trial court's decision is to be modified or reversed by an appeals court panel of three judges, and one of the three dissents, the Louisiana Constitution requires the case be re-argued in front of a larger panel of at least five judges. The ruling of the larger panel is by majority vote, and that decision could be appealed to the Louisiana Supreme Court.

However, workers' compensation decisions rendered by administrative hearing officers have been treated differently on appeal. The administrative decisions may be appealed to a state appellate court, but there is no requirement for re-arguing the case if there is a 2-1 panel decision. A 1990 constitutional amendment, which resulted in the current differing treatment for workers' compensation cases on appeal, passed by 59%.

Constitutional Amendment 9 has changed the situation again. There was little organized support or opposition to the amendment, with most workers' compensation stakeholder groups taking no position on the measure. The Legislative Fiscal Office reported the amendment would have no significant effect on government costs, but could result in a heavier workload for the administrative branch of the Louisiana Supreme Court. The Louisiana Secretary of State's Office showed the vote on the amendment as 634,757 for and 472,113 against, with 100% of 2,877 precincts reporting.

Excerpted from a Deposition:

MS . SMITH: And what is your name?
MR. BROWN: Blake Brown.
MS . SMITH: Have you filed an Entry of Appearance in this matter?
MR. JONES: I'm employed with the Jones' law firm.
MS . SMITH: I'll ask you to step out.
MR. JONES: He's a law clerk. He is not stepping out of the room.
MS . SMITH: Unless you can get a court order here allowing a non-party to attend the deposition, I 'm going to object to it, and I'll ask him to step out.
MR. JONES: He's not a non-party. He is not leaving.
MS . SMITH: He is a non-party, and I'll ask him to step out of the room. Has he filed an appearance?
MR. JONES: He's not a lawyer. He can't file an appearance.
MS. SMITH: Then I'll ask him to step out of the room.
MR. JONES: You need to get Judge Green on the phone.
MS. SMITH: No, you get Judge Green on the phone if you want him to stay here. If you can show me the authority that you have that would allow him to stay as a non-party, I'll change my position.
MR. JONES: Do you have Judge Green's telephone number? This is absurd.
MS. SMITH: Why don't we just continue and he can step out. If Judge Green says it's okay, I'll let him back in.
MR. JONES: No, no.
MS. SMITH: He's a non-party. There's no grounds for him to be here.
MR. JONES: He's here on behalf of the Jones firm in representation.
MS. SMITH: Is he representing? Is that what you said? While we continue, let somebody call.
MR. JONES: No.
MS. SMITH: If you can get a court order, that will be fine.
MR. JONES: I'm not doing that, Jennifer.
THE COURT: This is Judge Green.
MR. JONES: Hey, Judge Green. This is Ryan Jones. I 'm at the Jones Law Office in (CITY). we were about to start a deposition of Mr. Witness on the Village versus Smith case, the one we spoke about, I believe it was Monday .
THE COURT: Yes.
MR. JONES: I have brought to the deposition with me one of our summer clerks, summer associates, who is an employee of our firm. Jennifer is trying to exclude him from the deposition, tell him he can't be here. He's an employee of our firm. I insisted that he be here to observe the deposition. Judge, is there anything wrong with a summer associate, summer clerk attending a deposition?
THE COURT: I can't think of any reason why he can't attend.
MR. JONES: Thank you, Judge.
MS. SMITH: Judge, I don't know where the authority would be for a non-party to attend a deposition, and I respectfully object to any non-party attending the deposition.
THE COURT: There probably isn't authority one way or the other, Jennifer. It is just common sense.
MS. SMITH: Is it the Court's position that non-parties can attend depositions freely?
THE COURT: If somebody employed with a law firm, of course; any staff or support people should be permitted to attend a deposition.
MS. SMITH: But do the Rules call for that?
THE COURT: I don't know. I have no idea, Jennifer. I'm not sure there is a rule on that. I think it's common sense.
MS. SMITH: Well, I think if we consult the rule and it does not allow for that, may he be excluded?
MR. JONES: No.
THE COURT: No, not if it doesn't allow for a party; only if it prohibits him.
MR. JONES: Judge, he's not a non-party. He is an employee of our firm helping us in representation of our client.
MS. SMITH: He is not an attorney, Judge.
MR. JONES: Well, if I brought my paralegal, she wouldn't be either.
MS. SMITH: It's my position she shouldn't be allowed into the deposition either.
THE COURT: can you tell me what the problem is, Jennifer?
MS. SMITH: Judge, I'm trying to go by the Rules. I don't think there is authority.
THE COURT: Do you have a rule you can cite to me?
MS. SMITH: I think I do. I'll borrow Mr. Jones' book real quick and turn to Civil Procedure.
THE COURT: Yes. Jennifer, let me ask you something. You don't know what the rule is, and you are objecting to it?
MS. SMITH: I don't believe the rules allow for non-parties.
THE COURT: I don't think it will say one way or the other.

