# Lex and Verum

## The National Association of Workers' Compensation Judiciary

Number XVIII, 0211


# NAWCJ Announces 2011Judiciary College Curriculum

It seems like last week we were in Orlando for the second annual Judiciary College. The reviews and comments last August were gratifying, and are a tribute to the efforts of our program committee. Their efforts over the last five months have positioned us for the best curriculum ever in 2011, our thanks to Judges Lazzara and Torrey in particular for their efforts formulating the 2010 curriculum.

Nat Levine is a workers' compensation veteran, with extensive expertise in the medical challenges in particular. He has organized the medical portion of our program to provide insight into areas that currently challenge workers' compensation claimants, their counsel, and the industry. Addictions come in many forms, both physical and psychological, a distinction which may be blurred at best in some cases. Dr. Marc Gelber will present "The Power of Addiction," with an emphasis on these distinctions, and provide insight into the "pill mill" situation faced by many states. A second medical program will focus on the biomechanical forces that act upon the human anatomy. This program will provide concrete visual examples of loads and forces acting on the body, with expert analysis and explanation of how and why these forces affect the results that they do. Although the adjudicator is necessarily limited to the medical evidence adduced in the case before her or him, understanding the logic of the mechanical forces will aid comprehension of the cause and effect that we read about in so many records and depositions. Finally, the risks and challenges of the aging workforce will be examined by Dr. Jesse Lipnick. He will identify and define particular challenges of injuries in older patients, with particular focus on how age can affect the speed of recovery.

The NAWCJ program this year will continue to include two of the most popular educational opportunities, a live orthopedic surgery and a live appellate oral argument. These two thought provoking opportunities are exceptional.

People have biases and prejudices. As adjudicators, part of our job is to put these aside. The 2011 Judiciary College will include a program focused on the neuroscience of how our brains approach problem-solving and analysis. This presentation by a prominent judicial speaker will help us all to understand how we make decisions, and in the process will help us recognize how subconscious affects that process. Recognizing the potential for these reactions and their influence on our decisions is the first step to working through them and working toward eliminating or minimizing such influences. This will be an interactive, entertaining, and thought-provoking two hours, and is a must for adjudicators.

The 2011 program will provide eleven hours of "adjudicator-specific" continuing education value, including an hour of ethics and professionalism. In addition four to nine more hours in multi-state, Medicare or mediation credit is included for those who elect to stay through Wednesday. An astounding twenty hours of education for as little as $200.00. Do not let the price of this program fool you. The support of the Florida Workers' Compensation Institute and our Associate Members makes it possible for the NAWCJ to deliver an unparalleled program at an exceptionally affordable rate. We all see multiple seminar advertisements throughout the year. None measures up to the NAWCJ. Our program focuses specifically on the adjudicator role, brings exceptional caliber speakers, and is about half the price of similar programs.

Make plans now to join us in Orlando, August 21-24 2011!

# A Trial Judge Views His Job

By Jonathan L. Alpert*

A trial judge makes decisions in an undemocratic fashion in a democratic society. Virtually every other governmental decision is reached by consensus and agreement. Appellate courts, for example, decide cases after discussion between equals. Statutes are passed only with the concurrence of many. Yet the decision making process of the trial judge is his and his alone.

This insight into the judicial process is personal: the result of service as a Judge of Industrial Claims in Pinellas, Manatee and Sarasota Counties between May 1, 1977, and August 1, 1979. Workmen's compensation hearings, over which judges of industrial claims presided,[1] were essentially non-jury trials involving thousands to hundreds of thousands of dollars. The legal issues were many and varied: marriage, divorce, paternity, competency, guardianship, equitable remedies, wage-earning capacity, and so on. The duties of a judge in this area of the law were similar to those at other levels of the trial judiciary.

The uniqueness of the decision making process of the trial judge creates its own demands, conditions and pressures. Although it is widely understood that trial judges perform a special function, perhaps the bar and the public are unaware of the essence of the task. Hence, the almost Maoist self-criticism of the legal profession should be set aside and replaced by a better understanding of what lawyers and judges are doing.

Trial judges decide cases in an unbiased vacuum. There is no discussion between equals, much less consensus. Lawyers of course advise, but there is no requirement of consent. The decision making process of the trial judiciary is virtually the only undemocratic process permitted in this country. The process is both satisfactory and acceptable because it is subject to proper controls. But all of us engaged in the administration of justice should be aware of the special demands upon the trial judiciary. Also, trial judges can share a perspective and insight about the law.

It is all too easy for a trial judge to forget his own limitations and imperfections because of his significant unshared responsibility. A fine sense of fallibility coupled with an ability to admit error is necessary. If trial judges were perfect, there would be no need for appellate courts. Judges are not perfect but are fallible human beings as everyone else. Within his own court, however, the trial judge is "perfect." Therefore, a careful and considered balance is indispensable.

Few things are as frustrating to the bar as the opinionated, dogmatic' judge. But there is a fine line between being opinionated, which is undesirable, and having opinions, which is required. Opinions must be tempered by a sense of justice. Opinions must be controlled by appellate and legislative authority, when such authority is plain. Opinions must allow the advancement of causes and positions which at first blush may seem unsupportable. Opinions must be finalized only after all of the evidence is adduced.

