Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XIX, 0311

Thoughts from the Association President

By Hon. Ellen Lorenzen

I was first introduced to the field of workers' compensation in 1974 when I was a secretary at an insurance company and learned of an opportunity to become a claims adjuster. I had very little knowledge of what a claims adjuster did except the job paid almost twice what I was earning. That knowledge was all the motivation I needed to apply for the position. Two years later I was on my way to law school. After practicing for 26 years, watching workers' compensation litigation in Florida evolve from a relatively uncomplicated process with a few rules, little discovery, hand-shake stipulations, occasional final hearings and an appeal once a year to a system of mandatory mediation, detailed rules of procedure, depositions and requests to produce, lengthy final hearings and frequent appeals, I took the opportunity to apply for a position as a Judge of Compensation Claims and was honored to be appointed in 2004.

What motivated me in 2004 was very different from what motivated me in 1974. My interest in becoming a judge was based upon my desire to implement the workers' compensation system put in place by the legislature in a fair and impartial manner, allowing all parties an opportunity to be heard. Each of you had your own motivation when you decided to become a workers' compensation adjudicator, removing yourself from the day-to-day practice of law. But I am confident that part of your motivation was the same as mine: to contribute your best efforts to making the workers' compensation system in your state provide the benefits and protections of workers' compensation law to employees and employers. Part of making my best effort, and I hope, part of your effort as well, is participating in the National Association of Workers' Compensation Judiciary. I believe it is critical for me, as an adjudicator, to continue to educate myself in the judicial process and to meet and speak with others who are rendering the same service to learn of their experiences and to appreciate their perspective. It is all too easy to limit myself to my small pond and forgot there is a much larger ocean out there.

Please join me and our fellow members in participating in NAWJC to the fullest extent possible. We publish *Lex and Verum* monthly; please submit articles or let us know topics that would interest you. There are monthly educational programs which require you only to spend an hour on the phone. Call in. And every August we have a three day educational conference. Attend with us. Let us know if you would like to speak or have heard good speakers whom we might invite. And please feel free to e-mail me at any time at Ellen_Lorenzen@DOAH.state.fl.us.

* Only 165 Days until Judiciary College 2011 *

MMSEA Section 111 Reporting Is *Not* the Only Medicare Game in Town

By Mark Popolizio, J.D.*

Going Beyond Section 111:Why Medicare Conditional Payments Should be on the Claims Radar

A little over three years after President Bush signed Section 111 of the Medicare, Medicaid & SCHIP Extension Act of 2007 (MMSEA or Section 111) into law, official reporting for certain non-group health claims will finally commence in the first quarter of 2011; with full implementation of Section 111 reporting now slated for January next year.

For the past three years, the claims industry has incurred considerable expense, and dedicated significant time and resources in building Section 111 compliance programs to meet Medicare's new "notice and reporting" mandates. Section 111's steep penalty ($1,000 per day, per claim) has rightfully focused the claims industry's attention on developing Section 111 compliance protocols.

However, in all the fireworks over Section 111, it is important that *another* Medicare compliance obligation is not lost in the shuffle: Medicare Conditional Payments. On a number of levels, this *separate* compliance obligation could actually have a much greater and direct impact on every day claims handling and settlement than Section 111's reporting mandates.

Importantly, it must be understood that Medicare's conditional payment rights exist independently of Section 111. Thus, although the Centers for Medicare and Medicaid Services (CMS) recently delayed Section 111 reporting for *certain* liability (including self-insurance) claims; primary payers still need to address the conditional payment issue even if reporting is not yet required under Section 111, or is otherwise exempted per a Section 111 reporting exception.

As Medicare continues to more ardently enforce its rights under the Medicare Secondary Payer Statute (MSP), now is the time for primary payers and practitioners to make sure that conditional payments are on the claims radar, and that proper protocols are in place to address the issue as part of claims handling and settlement practices.

What Are Medicare Conditional Payments?

Medicare conditional payments are payments made by Medicare for accident related medical treatment for which another payer is responsible as determined and defined under the Medicare Secondary Payer Statute (MSP).

There are several manners in which conditional payments can arise in relation to workers' compensation, no-fault, liability and other injury based claims. The most typical way for conditional payments to arise relates to cases where the primary payer denies the claim, and does not pay for medical services. In this instance, if the claimant is a Medicare beneficiary, Medicare very typically steps in and provides medical treatment for the alleged accident related injury or condition. Conversely, a primary payer may actually accept responsibility to provide accident related medical treatment (such as a compensable workers' compensation claim, or non-fault claim), but the treating physician mistakenly submits the bills to Medicare for payment instead of to the primary payer.