Continued, next column

Continued, page 11

"From a Deposition," from Page 10.

MS. SMITH: Well, I will look it up.
MR. JONES: I think you can invoke the rule to exclude another witness that is not a party. This isn't a witness.
THE COURT: Jennifer?
MS. SMITH: Sir.
THE COURT: Before you call me and get me on the phone.
MS. SMITH: I didn't call you, Judge. Mr. Jones did.
THE COURT: I understand that, but you were trying to prohibit somebody from stepping into the deposition
MS. SMITH: I'm trying to follow the Rules.
THE COURT: Be sure you know what the rule is before you call me on the phone.
MS. SMITH: I 'm reading it. Hey, here it is. Judge, I have got it. Discovery methods. Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions. That certainly applies here. It does not say non-parties. It says parties.
THE COURT: Does it say the court reporter can be in the room?
MS. SMITH: Well, Judge, the Circuit Court is a Court of Record.
THE COURT: I 'm asking you the question. Does the Rules say a court reporter can be in a room?
MS. SMITH: Judge, the Circuit Court is a Court of Record. We are taking testimony. The court reporter swears the witness, and the court reporter --
THE COURT: Does the rules say that a court reporter can be in the room?
MS. SMITH: Let me read it.
MR. JONES: can we just get started?
MS. SMITH: Yeah, if you will exclude him. Depositions by their nature are sworn.
THE COURT: It's common sense, isn't it, Jennifer?
MS. SMITH: Judge, the language of the rule. I mean, this wasn't me calling you. This is the other side.
THE COURT: No, but, Jennifer, you were apparently were not going to allow go (sic) forward with the deposition unless this person left the room.
MS. SMITH: In accordance with the Rules of Civil Procedure. Yes, sir.
THE COURT: You have not cited a rule, Jennifer.
MS. SMITH: Yes, I did. Rule 26, Judge. Parties.
THE COURT: What does it say about summer interns?
MS. SMITH: It does not allow for them.
THE COURT: Okay. Then you have to fall back on common sense, don't you?
MS. SMITH: So it's the Court's position that -- well, Judge, the Rules do not call for it. They don't.
THE COURT: Do they prohibit it?

Continued, page 12

Cumulative Index to Past Editions

All available on www.NAWCJ.org

June 2010

Impeachment with Evidence of Prior Criminal Conviction, Charles W. Ehrhardt

What is the College of Workers' Compensation Lawyers?, Per Curium

Florida's New Inductees into the National College of Workers' Compensation Lawyers, Gerald Rosenthal

A Practitioners Perspective on the Demands of Complex Litigation, Gerald Rosenthal

Keeping Legal Minds Intact, Mitigating Compassion Fatigue Among Legal Professionals, Linda Albert

Bad Appeal Renders Attorneys Liable for Fees, 1st DCA Rules, Workcompcentral.com

Wage and Hour Database Allows Tracking Enforcement Actions, Workcompcentral.com

What's a Menisc and Why Would You ectomy One?, Per Curium

July 2010

What Judges Need to Know About Mediation, Robert L. Dietz, Esq.

