

# Lex and Verum

## The National Association of Workers' Compensation Judiciary



Number XX, April 2011



### President's Page

By Hon. Ellen Lorenzen  
NAWCJ President

Some things never change in my life: I always owe taxes, the check is always in the mail, and my son/daughter/significant other will remember to take out the trash next week. And in the spring, as the legislature meets, I hear: there's not enough money.

I know we are all in the same predicament. Jobs have disappeared and show little sign of reappearing quickly, particularly in construction and manufacturing where the bulk of injuries occur. Lots of small businesses are closed and large ones are consolidating their operations outside our country. All this means there are fewer revenue dollars available for court systems. I think it is very important, when budget dollars are short, to identify what our core missions are so that we stay focused on them, even if we have staff cuts or unpaid furloughs. As I see it, we have three obligations which we must fulfill.

Core mission 1: we have a duty to the general public. The public must be able to understand what we are supposed to do. The public must be able to see that we are doing what we are supposed to do. The public must be able to understand how what we do has an effect on every worker and every employer.

Core mission 2: we have a duty to the parties. The parties must have easy and reliable access to our offices. The Parties must be able to determine what rules apply to procedures in our offices. The parties must be able to file and retrieve documents easily and reliably with our offices. The parties must be able to learn the results of their cases easily and reliably.

Core mission 3: we have a duty to the judiciary as a whole. We must see that the integrity of the rule of law is preserved. We must see that every party is treated fairly and impartially. We must understand that we are the physical embodiment of abstract statutes and regulation and take every step necessary to allow the parties to express their beliefs regarding the application of the abstract to the reality of their cases.

I believe we must fulfill these missions before we do anything else. If we have to sacrifice other functions of our offices because there are not enough dollars to allow for them, then so be it. If we don't have money for transcription, then we learn to type or to use a dictating program. If we don't have money to print multiple copies of documents, then we use electronic mail to distribute them. If attorneys need to save money by having court reporters provide electronic copies of depositions, then we learn to read them on-line. These are all adjustments we have to make so that we can perform our core missions. And above all, we remind our staff that we are all in this together and we are all working toward the same goal: the efficient and fair adjudication of workers' compensation cases.

E-mail me your comments: [Ellen\\_Lorenzen@DOAH.state.fl.us](mailto:Ellen_Lorenzen@DOAH.state.fl.us)

WorkCompCentral and Michael Sullivan & Associates have agreed to donate \$100 to the American Red Cross Japan Earthquake and Pacific Tsunami relief fund for each purchase of a full set of "Sullivan on Comp" books with online access. The American Red Cross Japan Earthquake and Pacific Tsunami relief fund donation program is effective through April 15, 2011. To place an order for this new legal series about California workers' comp, call 805-484-0333, or go to [http://www.workcompcentral.com/signup/subscribe/index.php?fa=pick\\_term&account\\_group\\_id=13](http://www.workcompcentral.com/signup/subscribe/index.php?fa=pick_term&account_group_id=13)

# Distracted Driving Catches the Attention of NIOSH (again)

*The following is a combination of a recent 2010 update from NIOSH regarding “Distracted Driving,” followed by an earlier 2003 NIOSH exposition (No.2003-119) on the subject from a more limited “cell phone” perspective before the texting revolution that has taken hold in recent years.*

Distracted driving is a danger under any circumstances. Drivers are a risk to themselves and others when they take their eyes off the road, their hands off the wheel, or their mind off what they are doing. According to the National Highway Traffic Safety Administration, nearly 5,500 Americans were killed (16 percent of all traffic crash fatalities) and 448,000 were injured in motor vehicle crashes that reportedly involved distracted driving. When someone is behind the wheel while on the job, distracted driving becomes an occupational hazard.

Motor vehicle crashes are the leading cause of work-related death. While it is not known with certainty how many of those incidents involve distracted driving, there is no reason to think that the role of distracted driving in fatal work-related crashes is any less than in fatal crashes in the general population.

Mobile workers routinely communicate with offices and dispatchers through cell phone calls and text messaging. The work environment may impose additional risks through in-vehicle telematics: systems that provide information on clients, schedules, and inventory. The desire to increase productivity and efficiency, as well as pressures created by tight schedules and unforeseen delays, can provide incentives for workers to make calls, send text messages, or access in-vehicle information systems while driving.

“While the basic distractions of cell phone calls or text messaging are similar whether one is driving on work time or on personal time, there are sources of distraction and incentives to engage in distracted driving behaviors that are unique to the workplace,” noted John Howard, M.D., Director of the National Institute for Occupational Safety and Health (NIOSH). “Someone driving on personal time has the leisure of waiting to return a friend’s call or text message. In these situations, minimizing risk is a matter of changing personal behavior and habits,” Dr. Howard said. “Workers, however, may be required or pressured by job demands to engage in distracted driving behaviors. Strong employer policies to curb the use of cell phones and in-vehicle technologies while driving are an important tool in creating a safe driving culture within an organization.”

Dr. Howard added, “NIOSH applauds the efforts of the Departments of Transportation and Labor to highlight the important role public and private employers can play in reducing distracted driving. We join them in urging employers to set policies to prohibit text messaging while driving. In addition, NIOSH will continue to work with our federal and other partners to support further efforts to reduce distracted driving in the workplace.”

## ***NIOSH Publication No. 2003-119:***

***Work-Related Roadway Crashes -  
Challenges and Opportunities for Prevention***

Driver distraction has been defined as “capture of the driver’s attention by information that is irrelevant to the driving situation to a degree where insufficient information is left for the primary task” [Janssen 2000]. Some distractions affect the driver by requiring physical maneuvers that may threaten vehicle control, whereas others are mental distractions from sources inside or outside of the vehicle. Among all the elements of driver distraction, cell phone use has perhaps received the most attention. In recent years, cell phone ownership has increased rapidly in the United States, with more than 137 million cell phone subscriptions as of August 2002 [Cellular Telecommunications & Internet Association 2002]. Cell phone use while driving has been questioned because it may contribute to increased risk of motor vehicle crashes. Despite this safety concern, the availability of a cell phone in a vehicle offers a number of benefits, including prevention of unnecessary trips, peace of mind through improved access to family and friends, the ability to report emergencies, improved response time to accidents, and the ability to handle household errands during commuting time [Brookhuis et al. 1991; Lissy et al. 2000]. For workers, the availability of a cell phone may offer increased productivity, efficiency, and access to clients and coworkers [Lissy et al. 2000].

*Continued, Page 3.*

### **4.3.1 Data on Crashes Involving Cell Phone Use While Driving**

National estimates from NHTSA observational studies conducted during 2000 indicate that at any given time during daylight hours, 3% of passenger vehicle drivers in the United States were actively using a hand-held cell phone. An additional 0.9% of drivers were estimated to be using a hands-free phone [Utter 2001]. However, no estimates exist for the number of persons who use cell phones while driving for work. Although improper use of cell phones and other devices has been documented as contributing to roadway crashes in the general population, determining the role of cell phones in work-related crashes is difficult. CFOI, the primary source of data on occupational fatalities, does not collect this information. FARS collects information about the presence of driver-related factors such as inattention, drowsiness, and cell phone use, but it is less comprehensive than CFOI in its coverage of occupational roadway crashes. Death certificates are the only means FARS uses to ascertain work relationship; and although death certificates are the single source shown to identify the greatest number of work-related deaths, at least 20% may not be captured [Stout and Bell 1991].