Must Medicare be Reimbursed for Conditional Payments?

Yes. Pursuant to 42 U.S.C. § 1395y (b)(2)(B)(ii), Medicare has a statutory right of reimbursement for conditional payments. This section, in pertinent part, provides as follows:

> A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service.

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> *A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means*. (Emphasis Added).

In addition, a *settlement* or *contractual obligation* demonstrates "responsibility" under the MSP. (See, 42 C.F.R. § 411.22(a)(3)).

With respect to reimbursement, if CMS does not need to take legal action, the amount of recoverable conditional payments is the lesser of either the Medicare primary payment, or the amount of the full primary payment that the primary payer is obligated to pay. Medicare's claim may be reduced by "procurement costs" as outlined in the Code of Federal Regulations. If legal action is necessary, Medicare may seek *twice the amount* of the Medicare primary payment against the primary payer.

The *claimant* may appeal a conditional payment claim through an established administrative appeals process, and may file an action in Federal Court. Claimants also enjoy other potential methods to request a reduction of the conditional payment claim including, "economic hardship" and "equity and good conscience."

Who is At Risk?

Under the MSP, Medicare has wide latitude in terms of who it may pursue for conditional payment reimbursement, and how it may do so.

Medicare has a direct action against *"any and all entities that are or were required or responsible"* for making payment, as well as, and any entity that "*receives"* a primary payment, including a beneficiary, provider, supplier, physician, attorney, state agency, or private insurer. Medicare also has a subrogation right, and rights of joinder and intervention. As noted, CMS may seek double damages against primary payers in certain situations.

While it is a common settlement practice in many quarters to "pin" the responsibility for conditional payment reimbursement on the claimant, it is questionable at best whether CMS is obligated to abide by such settlement provisions given its broad powers under the MSP and corresponding regulations. One potentially troubling regulation in this regard is 42 C.F.R. § 411.24 which provides that if CMS is unsuccessful in its efforts to obtain conditional payment reimbursement from the claimant, then the "*primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party*."

The recent case of *U.S. v. Stricker*, No. 09-2423 (N.D. Ala., September 30, 2010) illustrates Medicare's broad enforcement rights.

In *Stricker*, the government sued the plaintiff law firms, the defendant corporations and their insurance carriers involved in a 2003 liability settlement for their alleged failure to protect Medicare's interests regarding conditional payments. As part of this action, Medicare claimed double damages against the primary payers (insurers and corporations).

While this action was ultimately dismissed on the unrelated and technical grounds of the statute of limitations; *Stricker* nonetheless underscores the need for *all* parties to ensure that conditional payments are being addressed, and dispels the erroneous belief that conditional payments are *solely* the claimant's (plaintiff's) problem.

How Can Conditional Payment Information Be Obtained?

The parties must take affirmative steps to request conditional payment information from CMS. This entails a *separate* "notice and reporting" process from Section 111 involving the following steps:

Step One: Reporting the Claim to COBC

To get the process rolling, the claim must be reported to Medicare's contractor, the Coordination of Benefits Contractor (COBC). Reporting to COBC is made via phone, writing or fax. It is important to note that this is a *separate* and *independent* reporting process from Section 111 electronic reporting.

Step Two: MSPRC Issues Certain Documents

Once COBC is placed on notice, it in turn notifies another contractor, the Medicare Secondary Payer Recovery Contractor (MSPRC). The MSPRC will then issue a *Rights and Responsibilities Letter* to the parties advising of Medicare's reimbursement rights.

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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.

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The 2011 Program Includes Three Timely and Exceptional Medical Presentations:

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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.

Per the MSPRC, within 65 days of the date of the *Rights and Responsibilities Letter* a *Conditional Payment Letter (CPL)* will be issued providing an initial itemization of its claimed conditional payment amount. Typical information contained in a CPL includes, but is not limited to, provider information, diagnosis/ICD codes, service dates, total charges, claimed conditional payment amount. It is important to note that as the case continues it may be necessary to request "updated" CPLs.