The effort to do justice requires a tempered and receptive open mind. Trial judges must strive for justice but it must be Justice within the confines of the law. Legal principles are necessary because one man's justice may be another's folly. In reaching for justice the judge must be aware that his function is dispute resolution within the confines of the law. As no one can know all of the law, the bar can assist the trial judge by bringing applicable law to his attention. When a judge wishes to make or change law, he must carefully weigh the consequences to the immediate litigants and to future litigants. Opportunities to enunciate or develop what one perceives to be fresh legal theory often must be abandoned because the cost to the parties-delay or surprise-is too great. A trial judge, if the occasion is appropriate, may "make" law. He must remember, however, that litigants generally do not want new law; they want a resolution of their dispute.

Dispute resolution requires listening to litigants, witnesses: and lawyers. Lawyers can make this task easier by confining testimony and argument to the relevant and by stipulating to matters which are not really in issue. Judges can make this task easier by proper behavior. Because the trial court is the most accessible court, the trial judge faces demands peculiar to this level of the judiciary. A trial judge is, so to speak, on display all day every day for the benefit of the public. The public has expectations regarding the appearance and decorum of a court. These expectations are created and satisfied by well scripted television drama. They can rarely be met by real cases tried and adjudicated by real people. But the trial judge has the obligation to maintain proper form and decorum. While a judge may be informal when counsel alone are present, certain kinds of informality and familiarity must be avoided in the presence of the public.

*Continued, Page 3.*

*A Trial Judge, from P.2*

This is not a charade but is required decorum. Proper decorum includes both the judge's attitude and the demeanor of everyone present. Although it is fashionable to criticize forms of behavior, form does imitate and predict substance. Therefore, it is essential that proper form and dignity be assured. This requires a judge to be flexible on a case-by-case basis. For example, one trial may involve lawyers who are close friends while the next may involve personal enmity. In both instances the judge must prevent personalities from interfering with the trial. Law and ethics require that litigants and the public realize that cases are heard on the merits and that no personal feeling between counselor between counsel and the court affects the result.

When the lawyers are friendly, a judge may explain to the parties that such friendliness is acceptable because counsel work with or against one another all of the time and their friendliness does not hinder their advocacy. When enmity exists, counsel can be cautioned to address the court and not each other and to stick to the merits. It is the responsibility of the judge, assisted by counsel, to ensure that cases rather than personalities are tried.

While a judge must be vigilant to maintain the proprieties, the manner in which propriety is maintained is as important as the maintenance itself. The character, attitude, demeanor and behavior of the judge permeate the proceedings. A judge must be patient, considerate, and kind. At the least he must appear attentive. He should not scoff or sneer at even the most ridiculous contentions. The judge and the judge alone must control the proceedings. This is accomplished by firm but fair demeanor and mien. It must be plain that the judge and only the judge is in charge and that no litigant may intimidate or overreach the other or the court. Fairness and firmness can be achieved by judicious action before matters get out of hand rather than after an untoward event. Consistent judicious control is preferable to erratic or unpredictable judicial intervention. Quiet firmness will often calm counsels who have been swept up in the fervor of their positions. If the proceedings become overheated, it is better to take a recess than a revenge.

Judicial kindness and compassion are achieved only if the judge is aware of the stresses on lawyers, litigants and witnesses. Court appearances are extremely difficult for people and a trying experience even for skilled counsel. With this in mind a judge should act with all due consideration. When criticism is necessary, it is better to criticize the act rather than the actor. "That is wrong" is much better than "You are wrong."

A judge should attempt to monitor the impact of the proceedings on the litigants and witnesses. If the non-lawyer participants appear puzzled, explain in plain English what is happening and why. This is particularly important after ruling on the omnipresent hearsay objection. Rulings on all evidentiary objections should be made in such a manner as to preserve the appearance of impartiality. As these rulings are the most frequent and the least understood by the lay public, it is important to handle objections in an evenhanded fashion.

*Continued, Page 5.*

# Georgia Begins Publishing Awards

The internet continues to provide increasing transparency of process in administrative proceedings. Georgia has recently premiered free access to decisions of the State Board of Workers' Compensation (SBWC).

The Board has developed and deployed a database of their appellate decisions and corresponding trial judge awards dating back to October 1, 2009. Efforts continue, and additional awards are being prepared and published.

An issue illuminated by the Georgia effort is the wide variation among states regarding privacy issues. The SBWC, to comply with the applicable privacy restrictions, has modified the manner in which new awards are drafted, and has performed a manual redacting of past awards prior to their inclusion in the database.

The result is a vastly increased level of access to information for attorneys, employees and employers alike. The database is searchable in a "Google" format, allowing access to decisions based upon key-word searches to identify issues, judges, or other specifics.

Visit their site:

http://sbwc.georgia.gov/portal/site/SBWC/menuitem.2f54fa407984c51e93f35eead03036a0/?vgnextoid=45d532258ac98210VgnVCM100000bf01010aRCRD

"When I stand before God at the end of my life, I would hope that I would not have a single bit of talent left and could say, 'I used everything you gave me.'"

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

Erma Bombeck

# NAWCJ Judicial College 2011

## August 21through 24, 2011

Up to Twenty-one Hours of Judicial Education available for only $200.00!