The fundamental problem is that currently only 15 States are required by law to collect information about cell phone involvement on police crash reports [Rushing 2002]. Therefore, although FARS and the National Automotive Sampling System added cell phone use as a driver-related factor in 1995, the police crash reports that are a primary source of data for these systems do not necessarily collect this information [NHTSA 1997]. Even for States that do collect it, the true extent of the involvement of driver distraction and cell phones may be underestimated: as with fatigue-related crashes, assessment of these elements is largely subjective. And police crash reports are not designed to provide a scientific assessment of crash causation.

Although DOT data systems provide a mechanism to collect national data on roadway crashes associated with cell phone use, published data indicate that very small numbers are actually reported through FARS—a total of 76 cell-phone-related fatal crashes in 1994 and 1995 [Lissy et al. 2000]. Examination of more recent on-line FARS data revealed that 81 fatal crashes in 1999 and 101 fatal crashes in 2000 were reported to be related to cell phone use—0.2% of the total for those years. One of the crashes in 1999 and two of the crashes in 2000 were identified as being a fatal injury at work [NHTSA 2002b]. Other electronic devices (e.g., computers, fax machines, and on-board navigation systems) were identified as contributing to a total of five fatal crashes in 1999 and 2000, one of which was a fatal injury at work. It is not yet known whether the small number of fatal crashes related to use of cell phones or other electronic devices reflects under-reporting or whether these devices indeed pose little risk [NHTSA 1997].

Data from the Crashworthiness Data System indicate that in 1995, small proportions of nonfatal towaway crashes in the United States were related to cell phone use. Of nearly 2.4 million crashes in 1995, talking on a cell phone was associated with 0.1%, and dialing a cell phone was associated with an additional 0.1% [Wang et al. 1996]. Unlike FARS, the Crashworthiness Data System does not collect information about work relationship. However, this system does record a detailed description of the vehicle and information about gross vehicle weight, both of which may be of some value in assessing whether a crash is occupational in nature.

Lissy et al. [2000] suggest that fatal cell phone-related crashes may appear infrequently in data systems that focus on fatal crashes and towaway crashes because they are likely to occur during rush hours, when congestion may lead to lower-speed collisions and hence fewer crashes resulting in fatalities and injuries. In addition, cell phone use may be most common during daytime hours, when overall crash risk is lower.

### **4.3.2 Research on the Risks of Cell Phone Use While Driving**

Two case-control studies found a statistical but not necessarily causal relationship between cell phone use and increased risk of motor vehicle crashes [Violanti and Marshall 1996; Violanti 1998]. The methods used in the first of these studies did not allow researchers to establish whether a cell phone was in use at the time of the collision. A study by Redelmeier and Tibshirani [1997] is generally considered to be the most scientifically sound study of the relationship between cell phone use and crash risk. They examined drivers involved in property-damage-only crashes, comparing their cell phone use on the day of a crash with their cell phone use on the day before the crash during the same time period. This research found that drivers who had used a cell phone in the 10 minutes before a crash had 4.3 times the crash risk of those who had not. This study, like several others, was limited by its inability to establish that cell phone use caused the crash.

In general, studies conducted in driving simulators and in instrumented vehicles have found that the use of cell phones while driving has a negative effect on driving performance [Brookhuis et al. 1991; McKnight and McKnight 1993; Nilsson and Alm 1991; Tijerina et al. 1995].

*Continued, Page 5.*

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## 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.

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

## 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 opioid 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 comorbidities 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.

In these studies, the decreased performance associated with cell phone use was measured by decreased response time for manual or cognitive tasks, decreased time looking at the road, increased workload (as indicated by increased heart rate and steering wheel movements), less mirror checking, longer braking times, failure to maintain safe following distances or consistent speed, and poor lane-keeping.

Results are mixed from research addressing whether hands-free phones with voice-activated dialing pose less risk than hand-held phones that require manual dialing. In general, research suggests that hands-free phones are safer than hand-held models, although they still pose distractions for drivers [Stevens and Paulo 1997]. One study conducted with instrumented vehicles found that drivers using hands-free cell phones performed better than those using hand-held phones but less well than those who did not use cell phones at all [Brookhuis et al. 1991]. A study conducted in a driving simulator reported better driving performance for voice-activated dialing versus manual dialing [Serafin et al. 1993]. In contrast, another simulator study found equivalent declines in driving performance among users of hand-held and hands-free cell phones [Strayer and Johnston 2001].

Studies outside the laboratory, like simulator-based studies, have failed to establish that hands-free phones offer clear safety advantages. A study of professional semi-truck drivers found that lane-keeping was improved and distraction from visual driving tasks was reduced during voice-activated versus manual dialing [Tijerina et al. 1995]. In contrast, two other studies did not report lowered crash risk for users of hands-free phones versus hand-held phones [Dreyer et al. 1999; Redelmeier and Tibshirani 1997]. However, it is important to note that the two types of studies are not directly comparable. The first study [Tijerina et al. 1995] measured differences in performance that may be associated with crash risk but was not designed to follow drivers' crash experience. The other two studies reported differences in crash risks among large groups of cell phone users [Dreyer et al. 1999; Redelmeier and Tibshirani 1997].

Also unclear is whether crash risk is greater while dialing, conducting a conversation, or reaching to answer a phone or retrieve a dropped phone. Studies done in the United States have generally found that conversation, not dialing, is involved in greater numbers of cell-phone-related crashes. A multiyear review of North Carolina police crash reports found that reaching for a dropped cell phone and talking on a cell phone were the primary circumstances associated with crashes involving cell phones [NHTSA 1997]. A review of FARS and GES cases found that talking on a cell phone was implicated in 17 of 28 crashes involving cell phones (61%). Reaching for a phone was identified in two cases, and dialing was identified in only one case [NHTSA 1997]. Another study, conducted in a simulator, assessed differences in driving performance among users of hand-held cell phones given simple versus more complex conversational tasks. The researchers reported that more driving errors were committed while performing a more complex word-generation task than during a simple word repetition task [Strayer and Johnston 2001]. These findings have implications for the safe use of cell phones in the workplace. Although little is known about the content of work-related cell phone calls made from vehicles, it is reasonable to assume that some of these calls place substantial demands on driver attention and may increase crash risk.

#### **4.3.3 In-Vehicle Internet and Other Information Systems**

New technologies have the potential for further eroding driver attention, especially when they are coupled with cell phone use while driving. Although in-vehicle Internet technology would ideally provide information that has positive effects on traffic and fleet management [Burns and Lansdown 2000], others have cautioned that little is known about the effects of multiple information systems on driver attentiveness [NHTSA 1997]. Trends toward miniaturization of electronic devices might also compromise safety by placing greater visual demands on the driver [NHTSA 1997].

*Continued, Page 6*



# **NAWCJ**

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

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A recent study conducted on a test track assessed the effects of multiple devices on driver performance [NHTSA 2000a]. Drivers were asked to manually tune a car radio, manually dial an unfamiliar number on a cell phone, and enter information into a route guidance system. The route guidance systems tested had various types of user interfaces: manual keypad entry, joystick, and voice activation. Overall, drivers needed much more time to interact with the route guidance system than to dial the cell phone or tune the car radio.