CMS has established a variety of different methods and forms (e.g. Proof of Representation, Consent to Release or Carrier Letter of Representation) to be used to obtain CPLs. Information regarding which method and document to be used can be obtained at www.msprc.info.

Step Three: The CPL Must be Reviewed for Accuracy

When a CPL is received, it must be reviewed "line by line" for accuracy. The MSPRC should be contacted to request the removal of any inappropriate claims.

Step Four: Request a "Final" Conditional Payment Figure

Under CMS' current process, the parties generally cannot obtain Medicare's "final" conditional payment figure until *after* the claim is actually settled and the executed settlement agreement is sent to the MSPRC. When CMS issues its final demand, it gives the party against whom demand is made 60 days from the date of the conditional payment final demand issue date to tender payment. If reimbursement is not tendered in accordance with the 60 day timeline, interest will be assessed. If payment is not tendered within 120 days, the matter will likely be referred to the U.S. Department of Treasury for official collection action.

Per CMS, it should be noted that there are two instances when a *Conditional Payment Notice (CPN)* will be issued in lieu of a CPL described by CMS as follows:

1. If the MSPRC is notified of a settlement, judgment, award, or other payment through Section 111 reporting rather than from the beneficiary or their representative; and
2. If the MSPRC has been alerted to a settlement, judgment, award, or other payment by the beneficiary or their representative before the usual Conditional Payment Letter (CPL) has been issued.

Conclusion

As Section 111 reporting finally (and slowly) commences, it is vitally important that primary payers do not fall prey to "tunnel vision" by failing to look beyond Section 111 to address *other* Medicare compliance obligations, such as conditional payments. For the reasons outlined herein, developing best practices and protocols to address conditional payments should be an integral part of a primary payer's overall Medicare compliance program.

Mark Popolizio, Esquire is the Vice President of Customer Relations for NuQuest/Bridge Pointe. Prior to joining NuQuest, Mark practiced workers' compensation and liability legal defense for 10 years. During this time, he developed a national Medicare practice which included Medicare Set-Asides and Medicare Compliance. Mark is very active on the national MSA/Medicare educational and training circuit. He is a regularly featured speaker on MSA/Medicare issues before carriers/TPAs, state bar associations and industry specific organizations. Mark served as Vice President of the National Alliance of Medicare Set-Aside Professionals (NAMSAP) from 2006-2008 and remains active with NAMSAP concentrating on educational and legislative matters. Mark is also involved with current MSP reform efforts in Congress (H.R. 4796). Mark has also published numerous articles on MSA/ Medicare issues. Mark is licensed to practice law in Florida and Connecticut. Mark can be reached at 786-457-4393 or via e-mail at mpopolizio@nqbp.com.

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Professional Conduct and Judicial Accountability: Issues and Possible Enforcement Mechanisms

By Justice Thomas During

Judge Shirley Hufstedler, in her article entitled, "New Blocks for Old Pyramids: Reshaping the Judicial System," Southern California Law Review 901 (1971), made the following lapidary remarks about the work of the Courts:

> "We expect our courts to encompass every reach of the law, and we expect law to encircle us in our earthly sphere and to travel with us to the vastness of outer space. We want the courts to sustain our personal liberty, to end racial tensions, to outlaw war, and to sweep the contaminants from the globe. We ask our courts to shield us from public and private temptation, to penalize us for our transgressions and restrain those who would transgress against us, to resuscitate our moribund businesses, to protect us pre-natally, to marry us, to divorce us, and if not to bury us, at least to see to it that our funeral expenses are paid. These services, and many more are supposed to be performed in temples of justice by a small priestly caste with the help of devoted, retainers and an occasional vestal virgin."

The above remarks show in a small way the vastly important duties that we as Judges perform on a daily basis with the help hopefully of independent legal practitioners. Most importantly, it reflects how profoundly and sometimes irrevocably our daily decisions impact on the lives of litigants and other persons in almost every aspect of their lives; before the cradle until after the grave. It is with these remarks in mind that I now turn to deal with the twin concepts of professionalism and accountability, which, if properly applied, would serve to enhance the dignity, respect and esteem with which our judicial functions will be perceived and received by the members of the public at large that we serve.

Professionalism

Black's Law Dictionary defines professionalism in the following manner, "The practice of a learned art in a characteristically methodical, courteous and ethical manner."