## The 2011 Judicial College Tuition:

NAWCJ Members

$200.00 if paid on or before July 31, 2011
$225.00 if paid on or after August 1, 2011

Non-NAWCJ Members

$240.00 if paid on or before July 31, 2011
$265.00 if paid on or after August 1, 2011

## More Information At:

www.NAWCJ.org

www.FWCIweb.org

Judge Lazzara JJL@NAWCJ.org

Visit a Florida OJCC Videoteleconference facility for live demonstration of technology during conference!

***Get Ready to be "FUSED" to your seats as Orlando Orthopedic Center presents yet another thrilling Live Surgery…***

Dr. G. Grady McBride, a board certified spine surgeon and author of numerous spine related publications with over 25 years of experience will be performing a minimally invasive lumbar fusion called TLIF (Transforaminal Lumbar Interbody Fusion). This new procedure and technology allows for a less invasive placement of hardware decreasing patient's hospital stay, blood loss and allowing an early return to work versus the traditional open fusion.

Dr. Steven Weber, a board certified spine surgeon at Orlando Orthopedic Center who specializes in Adult Spinal Reconstruction will be on location at the World Center Marriott to assist with questions from the audience.

## The 2011 Program Includes Three Timely and Exceptional Medical Presentations:

### The Power of Addiction

Marc Gerber, M.D., Orlando, FL, will provide an overview of the pill mill problem spreading through the nation. His presentation will focus on addictions and the physical and psychological causes of patients becoming dependent on the variety of opiod medications.

### The Anatomy of the Injury

Michael T. Reilly, M.D., Ft. Lauderdale, FL, and Tim Joganich, Penns Park, PA, will discuss the questions of causality inherent in the orthopedic surgeon's diagnoses. This is a study in the biomechanical forces necessary to produce injuries to the spine and joints. Understand how the medical findings relate to the medical opinions.

### The Aging Workforce

Jesse A. Lipnick, M.D., Gainesville, FL, will explore the implications of older workers remaining in the workforce. The body's ability to heal changes with age. The likelihood of co-morbidities is also an issue with older workers' injuries. Dr. Lipnick uses his medical experience and work with aging patients to foster understanding of the unique challenges that are presented by this demographic.

## Multistate Comparative Law Panel

Our distinguished panel of Judges from Florida, Texas, Pennsylvania, and Maryland will describe and discuss similarities and differences among the states' workers' compensation laws and procedures. This highly interactive program will provide insight, perspective and analysis of the variety found in workers' compensation systems around the country. Attendees will come away from this with perspective and ideas.

Judicial temperament also involves the use and abuse of judicial humor. Although a sense of humor is helpful, particularly when in conferences or hearings with lawyers alone, humor usually should be avoided during trials. Litigants are not amused by their claims or defenses. They find it even less amusing for the judge to be amused. It is not the function of the judge to amuse himself by the sometimes bizarre facts which under other circumstances might be better comedy scripts than lawsuits.

Every litigant and every lawyer should be given the full measure of his day in court. One side must lose. The loss is easier to accept if the loser has had a fair and full opportunity to present his position. And, just as lawyer should respect Judges, Judges should respect lawyers. A compliment to a lawyer whose client has lost can make defeat tolerable. There is almost always something nice to say about a particular lawyer's handling of a Case. It is important for a judge to acknowledge the ability of counsel, particularly in the presence of clients. (I do not subscribe to the view that most lawyers are not competent. Rather, my experience is just the opposite.)

When possible, it is good practice to announce the ruling at the conclusion of the hearing or trial. This is advantageous to both counsel and court. By utilizing this procedure the judge does not have to remember complex factual or legal conundrums. He also does not have to take the case home with him at night. This procedure is helpful to lawyers and their clients because they know where they stand at the conclusion of the trial. The lawyers are also able to promptly advise their clients of the effects of the order. Finally, if necessary, preparation of the appeal can commence before the order is rendered, thus alleviating some of the time pressure on counsel.

A trial judge should not be fearful of his record of affirmations and reversals. By the time a matter has reached trial, two professionals have disagreed. Depending on the case it is reasonable or likely that three more professionals may disagree at the appellate level. It is essential that disputes over points of law do not devolve to personality clashes. Mutual respect should be maintained throughout the course of litigation.

Although a judge becomes accustomed to continuous litigation, he should remember that to the parties each case is very special. It is all in a day's work for the judge, but to the litigants it is an important, landmark event. The bar can assist judges by remembering that a judge is also a person. Matters which tax or annoy most people in all likelihood will have the same effect on the judge. This includes such things as arguing through the judge's lunch hour.

A judge can only maintain his patience, courtesy, kindness, compassion, and attentiveness if he is assisted by the bar. The following suggestions may be helpful.

1) Become acquainted with judges and their requirements.
2) Extend every possible courtesy to opposing counsel.
3) Stipulate to matters not really in controversy.
4) If asked, concisely explain the disputed issues.
5) Support legal arguments with authority.
6) Do not argue for the sake of argument.
7) After a judge rules, do not argue with the ruling.
8) Keep witnesses' testimony on the issues.
9) Respect the court, if not a particular judge.
10) Consider the demands you are making on a court.

Regardless of the actions of attorneys, judges must remember that they are servants of the public rather than the other way around. This concept can temper the significant unshared responsibility of the trial judge. In addition, a judge must do his utmost to assure a truly fair trial or hearing. The bench and the bar can achieve just and proper dispute resolution at the trial level, but it is important that all of us work together toward that goal. Once the undemocratic and demanding trial process is understood, we can all function more effectively. The all too easy criticism will be replaced by understanding as we serve the public. And, after all, that's what it's all about.