Compared with drivers aged 35 or younger, drivers aged 55 or older took more than twice as long to enter information into the route guidance system, took their eyes off the road about twice as often, and had much more difficulty staying in the travel lane while entering information. For all drivers, using the voice-activated route guidance system was associated with far less time with eyes off the road and no declines in lane-keeping. Among older drivers using the voice-activated system, times with eyes off the road decreased almost to that observed among younger drivers. The voice-activated system did not necessarily require less time than interacting with the manual entry systems. However, the eyes-off-the-road time associated with its use was much lower - nearly as low as that observed for dialing a cell phone or tuning a radio. Thus voice-activated route guidance systems appear to be preferable to manual entry systems, although research is needed to further assess the effects of voice interaction on driver attentiveness [NHTSA 2000a].

The potential for task and sensory overload as a result of more and smaller devices is of particular concern in the workplace, where installation of Internet-based information systems may offer increased productivity through streamlined customer contact and scheduling. Given the potential economic benefits, it is possible that introduction of this technology into fleet vehicles may precede its widespread use in personal vehicles. Thus the first evidence of any safety effects of in-vehicle Internet combined with other technologies may be seen among workers.

The European Union has developed principles for in-vehicle Internet systems that address design, installation, presentation of information, and drivers' interactions with displays and controls [Commission of the European Communities 2000]. The European Union principles stress the importance of maintaining the driver's attention to the driving task, view of the road, and view of critical vehicle displays and controls. In addition, they emphasize that in-vehicle Internet systems should not (1) place the driver under pressure to respond in a certain time frame, (2) require long, uninterruptible sequences of interactions, or (3) visually entertain the driver. Others have recommended that in-vehicle Internet systems be capable of automatically restricting information when traffic conditions demand it [Burns and Lansdown 2000].

#### **4.3.4 Policy and Legislative Issues Related to Cell Phone Use While Driving**

Policy decisions to guide cell phone use while driving are unusually difficult given that cell phones offer clear safety benefits along with risks. In addition, the rapid growth in cell phone ownership has not been accompanied by regulations governing their use, either in the general population or in the workplace. Between 1995 and June 2002, at least 41 States considered legislation addressing the use of cell phones and other in-vehicle electronic devices in passenger vehicles [Rushing 2002]. To date, no State has instituted a complete ban on cell phone use while driving. However, the State of New York passed legislation (effective in December 2001) that prohibits motorists from using hand-held cell phones while driving on public roadways. A number of localities have passed similar ordinances prohibiting the use of hand-held devices [Rushing 2002]. An additional concern is that varying restrictions on cell phone use by locality has the potential to create confusion among residents and among those who are in an unfamiliar location on business travel and unaware of local laws. As of June 2002, five States had passed legislation that would make State law override any local ordinances related to cell phones. However, to date only New York has acted to place significant restrictions on the use of cell phones statewide [Rushing 2002].

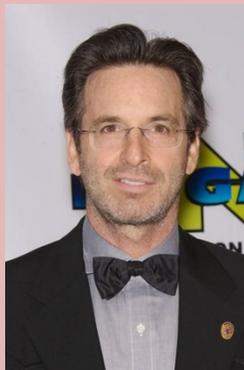
Of concern to employers is the possibility of increased legal liability of workers (and perhaps employers) who are involved in cell-phone-related crashes. One source cited recommendations that employers consider placing limits on worker cell phone use and convey to workers that cell phone use is not a necessary condition of employment [Buschman 2000]. To date, no research studies have addressed cell phone use on the job, including whether pressure on workers to use cell phones for conducting business has a detrimental effect on vehicle safety.

**Only 137 Days Until Judiciary College 2011  
See Page 18, et seq. for Details!**

# Workers' Compensation TV Project Filming in Sarasota



Morgan Fairchild



Robert Carradine

After years of trying to get Hollywood to come to this part of the Sunshine State, three TV pilots are cranking up soon in Orlando and Sarasota with familiar names

Fairchild is co-starring in "Workers Comp," an independent comedy pilot about a family insurance company that handles all kinds of weird claims. Also in the cast is Robert Carradine ("Revenge of the Nerds"), according to writer and actress Castille Landon, who co-wrote the script.

Filming gets under way April 10 in Sarasota and Bradenton. The half-hour comedy is being produced in cooperation with the new Sanborn Studios in Sarasota. The script was co-written by Harrison Sanborn, the 19-year-old son of Sanborn Studios owner Ken Sanborn.

"Workers Comp" also features Landon, 19, a native of Terra Ceia. She says the script is based on real-life workers' compensation claims, and she plays the daughter of Morgan Fairchild's character. Sanborn Studios, a 30,000-square-foot production center at Sarasota Bradenton International Airport, opened a few months ago. Ken Sanborn financed the operation after selling his aviation defense company, Gyrocam Systems, to Lockheed Martin



Castille Landon



Harrison Sandborn

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### Ask a dumb question . . .

Q. What you have, Exhibit A, is a list of close to 300 different jobsites. Have you seen this list before?

A. Yes, I've seen something that looks kind of like it. I didn't read it through, or whatever.

Q. How was that list put together, do you know?

A. Stapled.

# More Developments Regarding Undocumented Alien Injuries

Antonio Rodriguez fell from a roof in February 2004 and sought benefits for his injuries under Louisiana workers' compensation law. He sought workers' compensation benefits from his employer and a statutory employer. The Louisiana workers' compensation Judge awarded Rodriguez benefits. The Statutory Employer (Vaughan) argued that Rodriguez should not be awarded benefits, and that this award violated "United States Supreme Court jurisprudence and federal law. The Louisiana Third Circuit Court of Appeal affirmed the award of benefits (<http://www.la3circuit.org/opinions/2010/05/0505/09-1537opi.pdf>). The Court explained that in *Artiga v. M.A. Patout and Son*, 671 So.2d 1138 (LA 3<sup>rd</sup> CCA 1976), it had concluded that "Certain statutory exclusions exist,:" but that there is no such statutory exception in Louisiana for a worker "in this country illegally." The Court held that "Vaughan has failed to demonstrate why the straightforward reasoning applicable in *Artiga* is inapplicable to it as a statutory employer." The Court held that *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137 (2002) does not preclude payment of benefits to an undocumented worker. The Court noted that *Hoffman* "contains a wealth of information regarding immigration policy," but that it does not "include language indicating that a matter of state workers' compensation coverage, such as this, is preempted by this policy." On February 28, 2011, the U.S. Supreme Court declined the Petition for Writ of Certiorari.

The *Lex and Verum* reported in January 2011 regarding a bill introduced in Montana. That effort, HB71 is directed at foreclosing receipt of workers' compensation benefits by specific exclusion.

Excerpts of Montana HB 71 follow:

"A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT CERTAIN ILLEGAL ALIENS ARE NOT ENTITLED TO WORKERS' COMPENSATION WAGE-LOSS AND MEDICAL BENEFITS FOR A WORK-RELATED INJURY OR DISEASE; AND AMENDING SECTION 39-71-118, MCA."

**"Section 1. Payment of benefits to aliens.** (1) Wage-loss and medical benefits for a work-related injury or disease may not be paid under this chapter to an alien unless the alien is an individual who was lawfully admitted for permanent residence at the time the injury occurred, was lawfully present for the purposes of performing the services that resulted in the work-related injury or disease, or was permanently residing in the United States under color of law at the time the services that resulted in the work-related injury or disease were performed."