It is beyond dispute that most judges are drawn from the ranks of the legal profession. Practice of law is an art that is or should be deeply steeped in professionalism. It is my submission that professionalism with respect to Judges should not cease when we make the transition from the Bar to the Bench. It is the only baggage that we should be allowed to legitimately take with us and have in abundance as we discharge our judicial functions on a daily basis.

There are a few attributes that characterize professionalism. Professionalism, it would appear, is fashioned like a cross. It exacts duties on us at the vertical and horizontal planes. This is to say we, as Judges, ought to display professionalism with regard to fellow Judges i.e. at the horizontal level and also towards practitioners, witnesses and the Court staff, at the vertical level.

The attributes that stand out for mention regarding professionalism include honesty, integrity, competence, civility, courtesy, respect, patience, diligence, punctuality, protection of others against unjust or improper attacks or criticism.

At the horizontal level, it is imperative that we refrain from uttering disparaging personal sarcastic remarks, criticisms or demeaning statements about our colleagues on the Bench. Whatever our differences may be or how old or deep-seated they may be, we should remember that at the end of the day we are Brethren serving the same Master, namely justice. We are not called to like and glorify our colleagues on the Bench but we owe them respect, courtesy and civility in all our dealings with them, publicly or even privately.

This also calls upon us to work together as Judges and to try, difficult as it may be to foster a spirit of co-operation *inter se*. Where there is a spirit of co-operation, it is very easy to discuss legal issues, to agree and to disagree about them; to ask for clarity on grey areas; to seek guidance regarding obscure or novel points. Do not allow yourself to suffer alone in painful silence when there can be ready help next to your chambers in the form of a Brother or Sister Judge. We should realize that we are gifted differently and we have talent in different areas. Make use of the skill, knowledge or experience of a fellow Judge in areas where you may be lacking or where you are diffident.

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Professional Conduct, from P.6

One of the most remarkable indictments is where as a Judge you issue a judgment so wrong or impoverished that a by-stander is forced to ask – does he or she have no other Judges from whom he or she could have asked for guidance? I have so many times asked of my Brethren or Sisters to read my judgments before I hand them down. This gives one a sense of security and confidence that a fellow professional will assist in picking up what may be patently wrong or inaccurate legal propositions, conclusions or findings, or to enrich the judgment with latest authority or parallel views.

This would be even expected in instances where we do not agree with legal views that they may have espoused, for instance, in cases where we have decided to write a dissenting opinion. We should dissent with respect and dignity.

At the vertical level, it is important for Judges to treat Counsel with respect and courteously. This is so because when we were on the other side of the lectern as practitioners, we also wanted and expected to be treated with respect. That feeling should not necessarily change with our change in position. There are of course some lawyers who test your patience until you are at the end of your tether but even then, we should learn to exercise patience. This should also apply in relation to litigants and witnesses. We should avoid the use of words that are humiliating, demeaning or engaging in conduct that is hostile. Some of the people may be appearing in Court for the first time and may not be as comfortable therefore as we would expect them to be. Patience, in this regard, is a virtue.

The other issue to mention is that we should give the lawyers involved in the cases a fair and impartial hearing that will allow them to develop and present proper argument. We should avoid being curt because that may be the very point at which the crux of the matter was to be delivered. This is not to say we should not, when called upon, direct Counsel on the live issues and to try and curtail them when they engage in pointless, time-consuming legal chatter. A proper balance must be struck by the Court.

It is also important to start our Courts on time. As Judges, we sometimes blow our tops off if a lawyer is late or held up but we swiftly sweep it under the carpet once we are caught on the wrong side. The worst teaching that we can spread is "Don't do as I do, do as I say". In other words, as Judges, we should set the good and comely examples. This will give us the moral leverage to call on others to do likewise. Punctuality should become our watchword and once we set the pace, it becomes easy for the lawyers to act in step with the Court.

Another issue worth mentioning in this regard is the promptness with which we should hand down our decisions. It has been said that justice is sweetest when it is freshest. An otherwise well-prepared meal will not be appreciated when it is served cold and almost becoming stale.

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He can who thinks he can, and he can't who thinks he can't. This is an inexorable, indisputable law.

Pablo Picasso

As long as I have any choice, I will stay only in a country where political liberty, toleration, and equality of all citizens before the law are the rule.