*Associate Professor of Law. Stetson University College of Law. B.A. 1966. Johns Hopkins University; J.D. 1969, University of Maryland School of Law; L.L.M. 1970, Harvard University School of Law. Judge Alpert was a Judge of Industrial Claims from May I, 1977 to August I, 1979. The author wishes to thank William F. B1ews. Esquire, for his suggestions and critique.

[1] The position of Judge of Industrial Claims was abolished, effective August 1, 1979, by chapters 79-40 and 79·312, Florida Session Laws. The duties of the Judges were vested in deputy commissioners.

# NCCI Releases Workers' Compensation Prescription Drug Study 2010 Update

The National Council on Compensation Insurance (NCCI) has released a 2010 update to its workers' compensation prescription study. The conclusions support anecdotal reports of repackaging expense for the workers' compensation industry. This update studied a period from 1996 through 2008, and focused on accidents that occurred between 1994 and 2008. The data collected was limited to prescription drugs which are identified with specific drug codes. The study concluded:

> Prescription drugs have been a significant driver of WC medical costs for many years. NCCI first examined WC Rx issues in 2003 and found that utilization (as opposed to price) increases were the significant force behind Rx cost increases at that time. In 2007, NCCI found that state cost differences were driven mostly by the mix of drugs prescribed (as opposed to price or number of scripts). Several drugs, such as ACTIQ® and MOBIC® have shown significant changes in market share over the course of these prior studies.

NCCI identified the following as the "key findings" of the research:

> WC costs due to physician-dispensed drugs rose dramatically in 2008.
>
> Three-fourths of WC repackaged drug costs originate from physicians.
>
> Lower than expected emergence of Rx costs has prompted us to lower our projected ultimate Rx share of total medical from 19% to 18%.
>
> After two seemingly abnormal years in which price change was the dominant factor affecting per-claim WC Rx cost increases, utilization change has once again taken its historically dominant role.
>
> OXYCONTIN® has become the top prescribed (in terms of paid dollars) WC Rx. A successful patent defense, which resulted in the removal of the extended release generic version of OXYCONTIN® from the market, is likely the major contributing factor.

The complete study is here:

https://www.ncci.com/nccimain/industryinformation/researchoutlook/pages/2010prescriptiondrugstudyupdate.aspx?s=prescription drug

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# "Overheard in Court:"

An inexperienced and nervous notary, called upon to swear in a remote witness for a telephonic hearing, uttered: "do you solemnly swear or affirm that the testimony that you are about to forget is the truth, the whole truth, and nothing but the truth"

# *Death by a Thousand Paper Cuts*

by Jill Callihan, FRP, NWFPA

No matter your age or generation you cannot escape how technology has transformed the legal industry. The trend is not going away. Computers, laptops and smart phones are practically standard business equipment, not just for legal practitioners, but for clients as well. Nor can we forget e-mails, the Internet, Facebook, Twitter and other social network sites. Despite lawyers' love for paper, 95% of information is born digitally, and the majority of that information is never printed.[1] Do not panic or bury your head in the sand when someone mentions "e-discovery." Instead, evolve, adapt and be prepared. As Charles Darwin once said, "It's not the strongest species that survive, nor the most intelligent, but the ones who are most responsive to change."

Electronic discovery, or "e-discovery" as it has come to be known, encompasses identifying potentially relevant electronic evidence or Electronically Stored Information (ESI) also known as Electronically Stored Data (EDD), followed by preserving, collecting, processing, reviewing for relevance or privilege and, lastly, producing it. ESI includes, emails, voicemails, backup tapes, USB drives, CD/DVD storage, cell phones and any other information that exists electronically and resides on laptops, desktops, local and offsite servers including multiple locations across the world and even in "the cloud."

Recognizing the explosion of ESI, the Federal Rules of Civil Procedure (FRCP) enacted amendments in late 2006. Many in the legal community are still not familiar with the changes or the benefits. The amended rules explicitly recognize electronically stored information and describe procedures to make it available in discovery. The following is a summary of the principal provisions:

**Rule 26**

**(a) Automatic Disclosure of ESI**: Parties in litigation must provide a copy (or description by category and location) of ESI that will support that party's claims and/or defenses. Essentially, the words "document" and "data compilation" were clarified to include all "electronically stored information" as its own category.

**(b)(5)(B) Inadvertent Production of Privileged Information**: If discovery information is subject to a claim of privilege, or protection as privileged trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party is required to promptly return, sequester, or destroy the specified information and any copies it has and is not permitted to use or disclose the information until the claim is resolved (i.e. the "Claw Back Procedure").

**(b)(2)(C) Production Of Information "Not Reasonably Accessible"**: A party does not have to provide discovery of ESI from sources the party identifies as "not reasonably accessible because of undue burden or cost." The party asked to produce ESI bears the burden of demonstrating the information is not reasonably accessible because of undue burden or cost. Even if that showing is made, the court may still order discovery from that party if the requesting party shows good cause.