**"39-71-118. Employee, worker, volunteer, and volunteer firefighter defined.** (1) As used in this chapter, the term "employee" or "worker" means: (a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and who are lawfully employed, minors, whether who are lawfully or unlawfully employed, and . . ."

The bill is available here:

[http://data.opi.mt.gov/bills/2011/hb0099/HB0071\\_1.pdf](http://data.opi.mt.gov/bills/2011/hb0099/HB0071_1.pdf)

## 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/11406-2011-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\\_Theme/s/seak/July2011%20reg%20page%20only.pdf](http://www.seak.com//App_Theme/s/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.

## Workers' Comp Resources

National Association of Workers' Compensation Judiciary  
[www.NAWJC.org](http://www.NAWJC.org)

Florida Workers' Compensation Institute  
[www.fwciweb.org](http://www.fwciweb.org)

# Rules of Statutory Interpretation

## I. Role of the Court.

1. The proper interpretation of a statute is a judicial function. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 99 (2008).
2. When interpreting a statute, the court attempts to ascertain and give effect to the intent of the Legislature. *People v Gardner*, 482 Mich 41, 84 (2008).
3. Court may not speculate about the probable intent of the legislature beyond the language expressed in the statute. *Griswold Properties LLC v Lexington Ins. Co.*, 276 Mich App 551, 556 (2007).
4. In determining legislative intent, the courts look first into the specific language of the statute. *People v Underwood*, 278 Mich App 334, 338 (2008).

## II. Clear vs. Ambiguous Language

1. Statutory language is ambiguous when it is equally susceptible to more than one meaning, not when reasonable minds can disagree regarding its meaning. *Toll Northville LTD v Twp. of Northville*, 480 Mich 6, 15 (2008).
2. Clear and unambiguous language in given its plain and ordinary meaning. *In re LE*, 278 Mich App 1, 22 (2008).
3. An undefined term is given its plain and ordinary meaning. (a) A "legal term of art" is given its peculiar legal meaning. (b) Terms that have a unique legal meaning are given the definition found in a lay dictionary, such as *Random House Webster's College Dictionary*. *Brackett v Focus Hope, Inc.*, 482 Mich 269, 275 (2008); MCL 8.3(a).
4. Clear and unambiguous language should be enforced as written. *In re McLeod USA Telecommunications Services, Inc.* 277 Mich App 602, 609 (2008).
5. If the language is clear and unambiguous, the courts must apply it as written even if it leads to absurd results. *Kimmelman v Heather Downs Management Ltd.*, 278 Mich App 569 (2008).
6. "Absurd" means utterly and obviously senseless, illogical or untrue; contrary to all reason and common sense. It does not mean that reasonable people would think that the Legislature acted improvidently. *McGhee v Helsel*, 262 Mich App 221, 226 (2004).

## III General Principles of Interpretation

1. Every word of a statute should be read to give it meaning, and so the court must avoid interpretations that render words unnecessary or meaningless. *In re MCI Communications*, 460 Mich 396,415 (1999).
2. Unclear statutory language will be construed so as to avoid absurd results, injustice and prejudice to the public interest. *Hill v City of Warren*, 276 Mich App 299, 305 (2007).
3. Statutes are to be read as a whole to ascertain the intent of the Legislature, and any provisions that are apparently inconsistent are interpreted to produce a harmonious whole, if reasonably possible. *Macomb County Prosecutor v Murphy*, 464 Mich 149, 160 (2001); *Bailey v Oakwood Hosp. and Medical Center*, 472 Mich 685, 693 (2005); *Nowell v Titan Ins. Co.*, 466 Mich 478, 482 (2002).
4. Statutes that relate to the same subject ("in pari materia") are to be read and construed together. *In re MCI Telecommunications Complaint*, 460 Mich 396, 417 (1999).
5. In interpreting a statute, the court presumes that the legislature is aware of:
  - (a) judicial interpretations of existing law *Ford Motor Co. v City of Woodhaven*, 475 Mich 425, 439 (2006).
  - (b) the existence of the common law, so that (i) statutes are interpreted consistent with their terms even if those terms conflict with the common law and (ii) common law rules are not abolished by implication. *Spires v Bergman*, 276 Mich App 432, 438 (2007); *Houghton Lake Area Tourism and Conservation Bureau v Wood*, 255 Mich App 127, 149 (2003).
  - (c) the laws on the same subject and the effect of new enactments on existing laws. *Wayne County v Wayne County Retirement Comm'n.*, 267 Mich App 230, 244 (2005).
  - (d) the rules of statutory interpretation. *People v Clark*, 274 Mich App 248, 252 (2007).

Continued, Page 11.

In Keeping with the NAWCJ 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 upcoming meetings of the Southern Association of Workers' Compensation Administrators (SAWCA). You can learn more about SAWCA by visiting their website, [www.sawca.com](http://www.sawca.com)

## ***The Southern Association of Workers' Compensation Administrators***

The Southern Association of Workers' Compensation Administrators, Inc. (SAWCA) is a cooperative effort of nineteen jurisdictions. The Mission of SAWCA is to make available and present instruction by means of forums, lectures, meetings, and written material regarding the administration of workmen's laws and to provide an avenue by which those interested in workers' compensation may interact with one another to share information and address issues common to the jurisdictions that are members of the association.

### ***63rd Annual SAWCA Convention July 25 – 29, 2011 Biloxi, Mississippi***

Conference Outline:

Monday: Executive Committee Meeting /Ex. Com. Reception & Dinner, Sponsored By NCCI

Tuesday: Regulator's Roundtable & President's Reception

Wednesday: General Sessions / Lunch / & Committee Meetings

Thursday: General Sessions, Committee Mtgs Network Reception & Dinner

Friday – "Farewell Friday" / General Session & Committee Reports

### ***SAWCA National Regulators "Roundtable"***

***August, 23, 2011 at the Workers' Compensation Educational Conference,  
Orlando, FL***

This new addition to the conference is sponsored by SAWCA and intended to bring together regulators from throughout the country to discuss challenges, concerns, and issues facing individual jurisdictions in the oversight of the ever changing workers' compensation industry. Problems faced by one jurisdiction may have already been successfully addressed by another; a developing issue or concern in one state may be an omen for future development in your state; and legislative initiatives know no boundaries. The National Regulators Roundtable is a forum designed to permit regulators to share lessons learned and seek timely answers to their most pressing issues. Karl Aumann, President of SAWCA and Chairman of the Maryland Workers' Compensation Commission will moderate the roundtable which will include the following panelists:

Michael W. Alvey / Chairman of the Kentucky Workers' Compensation Board

Richard Thompson / Chairman of the Georgia State Board of Workers' Compensation

David Langham / Florida Deputy Chief Judge of Compensation Claims

Preston Williams / Director of Self-Insurance for Mississippi WCC

Larry White / Deputy Dir. Louisiana Workforce Commission Office of Workers' Compensation

Deneise Lott / Mississippi Administrative Law Judge

Melodie Belcher / Georgia State Board of WC / Division Director & Administrative Law Judge