Albert Einstein

Professional Conduct, from P.7

There may be cases that are complex, involved and which require a lot of thought and research. Even then, the more we delay in dealing with them, the more the issues and particularly the evidence and the impressions various witnesses made on us fade from our memories and the less confident we become in dealing with them. Suddenly, these files are kept in the cupboard, away from everyday sight until they become skeletons in the cupboard, haunting us at every turn. When we meet the attorneys involved in them, we wish we could look away in avoidance of eye contact. It may be important as a Court to have time guidelines regarding delivery of judgments. There will always be exceptions, which would require an explanatory note in the judgment or to the Chief Justice as the case may be.

I have adopted, as a measure of accountability and more particularly in order to apply pressure on myself in early deliver of judgments, I have decided to write on my judgments, as other jurisdictions do, the dates when the cases were heard together with the date on which the judgment in issue was developed. I have seen this as a method that works well as any tardiness in delivery of judgment will require an explanatory note in the judgment.

I need to make one small point about judgment writing: we should try and give the issues in contention deliberate, impartial and studied analysis and consideration. It may be very discouraging for lawyers to burn the midnight oil in a quest to assist the Court to reach a just decision, hopefully in their client's favor, only for the Court to discard or debunk without demur what has been said and submitted and handing down a judgment that is as bare as can be. We have had situations occurring where the appellate Court complained about cases being brought before it where they did not, after months, have the benefit of the judgment of the High Court in order to properly assess the correctness or otherwise of the decision appealed against.

Society, including the legal profession, throws up a vagary of novel situations that need to be addressed. This points to a need to have continuing legal education in order to equip judges with knowledge to deal with unprecedented situations. These new situations may present a dilemma as to what is acceptable professional or ethical behavior in any given case.

There is also a need for the Judiciary, in order to cut down on grey areas, to develop and adopt a code of ethics for the Judiciary. This would give guidance on what conduct is permissible or impermissible, acceptable and unacceptable. This would go a long way in assisting Judges to conduct themselves circumspectly and also to let members of the public know in those situations where Judges may have erred so that a report may be made to the appropriate authority or body. In this regard, it is important not only to have the Code but to ensure that it is applied so as not to remain a Code only on paper, helping nobody.

Recently, we have had a situation where an Industrial Court Judge was charged *inter alia* under the Prevention of Corruption Act. A search warrant was issued and they seized and attached certain documents, including undelivered judgments from his chambers; cell phones e.t.c. The issue that reigned supreme and was moot was whether it would not have been proper to precede the arrest, if subsequently rendered necessary, by an impeachment process in terms of the Constitution. See in this regard the case involving Mr. Justice Benjamin Paradza. There was also a warrant of search issued for the search and seizure of documents and other material at the Judge's former law firm. Issues of judicial and independence of lawyers arise from those actions.

Accountability

Are Judges accountable at all? If they are, to whom are they accountable or responsible? A story is told of a conversation between Mr. Justice Learned Hand and his clerk, which went thus:

> "Sonny…to whom am I responsible? No one can fire me. No one can dock my pay. Even those nine bozos in Washington, who sometimes reverse me, can't make me decide as they wish. Everyone should be responsible to someone. To whom am I responsible?"

The judge then turned and pointed to the shelves of his library and said: "To those books about us. That's to whom I am responsible." It is also said that Lord Donaldson, the former English Master of the Rolls once said: "Judges are without constituency and answerable to no one except their consciences and the law."

The Judiciary, of the three organs of State has been touted as the most accountable for the reason that although not in office through the ballot box, it conducts its daily undertakings in open Court and delivers its reasoned decisions in public, open for everyone to read. The accuracy of the statements from the learned Judges mentioned above may have to be viewed in the light of the juggernaut of transparency and accountability that has gripped the world. Can the Judiciary remain an island in this regard? I think not.

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Upcoming Conferences:

ABA 2011 Workers' Compensation Midwinter Seminar and Conference, April 7 – April 9, 2011, Intercontinental Hotel, Boston, MA, $395.00, http://www2.americanbar.org/calendar/ll406-2011-midwinter-meeting/Pages/default.aspx

SEAK 31st Annual National Workers' Compensation & Occupational Medicine Conference, July 19-21, 2011, Hyannis, MA, $975.00, http://www.seak.com//App_Themes/seak/July2011%20reg%20page%20only.pdf

63rd Annual SAWCA Convention, Beau Rivage, Biloxi, Mississippi July 25-29, 2011, $650.00, http://store.sawca.com/

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

Professional Conduct, from P.8

The issue of accountability is classified by Professor Shetreet in his work entitled "Judicial Accountability: A Comparative Analysis of the Models and Recent Trends" International Legal Practitioner, June, 1985 pp. 38 et.seq, into three viz: legal accountability; public accountability and informal social controls. The first relates to disciplinary jurisdiction over judges e.g. appellate review of their decisions and their civil and criminal liability. The second relates to controls over judges exercised by parliament, the executive and the press and pressure groups. The last is informal social control exercised by judicial and professional colleagues.