**(f) Enhanced Meet and Confer Requirements**: This sets up a framework for the parties and court to give early attention to issues pertaining to the disclosure and discovery of electronic information. Under this amendment, the parties must discuss during the discovery planning conference any issues relating to the disclosure and discovery of ESI, including the form of production, and discuss issues relating to the preservation of ESI and other information. It also calls for discussion of whether the parties can agree to production on terms that protect against privilege waiver. The "meet and confer" is conducted prior to the scheduling conference and within 120 days of service of a complaint filed in Federal Court.

**Rule 33**

**Production of ESI In Response To Interrogatories**: Provides the option to respond to an interrogatory by specifying and producing the business records, including ESI, which contain the answer.

*Continued, Page 8.*

*Paper Cuts, from P.7*

**Rule 34(b)**

**Form of Production**: This rule permits the requesting party to specify the form in which ESI is to be produced and permits the responding party to object to the requested form. If there is no request for a specific form for producing electronically stored information, and if the parties do not agree to a particular form and the court does not order one, the producing party has two options: (1) to produce the information in a form in which it is ordinarily maintained, or (2) in an electronically searchable form.

**Rule 37**

**The "Safe Harbor" Provision**: Pertains to remedies for a party's failure to respond to, or cooperate in, discovery. Amended Rule 37 provides that, absent exceptional circumstances, a court may not impose Rule 37 sanctions on a party for failing to provide ESI lost as a result of the "routine, good faith operation of an electronic information system."

By the latter part of 2009, 23 states adopted provisions to address the procedural issues in e-discovery. Many of the provisions or procedural issues based on the 2006 Federal Amendments. As of autumn 2010, the number of states adopting counterparts has grown to 36, with others testing improvements via exploratory pilot programs and state projects. On January 21, 2006, Florida established the Florida Bar Subcommittee on E-Discovery. This committee announced in July 2010 that it submitted language to be incorporated in several existing rules to address "ESI." If favorably considered, the changes will proceed to the drafting subcommittee. Lawrence Kolin, who currently chairs the Civil Procedure Rules Subcommittee on Electronic Discovery, says just over half the states have created their own e-discovery rules. Kolin said, "Those states that have recognized growing reliance by parties on the creation and storage of digital information potentially relevant to legal disputes, frequently resulting in costly and time-consuming efforts to identify, preserve, and produce electronic records, have passed rules. . . . With nearly six terabytes of information being exchanged over the Internet every second, it is time for Florida to get on board with civil rules governing discovery of this electronic data."

It should be evident that the legal community is expected to live in the digital age and ignorance can no longer be an excuse. We should embrace the concept that there are both necessary and strategic advantages in most litigation when proper e-discovery tactics are utilized. E-discovery is not just for big budget cases, involving large companies. Access to electronic evidence is for everyone. Take the initiative to learn and develop a working knowledge of e-discovery issues and educate yourself on the relevant case law. The evolution of our chosen profession requires the necessary expenditure in people, development and technology in order to successfully prepare for and manage the electronic discovery processes. Thoughtfully investing in these areas will help ensure that you are not outdone by your adversaries or, possibly even worse, "left in the dust" by your own co-counsel.

Jill Callihan is a Florida Registered Paralegal, and a member of the Northwest Florida Paralegal Association. She is employed with Levin, Papantonio, Thomas, Mitchell, Rafferty & Proctor in Pensacola, Florida. This article originally appeared in *The Summation*, published by the Escambia Santa Rosa County Bar Association. It is republished here with the permission of the author and publisher and should not be reproduced without their permission.

Ed. Note. Are workers' compensation disputes expected to be immune from such discovery disputes? How will administrative adjudication rules address these issues, and when?

**NAWCJ**

**National Association of Worker's Compensation Judiciary**

**P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222**

# Workers' Comp Resources

National Association of Workers' Compensation Judiciary
www.NAWJC.org

Florida Workers' Compensation Institute
www.fwciweb.org

WorkCompCentral.com
www.workcompcentral.com

Top 25 Blogs for Workers' Compensation and Workplace Issues - 2010 Honorees

http://www.lexisnexis.com/COMMUNITY/WORKERSCOMPENSATIONLAW/blogs/topblogs/archive/2010/10/28/lexisnexis-top-25-blogs-for-workers-compensation-and-workplace-issues-2010-honorees.aspx

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

The "Top 10 Bizarre Workers' Comp Cases for 2010"
http://www.lexisnexis.com/COMMUNITY/WORKERSCOMPENSATIONLAW/blogs/workerscompensationlawblog/archive/2011/01/09/the-top-10-bizarre-workers-comp-cases-for-2010.aspx

The "Top Comp Stories of 2010"
http://www.joepaduda.com/archives/001996.html

# Upcoming Conferences:

SCWCEA Workers' Compensation Medical Seminar, February 27-March 1, 2011, Francis Marion Hotel, Charleston, SC 29403.

ABA 2011 Workers' Compensation Midwinter Seminar and Conference, April 7 – April 9, 2011, Intercontinental Hotel, Boston, MA.

SEAK 31st Annual National Workers' Compensation & Occupational Medicine Conference, July 19-21, 2011, Hyannis, MA.

63rd Annual SAWCA Convention, Beau Rivage, Biloxi, Mississippi July 25-29, 2011

These programs are not sponsored or endorsed by the NAWCJ, but are noted here for information.

# More Action Likely on Immigrants and Immigration?

Montana's introduction of a bill regarding workers' compensation and immigrants was mentioned in the January 2011 Lex and Verum. BusinessInsurance.com announced on January 25, 2011 that a Georgia bill would similarly bar work comp benefits for illegal immigrants: "Sen. Bill Heath, R-Bremen, along with several other senators, sponsored S.B. 7.