The "Great Recession" and Workers Compensation: Assessing the Damage and the Road to Recovery, Robert P. Hartwig, PhD, CPCU

At-home Injuries Suffered by Telecommuters, Hon. David Torrey

BP Claims Include Injuries and Illness, but Comp Questions Linger, Michael Whiteley

August 2010

NAWCJ Elects New Officers, Per Curium

Disability Determination: Validity with Occupational Low Back Pain, Raymond C. Tait, John T. Chibnall, Elena M. Andresen, and Nortin M. Hadler

NAWCJ Members Judge the 2010 Zehmer Moot Court Competition at the FWCI in Orlando, Per Curium

New Study Identifies and Quantifies Factors That May Lead Injured Workers to Seek Attorney Representation,

States Huddle to Develop Program to Share Prescription Drug Data, Workcompcentral.com

Continued, page 12

"From a Deposition," from Page 11.

MS. SMITH: The Rules are stated in a way to govern a deposition. And, Judge, I think that is ... Um.
THE COURT: They don't call for it and they don't prohibit it, do they, Jennifer?
MS. SMITH: No, the parties are called for.
THE COURT: Use common sense.
MS. SMITH: The parties are called for, Judge. Not non-parties. Parties.
THE COURT: Jennifer, listen. I do not want you or anyone else to ever call me again.
MS. SMITH: I did not call you, Judge.
THE COURT: No. Listen to me now. Sear me out. I don't want you or anyone else to ever call me again about any discovery matters until you have thoroughly researched the rule and you can cite it to me.
MS. SMITH: I have just cited it to you, Judge.
THE COURT: No, no, you cited nothing.
MS. SMITH: Rule 26, Judge. I just cited it to you.
THE COURT: It says nothing about what you are talking about.
MS. SMITH: Yes, sir, it does. Yes, sir, it does. Parties are allowed at a deposition. That is our issue. Parties are allowed. A non-party - -
THE COURT: Does it say lawyers can be there, Jennifer?
MS. SMITH: Judge, the summer clerk is not a lawyer.
THE COURT: Does it say lawyers can attend the deposition? Does it say court reporters can attend the deposition?
MS. SMITH: If that is the Court's position, what is the purpose of the Rules of Civil Procedure? What are they there for?
THE COURT: Well, Jennifer. I'm telling you sometimes you have to use common sense about things.
MS. SMITH: I am, Judge. That is the reason I made the objection.
THE COURT: What you told me is totally devoid of any common sense. It is a ridiculous waste of time.
MS. SMITH: Well, Judge, it's my position that non-parties have no business in a deposition . I don't think that is obnoxious. And I don't think that it is a waste of time.
THE COURT: Employees of a law firm can sit in on a deposition.
MS. SMITH: That is not what the rule says.
THE COURT: What does the Rules say about employees of a law firm?
MS. SMITH: Judge, they have not cited any authority allowing it.
THE COURT: They don't have to. It's just common sense, Jennifer. Any person with an ounce of common sense would not even make an issue of this.

Continued, page 13

Cumulative Index to Past Editions

All available on www.NAWCJ.org

August 2010 (Cont.)

Narcotic usage - too much, or too little?, Joe Paduda

September 2010

A Summary Florida Workers' Compensation Institute Education Conference And National Association of Workers' Compensation Judiciary Judicial College, Hon. David Torrey

1st DCA Mandates Electronic Filing for Attorneys, Workcompcentral.com

DWC Intends to Make EAMS E-filing Mandatory, Workcompcentral.com

On Legal Writing: Or, Here's to "gravy stained placemats," Per Curium

October 2010

What a difference a day (100 years) makes, Per Curium

Workers' Compensation, a Brief History, by Lloyd Harger

Bullying from the Bench, By Steven Lubet

Judge Dismisses Cassens RICO Case, Parties Watch Sister Case, John P. Kamin, Workcompcentral.com

OSHA Prepares to Target 'Distracted Driving,' Especially Texting, Workcompcentral.com

How Did We Get Here, and Where Are We Going Next?, Hon. David Langham

Marking 100 years of Workers' Comp in America:

http://www.workerscompinsider.com/2010/06/marking-100-yea.html

http://www.state.il.us/agency/iic/news.htm#cent

http://www.workerscomp100.org/events.html

Do you know of an event, seminar, or program that is being held to commemorate this anniversary? Please email it to President Lazzara at jjl@nawcj.org

"From a Deposition," from Page 12.