Whatever the efficacy of these species of accountability might be, it must be mentioned quite loudly, as stated by Dr. Dató Cyrus Das in his paper entitled Judges' and Judicial Accountability, 12 November, 1999, that justice is a consumer product. For that reason, it must meet the test of confidence, reliability and dependability, like any other, if it is to survive market scrutiny. As Lord Devlin said, "The prestige of the judiciary and their reputation for stark impartiality is not at the disposal of the any government: it is an asset that belongs to the whole nation."

The accountability referred to above, has given rise to some problems. This has manifested itself in certain instances public criticism of the Judiciary. This criticism has in some instances been met with vitriolic reaction by the Judiciary, culminating in charges either for contempt or scandalizing the Court being preferred against alleged contemnors. As I speak, there are two cases pending in (the High Court of Swaziland) Court for contempt of Court against a magazine for making statements that were considered by the Attorney-General, to be contemptuous of the Court. Unfortunately, this raises a tension between the Court's dignity on the one hand and the freedom of the press and expression on the other. It remains to be seen how the High Court of Swaziland will resolve that quandary.

In regard to criticism of the Judiciary, Sir Anthony Mason said in "The Judiciary, The Community and the Media (1998) ALJ 33 at 40:

> Like other public institutions, the judiciary must be subject to fair criticism and, if the occasion demands it, trenchant criticism. What I am concerned with is response to criticism, particularly criticism that is illegitimate and irresponsible."

In India, Mr. Justice Bhagwati, the former Chief Justice, had this to say in "Independence of The Judiciary In a Democracy, Human Rights Solidarity – AHRC Newsletter – Vol.7 (April-July 1997) at p.34:

> "There is a pernicious tendency on the part of some to attack judges if the decision does not go the way they want or if it is not in accordance with their views. Of course, there is nothing wrong in critically evaluating the judgment given by a judge because, as observed by Lord Atkin, justice is not a cloistered virtue and she must be allowed to suffer criticism and or respectful, though outspoken, comments of ordinary men and women. But improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary and, whatever may be the form or shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary.
>
> Each attack on a judge for a decision given by him or her is an attack on the independence of the judiciary because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and, thereby, influence the decision-making process.

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In Keeping with our mission to facilitate and encourage education, collegiality and interaction for those who adjudicate workers' compensation disputes, the National Association of Workers' Compensation Judiciary is pleased to provide the following information on 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
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Conference 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."

Professional Conduct, from P.9

> It is essential in a country governed by the rule of law that every decision be made under the rule of law and not under the pressure of one group or another or under the threat of adverse criticism by irresponsible journalists or ill-intentioned politicians; and if a judge is to be in fear of personal criticism by political or pressure groups or journalists while deciding a case, it would most certainly undermine the independence of the judiciary.
>
> Unfortunately, this is what is happening in some countries, and those who indulge in such improper or intemperate and even sometimes vitriolic criticisms or attacks on judges little realize what incalculable damage they are doing to the institution of the judiciary."

There is another issue on accountability that I should comment about. It is important that the manner in which cases, particularly political and human rights cases, are allocated to Judges is transparent, unbiased so as to engender public confidence. This is because the manner in which the cases are allocated may be a cause for concern in that the allocation procedure may be abused to ensure that a certain type of cases is placed before certain and not other Judges with a view to obtaining a certain political result.

The Swaziland government has recently announced that in all cases involving charges of corruption, judges will be secured from South Africa and that none of the High Court Judges will preside because we live in a small society where people know each other closely. It was also argued that the accused persons in such cases are likely to be powerful and influential.

This decision, it would appear, was not taken by the Judicial Services Commission in consultation with the Judges but is a government decision. This is nothing but a vote of no confidence in the local Bench or an insinuation that the local Judges are either incompetent or themselves corrupt. If the allocation was done on a case by case basis because there is no local judge able to hear the matter that would certainly be a different story.