The bill says it would amend Georgia law 'relating to general provisions relative to workers compensation, so as to provide that benefits…shall not be paid to noncitizens who are not employed legally; to provide that such payments shall not be made unless the noncitizen is present in this country legally at the time such payments are made.'"

# WE NEED *YOU*, YOUR *WRITINGS*, YOUR *IDEAS*

Do you write about topics that would be of interest to our members? Have you entered a decision in which Judges around the country would be interested? The NAWCJ communicates monthly with approximately 1,000 workers' compensation adjudicators and appellate review officials across the country. If you have ideas for articles or would like to submit a case note or article, contact Hon. John Lazzara at JJL@NAWCJ.org.

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

## 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."

From www:workcompcentral.com


# Employer Sends Immigration Preemption Arguments to Supreme Court

By John P. Kamin, Legal Editor

A special employer is asking the U.S. Supreme Court to consider whether federal law preempts workers' compensation benefits for illegal aliens, but some are skeptical of the argument.

Vaughan Roofing and Sheet Metal, a Louisiana company, has asked the nation's highest court to decide that the Immigration Reform and Control Act of 1986 preempts states' workers' compensation awards to illegal aliens, with emphasis upon wages that could not have been legally earned.

The company filed the petition for certiorari with the Supreme Court on Dec. 23, seeking to overturn a Louisiana appellate court decision. In Antonio Rodriguez v. Integrity Contracting, et al., the Louisiana 3rd Circuit Court of Appeal held three defendants liable for an undocumented employee's workers' compensation award.

Specifically, the court held Antonio Rodriguez's primary employer, the primary employer's insurer, and a statutory employer liable. Vaughan Roofing, the statutory employer, was the general contractor on a project at University of Louisiana at Lafayette. The direct employer was a subcontractor on the project.

Kirk Landry, the attorney for Vaughan Roofing, argued that state courts are split on whether workers' compensation benefits are available to illegal aliens, and attributes the split to the high court's 2002 decision in Hoffman Plastic Compounds v. NLRB. His brief cited at least seven state court decisions that varied on whether undocumented workers were entitled to benefits.

Rebecca Smith, an attorney with the National Employment Law Project, said that she would be "astounded" if the U.S. Supreme Court granted review to the case, noting that the Louisiana Supreme Court denied review. "In Hoffman, the court did not hold that IRCA preempted the National Labor Relations Act, and I wouldn't expect it to do so now," she explained. "The preemption argument will not hold water."

The Louisiana 3rd Circuit Court of Appeal also rejected the decision to award Rodriguez benefits conflicted with the Hoffman decision, but did so for a slightly different reason. The court determined that Hoffman did not apply to the workers' compensation case because it did not mention any state workers' compensation system. "Instead, Hoffman addressed whether an undocumented worker was entitled to back pay following a termination of employment after an employer found him or her to be unauthorized to work," the 3rd Circuit concluded. "The Supreme Court determined that the worker was not entitled to such pay as it was contrary to federal immigration policy. In particular, such a payment was contrary to the Immigration Reform and Control Act of 1986. While Hoffman contains a wealth of information regarding immigration policy, its reach does not include language indicating that a matter of state workers' compensation coverage, such as this, is preempted by this policy."

Landry told WorkCompCentral that if the U.S. Supreme Court does not address the split of authority, then undocumented workers could face inconsistent results. For example, a worker might be entitled to benefits in one state, but not another.

Smith disagreed with the idea that state courts are split on whether undocumented workers are entitled to workers' compensation benefits.

*Continued, Page 12*

*Immigration, from Page 11*

"In over a dozen cases in almost 20 states, state courts have held that workers remain entitled to workers' compensation no matter what their immigration status," she wrote. "This makes perfect sense, since workers' comp is an insurance-based system and workers are being compensated for injuries on the job. For any court to hold to the contrary would just encourage employers to seek out, hire, and exploit undocumented workers, since they'd get a free pass on their workers' compensation bill."

Landry's petition for certiorari cited conflicting state appellate court decisions on the topic. He cited decisions where courts denied illegal aliens benefits, such as *Granados v. Windson Development Corp*. (Virginia), *Tarango v. State Industrial Insurance System* (Nevada), and *Sanchez v. Eagle Alloy* (Michigan). Next, he cited decisions where state appellate courts have ruled that the IRCA does not preempt state law, including *Reinforced Earth Co. v. WCAB* (Pennsylvania), *Correa v. Waymouth Farms* (Minnesota), and *Continental PET Technologies v. Palacias* (Georgia).

Besides the conflicting decisions, Landry said that Vaughan Roofing's role as a statutory employer who is deemed liable for an undocumented worker that was another company's employee, might be another factor that could draw the high court's attention. He noted that there is evidence that the U.S. Supreme Court is currently interested in preemption arguments, and cited the fact that the high court recently heard oral arguments in Chamber of Commerce of the United States v. Whiting on Dec. 8.

SCOTUSblog, the official blog of the high court, defined the issue in Whiting in layman's terms: "An Arizona law requires state employers to check the immigration status of job applicants through a federal computer database, although the federal law creating the database makes its use voluntary. Arizona also revokes the business license of state companies that hire undocumented workers. Are these provisions preempted by federal immigration laws?" WorkCompCentral left messages for the claimant's attorney in the Vaughan Roofing case, but did not receive a response before deadline.