MS. SMITH: Well, I respectfully disagree with the Court's position.
THE COURT: Okay. Do you understand, then, he will be allowed to sit in there?
MS. SMITH: If that is what you order.
THE COURT: And you understand that you are not to call me or cause anyone else to call me again until --
MS. SMITH: I didn't cause anybody to call you, Judge. I did not.
THE COURT: You were not going to let that person sit in on the deposition, and he had to call me to get permission. You should not have objected to him sitting in on that deposition.
MS. SMITH: So I should not be allowed to ask that the Rules be followed for Civil Procedure?
THE COURT: Tell me the rule you are referring to.
MS. SMITH: Rule 26.
THE COURT: Tell me what it says about summer attorneys or law firm employees.
MS. SMITH: It governs depositions in discovery. It does not provide for appearance for summer interns.
THE COURT: Okay. So it doesn't prohibit either, does it?
MS. SMITH: It does not allow it.
THE COURT: It calls for your common sense, doesn't it?
MS. SMITH: No, sir, I disagree with that, but the Court's position is what it is.
THE COURT: Let me be clear about this, Jennifer. Do not call me again --
MS. SMITH: I didn't call you.
THE COURT: -- or have anyone else call me again about any discovery matter. Do you understand that?
MS. SMITH: I did not call you, Judge.
THE COURT: Do you understand that, Jennifer? I said cause anyone else to call me.
MS. SMITH: Judge, I did not call you, and I'm trying to follow the Rules of Civil Procedure. I hope I am not punished for that.
THE COURT: Jennifer, did you hear the last part of my statement? Or cause anyone else to have to call me.
MS. SMITH: Judge, I can't control what anyone else does. And I hope I am not punished for trying to follow the Rules of Civil Procedure.
THE COURT: Do not call my office again about a discovery matter.
MS. SMITH: I did not call you.
THE COURT: You come to (the Courthouse) if you have a Problem.
MS. SMITH: I did not call you, Judge, as long as you understand that.
THE COURT: No, but you caused them to have to call me.

Continued, next column

MS. SMITH: No. Well, I'm trying to follow the Rules of Civil Procedure. That is all I'm trying to do.
THE COURT: Jennifer, read the Rules --
MS. SMITH: I did.
THE COURT: -- before you raise an objection.
MS. SMITH: I did, and it doesn't allow for it.
THE COURT: Do not call my office again.
MS. SMITH: I did not call you, Judge.
THE COURT: Do you understand? Do not call my office again about a discovery matter.
MS. SMITH: I did not call you, and I understand your position.
THE COURT: All right.
MR. JONES: Thank you, Judge.
TELECONFERENCE CONCLUDED

This was excerpted from a submitted document purporting to be a real deposition. The names have been changed to conceal identities. It is believed that this is an actual deposition, but the potential exists, based upon the content, that this is parody. If it is parody, it is exceptionally well done. If it is real, then it is troublesome. You be the Judge.

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

Thanks FWCI!

Only 279 days until Judicial College 2011!

The articles on pages 8 and 9 originally appeared on WorkCompCentral.com and are reprinted here in their full form with the permission of the publisher of that cite. The generosity of WorkCompCentral helps make this publication possible.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR.
Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

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

OFFICIAL TITLE: _____

Organization: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

YEAR FIRST APPOINTED OR ELECTED? _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ? _____

_____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

_____

_____

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

_____

_____

_____

Mail your application and check to:

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

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR ASSOCIATE MEMBERSHIP

THE NAWCJ ASSOCIATE MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. ASSOCIATE MEMBERSHIP DUES ARE $250 PER YEAR. Contributions, gifts, or dues to the NAWCJ are not deductible as charitable contributions for federal income tax purposes.

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

Firm or Business: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

HOW DID YOU LEARN ABOUT NAWCJ? _____

Mail your application and check 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

SAVE THE DATES!

The NAWCJ Judiciary College 2011 will be August 21 - 24, 2011

Marriott World Center, Orlando