Workers' Comp Resources

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

Florida Workers' Compensation Institute
www.fwciweb.org

WorkCompCentral.com
www.workcompcentral.com

A Real-Life Judge Judy Gets Smacked Down

http://www.time.com/time/nation/article/0,8599,2011494,00.html?hpt=T2

"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.

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

From www:workcompcentral.com

Court Concludes Collateral Source Rule Doesn't Apply to Comp

Employers and payers will reap the benefit of health insurers' preferred provider contracts, thanks to an appellate court ruling that the collateral source rule does not apply to workers' compensation medical benefits disputes, in a controversial decision affecting injuries before February 2006.

The majority of the Workers' Compensation Commission Panel of the Appellate Court of Illinois ruled Thursday that the collateral source rule is not applicable to the right to recover under the Workers' Compensation Act in the case of Tower Automotive v. IWCC (Nawrot).

While the court's opinion affirmed a 35% permanent partial disability award to claimant Robert Nawrot, the most noteworthy part of the decision addressed the question of how much the payer should reimburse the claimant for medical benefits.

This question arose when evidence showed that although medical providers originally billed Nawrot $165,168, his wife's health insurance paid $52,672 of that sum, and the providers wrote off $111,298 of the remaining charges because of their preferred provider contracts with the group health insurer. (Nawrot personally paid the remaining $1,183.)

The court's majority ruled in a 4-1 decision that the employer should be required to pay only the amount actually paid to the medical providers, which was $53,855. Nawrot had sought the entire $165,168. Justice Bruce Stewart dissented, arguing that the collateral source rule should be applied, which would require the court to ignore "collateral sources" such as Nawrot's wife's health insurance. If applied, the payer would have to pay Nawrot the full sum billed, $165,168. Justice Thomas Hoffman, the author of the majority's opinion, explained that while this was the first time the court has addressed the question, the impact of its ruling would be limited to injuries occurring before February 2006. This is because the relevant statute changed as of Feb. 1, 2006, to new statutory language impacting how employers pay medical benefits.

"Although our resolution of this issue is one of first impression, it is of limited future significance, as the legislature has seen fit to amend Section 8(a) of the Act to provide that employers are obligated to provide and pay 'the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is necessary to cure or relieve from the effects of the accidental injury,'" Hoffman wrote.

Richard Aleksy, Nawrot's attorney, explained that providers typically waive a large portion of billed medical charges in order to continue enjoying preferred provider status with group health insurers. "They do it because that greases the wheels of processing all their other claims, and of course, they want to be able to have a greater volume of people who have Blue Cross/Blue Shield insurance," he said. Aleksy said that he has no problem with group health insurers negotiating lower rates with providers.

Aleksy disagreed with Justice Hoffman's view that the decision will have little impact on cases with dates of injuries after February 2006. "I don't have any quarrel with anyone negotiating discounted rates for medical services if they can get away with it," he said. "But the situation that Justice Hoffman paints, that the new statute is going to erase any need for the collateral source rule is absolutely positively . . . wrong."

Continued, Page 13.

Collateral Source, from P.12

Aleksy said he believes that collateral source issues will still exist in a number of cases, regardless of the amended statutory language. He plans to file a petition for rehearing with the appellate court, and will also ask the appellate court to certify the case, which would allow him to appeal to the state Supreme Court.

Daniel Egan and Jeffrey Powell, two of the employers' attorneys on the case, said they felt that if the claim was compensable, that they felt that their client should not have to pay the $111,298 that the providers had already written off. The attorneys believed that they could prevail on the issue, thanks to language in prior appellate decisions featuring similar issues. (Powell had argued the case, and helped Egan with the appellate court briefs as well.)

"We thought we had a very good chance of prevailing in the appellate court based on previous Rule 23 decisions on similar questions that had come up through the court," Egan said. Powell and Egan said the case that suggested this was the 2007 decision in Myra Young v. IWCC, No. 1-07-1727. While the court did not address the collateral source rule directly because of a procedural issue, it did suggest that the "issue of windfalls need to be addressed" and that "windfalls will not be allowed for medical."

Aleksy disagreed with the idea that such an award would be a windfall, because the collateral source rule has been recognized by the state Supreme Court since the 1960s for a strong public policy reason. "If this case were to become the law of Illinois, that would mean that independent sources of benefits could be used by irresponsible employers or respondents to reduce their liability," he said.