The Foregoing was reprinted with the permission of WorkCompCentral.com. The NAWCJ thanks WorkCompCentral for their consistent support of this newsletter and the Association's ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.

# Trying a Case by Video Teleconference

By David Langham

In 2008 another acronym joined the Florida workers' compensation lexicon. The Office of the Judges of Compensation Claims (OJCC) began to utilize the technology of video teleconference (VTC). This equipment was installed over three years, and in 2009 the last unit was installed in Port St. Lucie. Seventeen District Offices around Florida now house twenty units. They are primarily wall-mounted flat screen televisions which utilize "picture in picture" to allow the presiding judge to visualize herself and the remote parties, while the remote parties may perceive themselves and the Judge on their screen. A few of the original units utilize two separate "cathode ray tube" televisions.

This technology allows the OJCC to efficiently and inexpensively allow Judges to temporarily and periodically appear in Districts other than the one to which they are primarily assigned. The financial and time costs of travel are eliminated, allowing assignment of cases to Judges hundreds of miles distant. This allows Judges in busier districts greater flexibility in planning their dockets and maintaining the pace required to process the intense volume of litigation that is present in the workers' compensation adjudication system. Furthermore, the process is highly dynamic allowing shifting of trial workload easily and on short notice when required.

Trial of a case using the VTC technology is fundamentally no different than an in-person trial. Granted the Judge is miles and sometimes hundreds of miles, away. However, this technology allows the Judge to adjust and direct the camera in the hearing room. Therefore, the Judge can focus particularly on any individual during trial, allowing observation of testifying witnesses and the determinations of credibility that underlie many cases.

*Continued, Page 13*

*Videoteleconference, from Page 12*

Manipulation of the camera, using a remote control similar to a home television's, is easily mastered. The sound quality is exceptional and allows both clear perception by the Judge and quality digital sound recording. The presiding Judge uses an RCA cable to attach the VTC unit to her or his hearing room computer, and the VTC microphones on each end of the connection provide the recording directly into the computer's digital recording software.

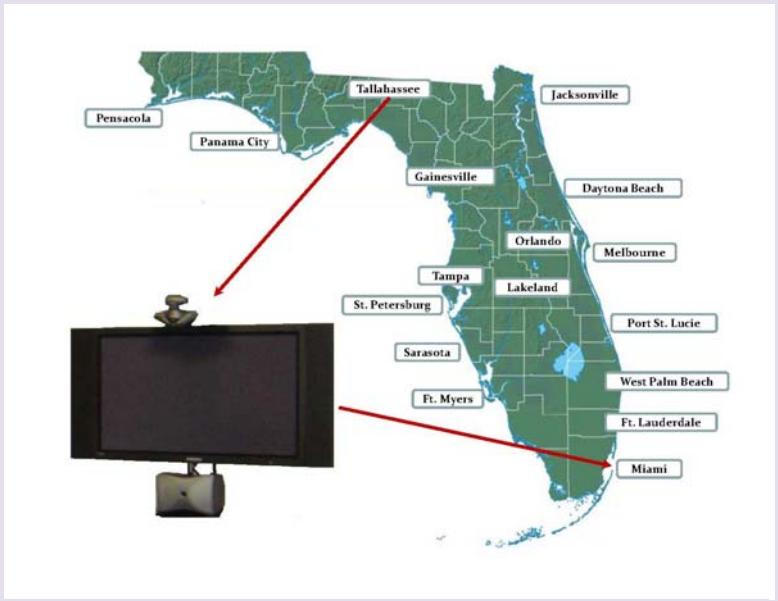
The use of this technology is also somewhat intertwined with the OJCC electronic filing system, for efficiency. When trial is conducted in a traditional format, attorneys are able to hand documents to the Judge as needed. This is not practical when the Judge is several hundred miles away. Therefore, VTC trial is best facilitated if all documents that will be used at trial are electronically filed in advance of trial. Several days' advance filing is best, and the procedural rules require filing two business days prior. This allows the presiding Judge the opportunity to print the documents ahead of time if she or he wishes, or more appropriately to save electronic copies of them for use at trial and in preparation of the order. It also allows the Judge to read the documents in advance of trial if they choose to do so either in printed or electronic form. Of course, the benefits of e-filing are true of exhibits for any trial because the exhibits are then part of the permanent record of the OJCC.

When uploading exhibits for trial, unfortunately, some attorneys do not plan for their case presentation. They will upload a single package that includes multiple individual documents that they may use as exhibits. In the course of a traditional trial, it is easy to later hand only one or some of these documents to the Judge to be marked. However, in a VTC trial, the presiding Judge is then called upon to scroll through a long PDF file looking for the page or pages that counsel wishes to mark as evidence. This may be time-consuming and frustrating for all involved. Too often the uploaded package is labeled by the attorney as "trial exhibits."

Prior to trial, instead, attorneys are encouraged to upload only the documents they intend to rely upon individually. Descriptive terminology, i.e. "the deposition of Dr. Smith," or if there are more than one "the 03.14.09 deposition of Dr. Smith" facilitates the Judge efficiently locating the needed document. Attorneys are encouraged to clearly label documents uploaded in parts due to the size of the original, i.e. "PART ONE - the 03.14.09 deposition of Dr. Smith," and "PART TWO - the 03.14.09 deposition of Dr. Smith."