Michele J. McDonald / Maryland Assistant Attorney General

#### IV Rules for Interpreting Specific Language

1. A word or phrase is given meaning by its context or setting *Crowe v City of Detroit*, 465 Mich 1, 6 (2001).
2. Where a general term follows a series of specific terms, the general term is interpreted to include only things of the same kind, class, character or nature of those specifically enumerated *Neal v Wilkes*, 470 Mich 661 (2004).
3. Where a statute contains a specific provision and a more general related provision, the specific one controls. *In re Haley*, 476 Mich 180,199 (2006).
4. The expression of one thing in a statute means the exclusion of other similar things: *Alan v Wayne County*, 388 Mich 210,253 (1970).
5. "Last antecedent rule": a modifying or restrictive word or clause contained in a statute refers solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation. *Stanton v City of Battle Creek*, 466 Mich 611, 616 (2002).
6. "And" and "or" are not interchangeable, and the court will give them their strict meaning when that does not render the sense dubious and there is no clear contrary legislative intent. *Niles Twp v Berrien County Bd of Commissioners*, 261 Mich App 308, 318 (2004).
7. "All" in a statute leaves no room for exceptions. *People v Monaco*, 474 Mich 48, 55 (2006).
8. The word "shall" refers to a mandatory duty or requirement. *Wayne County v State Treasurer*, 105 Mich App 249, 252 (1981).
9. "May" is permissive and indicates discretion. *In re Forfeiture of Bail Bond*, 276 Mich App 482, 492 (2007).

#### V External Aids to Interpretation

1. Preamble to statute is not binding authority for interpreting a statute, but it may be considered. *Malcolm v City of East Detroit*, 437 Mich 132, 143 (1991).
2. Statutory headings are not conclusive proof of legislative purpose, but they may be considered. *Camaj v SS Kresge co.*, 426 Mich 281, 290 (1986) *Bankhead v McEwan*, 387 Mich 610 (1972).
3. Official comments to a uniform act may be considered, although they lack the force of law. *In re Estate of Seymour*, 258 Mich App 249,254 (2003).
4. A statute is considered in light of circumstances that existed at the time of enactment, not with reference to later developments. *Cain v Waste Management, Inc.*, 472 Mich 236, 258 (2005).
5. Statements of individual legislators during the debate on a bill or statements made later are not considered since they cannot be attributed to the entire legislature. *In re Complaint of MCTA*, 241 Mich App 344, 374 (2000).
6. Courts may look at legislative history, including the journals chronicling legislative history and changes to the bill. *In re MCI Telecommunications Complaint*, 460 Mich 396, 415 (1999); *Jenks v Brown*, 219 Mich App 415, 419 (1996)
7. Legislative analysis is generally not a persuasive indicator of legislative intent. Analysis are not an official record of the Legislature, they represent the views of staff, rather than legislators and are not part of the legislative process. *People v Davis*, 468 Mich 77, 79 (2003); *Morales v Michigan Parole Bd.*, 260 Mich App 29, 44 (2003).
8. Interpretations of statutes by the agency that administers it are given great deference. But agency interpretations are not given deference if they are contrary to the plain meaning of the statutory language. *Adrian School Dist v Michigan Public School Employees Retirement System*, 458 Mich 326, 337 (1998); *Ludington Service Corp. v Acting Commissioner of Insurance*, 444 Mich 481, 498 (1994).

## “Second Fridays Seminars”

The NAWCJ 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.

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

### Memory? What memory?

Q. Have you suffered episodes in which you have lost your memory?

A. I don't recall.



# CWCI Opioid Study Gives no Clear Path to Solution

The insurance industry demonstrated its resolve to shine a floodlight on the issue of opioid overuse in pain management with polished multi-media presentations and a shout-out from a political big shot during the California Workers' Compensation Institute's annual meeting Thursday in San Francisco.

The CWCI played a pre-recorded video showing U.S. Rep. Jackie Speier – the Bay Area's Democratic representative in Congress -- joining the cause by saying the institute's latest “groundbreaking” report on opioids shows that pain medications are “becoming a big problem.”

But the study, released March 7, doesn't make any suggestions about what should be done to curb opioid overuse. It doesn't prove that the doctors who prescribe the most of them are doing anything wrong, either.

While Speier in her video promoted the use of evidence-based medicine to tackle the problem, long-time industry observers who spoke to WorkCompCentral said nothing in the CWCI data explains why the medical treatment guidelines and utilization review process put in place by California's 2004 system reforms aren't keeping opioid overuse in check.

The report, authored by CWCI head researcher Alex Swedlow, reaches narrow conclusions. In summary: The use of Schedule II opioids, such as oxycodone and fentanyl, in the California workers' comp system increased 380% from 1998 to 2008. Just 3% of doctors who treat injured workers prescribe 55% of those Schedule II drugs, most of them opioids. Slightly more than half of the opioids prescribed to injured workers – 50.2% – are for back injuries “with no spinal cord involvement,” which CWCI researchers say means minor strains and sprains.

The California Division of Workers' Compensation adopted a Medical Treatment Utilization Schedule in 2007 and updated it in 2009 with chronic pain guidelines that discourage the use of opioids for conditions that don't require surgery. But there is no absolute ban, which is why CWCI researchers haven't assigned blame to a small percentage of physicians ignoring evidence-based guidelines.

In an interview with WorkCompCentral, Swedlow said the numbers in his opioid study show a familiar pattern. “It's not all that uncommon in other areas of workers' compensation,” he said. “If you look at a distribution of claims ranked in order of costs, you have a relatively small number of claims that cost a lot of money -- tens of millions of dollars. Those outliers carry so much financial leverage that they really can't be ignored.”

After hearing Swedlow go over the details at CWCI's annual meeting Thursday, Frank Neuhauser, a workers' comp researcher for the University of California, Berkeley, said the data showing a small fraction of workers' comp physicians prescribing most of the drugs isn't particularly surprising. Neuhauser said statistics always contain outliers. In this instance, the doctors who are prescribing more drugs than their peers could be specialists who treat mostly injured workers who got no relief from more conservative treatment with other doctors.

Neuhauser pointed out that medical treatment guidelines do not absolutely ban the use of opioids for treating back pain. And he has firsthand experience on why bending guidelines may not always be a bad idea. Neuhauser said he himself suffers from occasional severe back pain. When the pain first struck, it got progressively worse for three months until his doctor prescribed a short course of Vicodin. He said he didn't take the drug again until years later when the pain struck again, but this time he got a prescription for Vicodin after three weeks of conservative treatment. Without the pills, “I wouldn't have been able to work,” Neuhauser said.

One might expect that treatment guidelines and mandatory utilization review, both key components of the 2004 reforms, would slow down the increase in the use of opioids, but Swedlow's research shows just the opposite.

*Continued, Page 13.*

Opioids grew from less than 1% of all prescriptions filled in the state's workers' compensation system in 2005 to nearly 6% in the first nine months of 2008.

Does that mean the treatment guidelines are ineffective? Not necessarily, says Mark Webb, vice president for government affairs at PacificComp, a Southern California-based workers' comp carrier.

Webb said the CWCI research does not show how many of the opioids prescribed to injured workers are coming from doctors who belong to medical provider networks and how many are prescribed from physicians who were self-procured by injured workers seeking treatment in disputed claims. Those prescriptions would fall outside of the claims administrators' regular utilization review processes and compensability would be determined by judges presiding over lien hearings, not doctors.