Justice Stewart's dissent reflected this opinion. Stewart wrote, "In determining that the collateral source rule does not apply to workers' compensation cases, the majority allows employers to reap the benefit of bargains to which they were not parties, and thereby shift the burden of caring for the casualties of industry to others."

Aleksy said that he believes that if the case featured a smaller sum of waived medical bills, the appellate court may have ruled differently. "Quite candidly, it came down to the number," he said. "I would suggest that if the difference was $10,000 instead of $100,000, this would not have been the result."

To read the appellate court's decision, go here: http://www.workcompcentral.com/pdf/2011/misc/Tower02032011.pdf.

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States Struggling with Budget Gaps for Fiscal 2012

On February 25, 2011, the Wall Street Journal published an overview of the budgetary situations of various states. The following data was derived from their report.

	Budget Gap FY 2010 (billions)	Gap as percent of total 2011 Budget
Alabama	No data	No data
Alaska	No data	No data
Arizona	$ 0.98	11.5%
Arkansas	No data	No data
Calfornia	$ 25.4	29.3%
Colorado	$ 0.99	13.8%
Connecticut	$ 3.7	20.8%
Delaware	No data	No data
Florida	$ 3.6	14.9%
Georgia	$ 1.7	10.3%
Hawaii	$ 0.41	8.2%
Idaho	$ 0.3	12.6%
Illinois	$ 15.0	44.9%
Indiana	$ 0.27	2%
Iowa	$ 0.29	5.6%
Kansas	$ 0.49	8.8%
Kentucky	$ 0.78	9.1%
Louisiana	$ 1.7	22.0%
Maine	$ 0.44	16.1%
Maryland	$ 1.6	12.2%
Massachussets	$ 1.8	5.7%
Michigan	$ 1.8	8.6%
Minnesota	$ 3.9	24.5%
Mississippi	$ 0.63	14.1%
Missouri	$ 1.1	14.4%
Montana	$ 0.08	4.3%
Nebraska	$ 0.31	9.2%
Nevada	$ 1.5	45.2%
New Hampshire	No data	No data
New Jersey	$ 10.5	37.4%

Continued, page 14.

A Look Back at Judiciary College 2010

Judges prepare to hear arguments in the annual Moot Court Competition.

Only 165 Days Until Judicial College 2011!

First District Court of Appeal Marshall Stephen Nevels, Dan Marino, and First District Court of Appeal Clerk Jon Wheeler.

"Budget Gaps," Continued from Page 13.

	Budget Gap FY 2010 (billions)	Gap as percent of total 2011 Budget
New Mexico	$ 0.41	7.6%
New York	$ 9.0	16.9%
North Carolina	$ 3.8	20%
North Dakota	No data	No data
Ohio	$ 3.0	11%
Oklahoma	$ 0.6	11.3%
Oregon	$ 1.8	25%
Pennsylvania	$ 4.5	17.8%
Rhode Island	$ 0.29	9.9%
South Carolina	$ 0.88	17.4%
South Dakota	$ 0.13	10.9%
Tennessee	No data	No data
Texas	$ 13.4	31.5%
Utah	$ 0.44	9.2%
Vermont	$ 0.15	13.9%
Virginia	$ 2.3	14.8%
Washington	$ 2.9	18.5%
West Virginia	$ 0.16	4.1%
Wisconsin	$ 1.8	12.8%
Wyoming	No data	No data

Source, The Wall Street Journal, Friday, February 25, 2011, Page A6.

Hold the DATES! NAWCJ Judicial College

August 21through 24, 2011

NAWCJ College 2011 Scholarship Application

_____

Name

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Agency Name Title

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Telephone Number Fax Number Email Address

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

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

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

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Lodging	_____	$_____
Other	_____	$_____

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Program Date

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Judge's Signature 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
APPLICATION FOR MEMBERSHIP

THE NAWCJ MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. MEMBERSHIP DUES ARE $75 PER YEAR OR $195 FOR 3 YEARS. IF 5 OR MORE APPLICANTS FROM THE SAME ORGANIZATION, AGENCY OR TRIBUNAL JOIN AT THE SAME TIME, ANNUAL DUES ARE REDUCED TO $60 PER YEAR PER APPLICANT.

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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
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850.425.8156
Email: kathy@fwciweb.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.

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:

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