*Continued, Page 14*

Videoteleconference Hearing Room.




Florida OJCC Videoteleconference Network

Cathode Ray Television Unit

*Videoteleconference, from Page 13*

The lawyers thereby are providing the Judge with the information required to find the document; the more descriptive the terms that are used, the simpler and more efficient the trial process. As use of the VTC process has grown, attorneys have made this adaptation and are increasingly efficient in their document filing.

Attorneys should also personally know what has been uploaded, how the document is named in the docket (which was likely done by their staff), and how she or he intends that document(s) to be marked. Some appear for trial with their laptop and aircard, able to see the docket in real-time. Those unable to do so should print the docket page from the internet prior to trial.

The Judge marks the exhibits on her or his end of the VTC connection. If the documents are voluminous, there is no prohibition against providing paper copies of those in advance of trial to the presiding judge. Whether a particular Judge would be benefited or burdened by that paper copy is a fair question to ask the presiding Judge in advance. As Judges became familiar with using the VTC for trial, it became common for their staff to contact attorney staff to discuss such details.

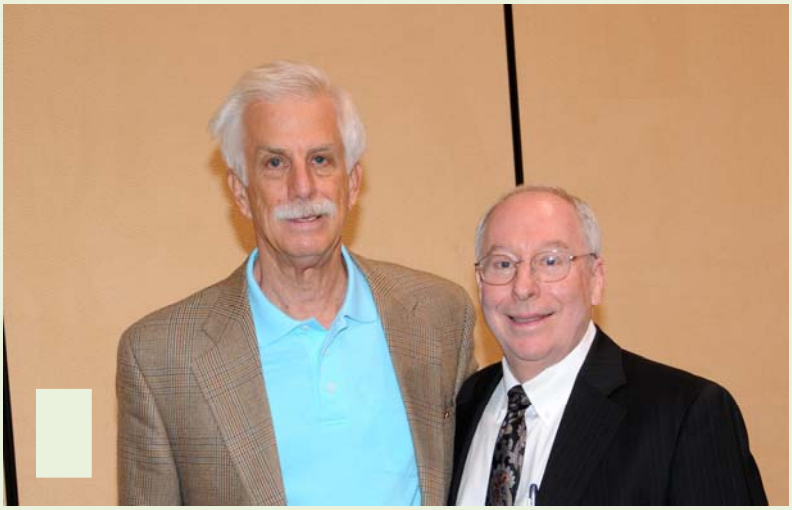
The OJCC VTC system is state-of-the-art, and is very dependable. All mechanical things fail periodically, though. Just as a cell phone may drop a call periodically, the VTC network periodically drops a call. When that happens, staff on the remote end and the presiding Judge reset their devices, and the hearing is renewed. These are typically short interruptions.

The use of VTC technology is destined to increase. With 17 District Offices distributed through Florida, some offices tend to be isolated. The VTC system minimizes this isolation and allows assistance in any district from any district.

Demonstration of the Florida OJCC Videoteleconference system is available here: http://www.fljcc.org/JCC/resources/videos/default.asp?Vid=VTC

Attendees at the NAWCJ 2011 Judiciary College will be afforded an opportunity to visit a facility and observe this technology first-hand.

# A Look Back at Judiciary College 2010



Professor Ehrhardt, our Evidence speaker and NAWCJ Founding Associate Member Steve Rissman

## Only 195 Days Until Judicial College 2011!

Live orthopedic surgery, narrated and facilitated by an orthopedic surgeon.

## "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.

This year, the NAWCJ and Florida Office of Judges of Compensation Claims is joined by the Florida Workers' Compensation Institute (FWCI) to present a diverse and interesting 2010-11 program. The schedule for 2010-11 will include the programs listed below. Plan now to join us for these exceptional programs, at no charge to NAWCJ members.

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

# Hold the DATES!

# NAWCJ Judicial College 2011

## August 21through 24, 2011

## Workers' Compensation Turns 100 This Year!

In 1911:

William Howard Taft was the 27th president of the U.S.

The world population was 1.6 billion. (2011 it is 6.8 billion).

The U.S. population was 94 million. (2011 it is 310 million)

There were 46 states in the Union.

New Jersey Governor Woodrow Wilson introduces worker's compensation.

A half gallon of milk cost $.17, a pound of butter $.34, a first-class stamp cost $.02, and a new Ford cost $780.

The average annual income was $520

Births: Ronald Reagan, 40th president of the U.S. (Feb. 6)
Tennessee Williams, American playwright (May 26);
Vincent Price, actor (May 27);
Ginger Rogers, actress (July 16);
Lucille Ball, comedienne (Aug. 6);

The Cadillac Division of General Motors demonstrates the first electric self-starter

In Michigan, the first white center line on a roadway is introduced.

Source:
http://www.centraljersey.com/articles/2011/01/03/lifestyle/doc4d226344a39d5235352563.txt

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**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:**

_____

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

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Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@fwciweb.org

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

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Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@fwciweb.org

# THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2011 NAWCJ Judicial College August 21 through 24, 2011, in Orlando, Florida. If you are interested in sponsoring any of the following:

## WELCOME LUNCHEON PRIME SPONSOR

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