Similarly, qualified medical evaluators and agreed medical evaluators are involved in a large percentage of claims, Webb said. If those doctors determine that opioids are reasonable and necessary to relieve an injured workers' pain, no treatment guideline or utilization review doctor's opinion is likely to persuade a judge that the QME or AME is wrong, Webb said. Webb did not give the DWC's treatment guidelines a complete pass as being a potential source of the opioid overuse problem, however. He noted that his company and other insurers had advised the division against adopting the Official Disability Guidelines as the chronic pain management chapter in its Medical Treatment Utilization Schedule, fearing ODG wasn't restrictive enough on the use of opioids as a treatment method. The American College of Occupational and Environmental Medicine guidelines, in contrast, are starkly specific, stating, "the use of opioids during the sub-acute and chronic phases of a back injury ... cannot be recommended." Frustration with the limits on existing controls was apparent among three claims managers who chatted about the issue over a chicken and salad lunch at the CWCI annual meeting. Each of the three, perhaps unaware they were talking to a journalist, offered anecdotes about how utilization review and treatment guidelines don't allow them to put an end to the problem simply by refusing to pay for improperly prescribed opioids.

One of the claims managers said her supervisor told her she can't use a utilization review report to bar payment because treatment guidelines don't say opioids are never acceptable for minor back injuries, only that they are not effective "in most cases." Another said claims adjusters with her organization has denied authorization for opioid prescriptions based on a UR report, only to be overruled by a workers' compensation judge.

The CWCI data may not provide any smoking gun, but release of the study sparked a scathing e-mail blast from Bill Zachry, a former Fraud Assessment Commission chairman and vice president of risk management for California-based grocery chain Safeway. "Opioid abuse is part of a larger problem that a relatively small group of physicians and applicant attorneys perpetuate in Southern Ca.," Zachry wrote. "It is my understanding that this group of physicians and attorneys also account for many of the Southern California medical treatment liens for treatment that was not performed in accordance with evidence based medicine and that was provided outside of the medical provider networks."

Zachry went on to say that opioid overprescribers are motivated by "massive profits that they get from self-dispensing" the drugs. The CWCI report, however, doesn't provide any indication that doctors are dispensing large volumes of opioids out of their own offices, only that a small fraction of doctors are prescribing large amounts of narcotics.

After Zachry's email made the rounds among system insiders, a lobbying group for the California Society of Industrial Medicine and Surgery (CSIMS) wrote a letter to CWCI admonishing it for using the term "dispensing" in its report, which it said gave the impression that doctors themselves are selling opioids to injured workers.

While the cause of the rise in opioid use remains in debate, the insurance industry and its allies in the cause are working to build on widespread public outrage. CWCI noted during its annual meeting that a report released this year by the Center for Disease Control and

Prevention stated that drug-induced deaths in the United States had become more common than alcohol and firearm-related deaths as of 2007, and that prescription painkillers had supplanted illicit drugs as the leading cause of overdose deaths.

Congresswoman Speier noted during her video address that Broward County, Fla., Sheriff Al Lamberti had told news reporters that his jurisdiction, with 130 pain-management clinics, was in the midst of a "pain-management epidemic." She noted that Florida has the capability of tracking opioid prescriptions to discourage doctor shopping, as California does, but has chosen not to "because of privacy concerns." Speier, perhaps trying to avoid any appearance of partisan politics, did not mention that Republican Gov. Rick Scott killed funding for the Sunshine State's Prescription Drug Monitoring Program over the objections of some lawmakers in his own party.

*Continued, Page 14.*

# Montana Supreme Court Affirms Benefits for Man Mauled by Bear

The Montana Supreme Court recently (March 22, 2011) affirmed a decision of a workers' compensation judge there, concluding that an injured man (Hopkins) was an employee, and was acting in the course and scope of that employment when he was mauled by a bear. With a business called "Great Bear Adventures, this might seem a simple case at first blush.

The situation was complicated by the fact that the injured worker smoked marijuana on his way to the park on the date of accident. There was evidence that the owner of the park (Kilpatrick) did not condone marijuana use by workers, but also conflicting evidence that he had done so at the park himself, even that he had done so with the injured worker, "on occasion."

At some point that day, Hopkins asked Kilpatrick if he should feed the bears. There was some conflict in testimony, but the Compensation Judge concluded that the owner "never told Hopkins not to feed the bears." Hopkins proceeded to mix food for the bears, entered their pen and began to feed them. He was attacked by a bear named "Red." During the attack, a second bear, "Brodie" bit Red and distracted him long enough for Hopkins to crawl to safety despite his severe injuries. He was later discovered and flown by helicopter for care.

The Court noted that "non-prescription drug consumption will preclude an injured employee's benefits if the consumption was the leading cause contributing to the result, when compared to all others."

The Court noted that the Compensation Judge "aptly noted, 'Hopkins' use of marijuana to kick off a day of working around grizzly bears was ill-advised to say the least and mind-bogglingly stupid to say the most.' However, the WCC further noted that grizzlies are 'equal opportunity maulers,' without regard to marijuana consumption. Without evidence of Hopkins' level of impairment, the WCC correctly concluded that marijuana was not the major contributing cause of Hopkins' injuries."

*CWCI Opioid Study, from P.13*

The CWCI opioid report states that "concern over the inappropriate use of Schedule II drugs has reached the tipping point" and policymakers around the country are pursuing a variety of potential solutions. As of October 2010, 34 states have an operational Prescription Drug Monitoring Program. California in 2009 adopted new chronic pain treatment guidelines. In March 2010, Washington state passed a law that directs five health boards and commissions to adopt rules concerning management of chronic, non-cancer pain.

Advocates for industrial medicine doctors are paying attention. Stephen Cattolica, government relations director for CSIMS, said after hearing Swedlow's presentation on

Thursday that he agrees CWCI's research points to a problem. When asked why medical treatment guidelines haven't curbed overuse of narcotics, he noted that the California DWC hasn't had a medical director since Dr. Anne Searcy resigned her position to take a job with Zenith National Insurance Co. in October 2008. Cattolica said without a director, the DWC is not in a position to tweak its Medical Treatment Utilization Schedule to address the problem. Improved treatment guidelines may be an option, but Cattolica offered another: Adoption of a closed formula that would require physicians to show that they have good reason to prescribe opioids for a condition where use of such drugs is not indicated. The Texas DWC adopted such a formulary last fall, which will take effect this Sept. 1. In his email, Safeway's Zachry suggested that insurers and employers adopt pharmacy networks, which would allow them to implement pharmacy formularies.

Cattolica quickly added that CSIMS has not endorsed adoption of a formulary for all of California's workers' compensation system, but was only acknowledging that this is one of the possible solutions being discussed by policymakers.

For its part, the CWCI promises to conduct more research on opioid use in the California workers' compensation system. For one thing, the institute plans to see if there are any differences in treatment patterns between doctors who prescribe high amounts and low amounts of opioids. CWCI also will compare high and low opioid prescription frequency at specific intervals to learn about the association with injured worker outcomes.

Swedlow said release of the opioid study on March 7 has already "triggered alarms" among insurers and employers, who are busy poring over their own data to identify any trends. This is a public health emergency," Swedlow said. "We are now dispensing very, very large volumes of these drugs in ways that don't make a lot of sense."

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

# NAWCJ College 2011 Scholarship Application

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

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

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Judge's Signature \_\_\_\_\_ Date \_\_\_\_\_

Mail your application to: John J. Lazzara  
Email: JIL@NAWCJ.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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Organization: \_\_\_\_\_

PROFESSIONAL ADDRESS: \_\_\_\_\_

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YEAR FIRST APPOINTED OR ELECTED? \_\_\_\_\_

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HOW DID YOU LEARN ABOUT NAWCJ? \_\_\_\_\_

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

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

Mail your application and check to: Kathy Shelton  
P.O. Box 200  
Tallahassee, FL 32302  
850.425.8156  
Email: [kathy@fwcweb.org](mailto:kathy@fwcweb.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.

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PROFESSIONAL E-MAIL: \_\_\_\_\_

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HOW DID YOU LEARN ABOUT NAWCJ? \_\_\_\_\_

Mail your application and check to: Kathy Shelton  
P.O. Box 200  
Tallahassee, FL 32302  
850.425.8156  
Email: kathy@fzwiweb.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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# NAWCJ Judiciary College 2011!

August 21 through 24, 2011, in Orlando, Florida

## Sunday, August 21, 2011

2:30 – 5:00 PM E. Earle Zehmer Moot Court Competition, Preliminary Rounds

## Monday, August 22, 2011

11:30 – 1:40 PM **NAWCJ WELCOME LUNCH AND MULTI-JURISDICTION COMPARATIVE LAW PANEL**

Honorable Ellen Lorenzen, NAWCJ President, welcoming remarks

Honorable John Lazzara, Florida, introduction of speakers

This panel discussion will bring perspective on how our statutes are different, and how they are similar. Dealing with statutory interpretation is part of our daily routine. Despite the diversity of our particular statutes, we share a multitude of concordant issues and challenges, which this program illuminates.

*Moderator,*

Honorable Melodie Belcher

*Atlanta, GA*

*State Board of Workers' Compensation*

*Speakers,*

Honorable Karl Aumann

*Baltimore, Maryland*

*Maryland Workers' Compensation Commission*

Honorable Diane Beck

*Sarasota, Florida*

*Florida Office of Judges of Compensation Claims*

Honorable Jennifer Hopens

*Austin, Texas*

*Texas Department of Insurance, Division of Worker's Compensation*

Honorable David Torrey

*Pittsburg, Pennsylvania*

*Pennsylvania Department of Labor and Industry*

1:50 – 2:00 PM **BREAK AND TRANSITION**

## Monday, August 22, 2011, Cont.

### 2:00 - 2:50 PM THE POWER OF ADDICTION

Honorable Robert Judge Cohen, Florida, introduction of speakers

#### **Moderator:**

Nat Levine  
*Broward Orthopedic Specialists*  
*Ft. Lauderdale, FL*

#### **Speaker:**

Marc Gerber, M.D.  
*MRG Rehabilitation and Pain Medicine*  
*Orlando, FL*

With Florida having the dubious distinction of the pain “pill mill” capital of the nation, claimants often find themselves depending on those medications. What causes addiction? What causes a claimant to abandon all sensibilities for Opioids such as Oxycodone or Hydrocodone? What are the psychological effects of addiction? Do ALL opioids prevent a claimant from performing their job function? Ever want to ask a question on addiction? Red flags in medical reports adjudicators should look for when overutilization is an issue. Don’t miss this one.

### 2:50 - 3:00 PM BREAK

### 3:00 – 3:50 PM THE ANATOMY OF THE INJURY

Honorable David Torrey Judge Torrey, Pennsylvania, introduction of speakers

#### **Moderator:**

Nat Levine  
*Broward Orthopedic Specialists*  
*Ft. Lauderdale, FL*

#### **Speakers:**

Michael T. Reilly, M.D.  
*Center for Knee, Shoulder and Hip*  
*Ft. Lauderdale, FL*

Tim Joganich  
*ARCCA Inc.*  
*Penns Park, PA*

The orthopedic said what? How did the injury cause that? Case management personnel and Judges often question causality based on the orthopaedic surgeon’s diagnoses. We will explore the biomechanical forces necessary to produce injuries to the spine and joints. We will review how the objective findings on MRIs combined with the study of the biomechanics allow us to determine the causality and age of an injury.

### 3:50 - 4:00 PM BREAK

## Monday, August 22, 2011, Cont.

### 4:00 – 4:50 PM THE AGING WORKFORCE

Honorable David Imahara, Georgia, introduction of speakers

#### *Moderator:*

Nat Levine

*Broward Orthopedic Specialists*

*Ft. Lauderdale, FL*

#### *Speaker:*

Jesse A. Lipnick, M.D.

*Southeastern Rehabilitation Medicine*

*Gainesville, FL*

With the Dow tanking and IRA's rolling over dead, millions of otherwise retired and older workers aren't retiring. The nation's workforce grows older as does the concept that all injuries are treated the same. If you believe that the 60 yr old and 25 yr old claimant heal at the same rate, or the frequency of injuries in these age group are similar, this breakout might open your eyes. Older claimants often have unrelated and pre-existing conditions such as hypertension, diabetes and heart problems. How do those conditions affect their claims for temporary total or permanent total disability? What about "major contributing cause" or "apportionment" issues? Take a sneak peak at the future of claims as our working population gets older.

### 4:50 - 5:00 PM BREAK

### 5:00 - 5:30 PM NAWCJ ANNUAL BUSINESS MEETING

### 7:00 - 11:00 PM RECEPTION AND ENTERTAINMENT

## Tuesday August 23, 2011

### 8:45 - 9:45 AM LIVE SURGERY

#### *Moderator:*

Steven E. Weber, D.O.

*From Orlando Orthopaedic Center, Orlando, Florida*

#### *Surgeon*

G. Grady McBride, M.D.

*From Orlando Orthopaedic Center, Orlando, Florida*

Get Ready to be "FUSED" to your seats as Orlando Orthopaedic 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.

## Tuesday August 23, 2011, Cont.

### 10:00 – 11:50 AM EVIDENCE, THE COMMAND PERFORMANCE

Honorable Michael Alvey, Kentucky, introduction of speaker

*Speaker:*

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

One of the evidence greats, in a command performance! Professor Ehrhardt will address issues troubling all adjudicators. Despite the differences between state evidence codes, this speaker's thirty plus years of study, reflection, lecture and publication bring evidence questions into sharp focus. Professor Ehrhardt brings and enthusiasm for the subject, and presents with such force and humor that the audience is always left wanting more.

### 11:50 - 12:00 PM BREAK

### 12:00 -1:00 PM FLORIDA BAR WORKERS' COMPENSATION SECTION JUDICIAL LUNCHEON

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

An actual workers' compensation appeal will be argued live before a panel of Judges of the Florida First District Court of Appeal. The briefs will be made available to attendees prior to the conference and the Court's Opinion will be posted on the Court's website several weeks after the oral arguments take place. The Court's decision will also be published in the NAWCJ's *Lex and Verum* newsletter.

### 2:15 – 4:10 PM NEUROSCIENCE AND PSYCHOLOGY OF JUDICIAL DECISION- MAKING FOR WORKERS' COMPENSATION ADJUDICATORS

Honorable Melodie Belcher, Georgia, introduction of speaker

*Speaker:*

Kimberly Papillon  
*San Francisco, CA*  
*California Judicial Council, Administrative Office of the Courts*

All Judges recognize that bias has no place in a trial. What many do not recognize is that bias can be implicit in everyday life, and as a result this may accompany the adjudicator to the hearing room. Kimberly Papillon is leading national expert on the subject of implicit bias. She has been a pioneering force in the quest to identify, dismantle and overcome these biases using proven methods. She has conducted this training for the California Judicial Council, various state and federal court conferences, and state and local bar associations. This program will not only change how you think about bias, it will help you first understand how you think about bias.

## **Tuesday August 23, 2011, Cont.**

**2:00 – 2:10 PM BREAK**

**4:20 – 5:10 PM CODE OF JUDICIAL CONDUCT FOR WORKERS' COMPENSATION ADJUDICATORS**

Honorable Jennifer Hopens, Texas, introduction of speakers

*Speaker:*

Honorable Rick Thompson

*Atlanta, GA*

*State Board of Workers' Compensation*

Honorable David Langham

*Pensacola, FL*

*Florida Office of Judges of Compensation Claims*

Can there be a more perplexing (or frankly sometimes onerous) topic? Various states are struggling with the disqualification and recusal process; refinements and revolutions have been proposed, discussed, and found wanting. This program will address the focus of the Code of Judicial Conduct on the specifics of unbiased adjudication, and on the ever-ubiquitous "appearance of impropriety." This highly interactive "point/counter point" presentation will illuminate the subject, make you think, and entertain.

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

Non-judicial (Associate) and members of NAWCJ are cordially invited to attend this reception in honor of the Judges.

## **Wednesday August 23, 2011 Option One, Mediation**

**8:00 - 8:50 REGISTRATION AND CONTINENTAL BREAKFAST**

**8:50 - 9:00 WELCOME AND INTRODUCTIONS**

**9:00 - 10:40 GENERAL SESSION**

**KEYNOTE PROGRAM, DESIGNING THE MEDIATION**

Rod Max, *Attorney and Mediator*

*Miami, Florida*

If you don't know where you are going, how do you know when you get there? Planning is an essential element of every successful endeavor in the professional world, why should a mediation be any different? It is critical to make a careful plan, identify the route you will take and understand the obstructions that may impede your progress. Rod Max and a panel of veteran attorneys will help you with the preparation techniques that will make your mediations successful for you and your clients. This session is two credit hours of "GENERAL."

**10:45 - 11:35 BREAKOUT SESSION ONE, SELECT FROM THE FOLLOWING:**

**“ETHICAL ISSUES IN CLOSING THE DEAL.”**

Michele Riley, *Attorney and Mediator*  
*New York, New York*

Every mediation presents ethical considerations. The perspectives and conflicts of multiple parties and their representatives make each mediation a unique challenge. Michele is familiar with the challenge from years of experience as a mediator and as an instructor at the International Center for Cooperation and Conflict Resolution, Columbia University. Michele brings an understanding of recognizing and avoiding ethical conflicts while guiding the parties to resolutions. This session is one credit hour of “ethics.”

**“APPLYING DALE CARNEGIE TO MEDIATION.”**

Dr. Beverly Pennachini, *Dale Carnegie of Central Florida*  
*Orlando, Florida*

The Dale Carnegie method is a time proven communication and presentation process. This process focuses on applying foundational principles to reduce stress, measurably improve confidence, communications, and interpersonal skills of individuals and teams. The successful mediator must effectively communicate and works in an environment that requires effective formation of relationships and consensus. This session is one credit hour of “general.”

**“CONFLICT RESOLUTION”**

Dr. Deri Joy Ronis, *Mediator*  
*Sarasota, Florida*

This program will provide practical approaches to working with situations involving anger and violence issues. Attendees will understand methodologies for identifying the presence of these issues, and effectively interacting with the individuals who are affected by them, with a focus on navigating these critical obstacles and accomplishing resolution despite them. A successful mediator recognizes impediments to the process and perseveres. This program reinforces the skills to do so effectively. This breakout is one credit hour of “General.”

**“MEDIATOR ETHICS.”**

Ross W. Stoddard, III, *Attorney-Mediator (civil & probate)*  
*Irving (Las Colinas), Texas*

Mediators often experience ethical dilemmas and difficult situations during mediations, putting them between the proverbial “rock and a hard place.” This *highly interactive* session will cover some of the challenging issues which confront mediators during mediations – from the beginning of the day to the final caucus. The objective is to provide each participant with some useful and usable tips which will be available to them in their next mediations. This session is one credit hour of “ethics.”

**11:35 - 12:35**     **GENERAL SESSION**

**LUNCHEON PROGRAM, DEVELOPING RAPPORT WHEN THE MEDIATOR IS CROSS-CULTURALLY CHALLENGED**

Robert Dietz, *Attorney and Circuit Civil Mediator,*  
*Orlando, Florida*

How does a mediator develop rapport with ethnic parties and attorneys when the mediator is too male, too pale, and too stale? Gender and cultural issues arise in more and more mediations, and some mediators are ill-prepared to maximize the chance for success by developing rapport. Robert Dietz will share anecdotes from his own and other mediators' and attorneys' experiences, and from some popular movies, to illustrate the necessity of cultural fluency in today's mediations. There's nothing trivial about building rapport with disputants and their representatives from other cultures. This session is one credit hour of "diversity."

**12:40 – 2:20**     **SESSION TWO, SELECT FROM THE FOLLOWING:**

**"DIFFICULT CONVERSATIONS."**

Kim Kern, *Attorney and Mediator,*  
*St. Louis, Missouri*

The practice of mediation is filled with difficult conversations—things the parties do not want to hear and certainly do not want to credit with any merit. The best-seller "Difficult Conversations," initially published in 2000, has just released a second edition with even more practical suggestions for understanding why those conversations are so tough and how to prepare for them. While there is some soul-searching to be done to determine why a conversation is causing you anxiety, the remainder of the presentation will focus on new ways to analyze the parties and their behavior, thus enabling you to move them towards settlement. The book has great ideas for making difficult conversations a bit less difficult. The presentation will apply the principles detailed in the book to real life mediation situations and give mediators advice for meeting the challenges of those very difficult conversations. This session is one-hour of "general" credit.

**"AVOIDING PESSIMISM IN MEDIATION."**

John Trimble, *Attorney and Mediator,*  
*Indianapolis, Indiana*

All of us who attend mediation on a regular basis soon come to realize that pessimism is one aspect of mediation that occurs in *every* mediation session. We learn that if we let pessimism cause us to quit, we would never settle anything. However, pessimism on the part of the parties and their counsel (coupled with impatience) can prevent success. Parties frequently come to mediation with a pessimistic view of the potential for success. Even optimistic or neutral parties can become pessimistic after the first demand and offer or as the negotiation proceeds toward apparent impasse. John will provide guides, principles and tools for addressing pessimism and getting past it. This session is one-hour of "general" credit.

12:40 – 2:20

SESSION TWO, CONT.

**THE ABUSIVE USE OF TECHNOLOGY WITHIN DOMESTIC VIOLENCE**

Haley Cutler, *Manager of Professional and Community Education,  
Ft. Lauderdale, Florida*

The presence or history of domestic violence may compromise the integrity of the mediation process. This workshop will identify the effects of modern technology on domestic violence. Recognizing the impact when these otherwise benign tools are used in inappropriate, threatening, and intimidating ways is an important tool for any mediator in the Twenty-First Century. Mediators will leave this training greater understanding of the tools themselves, and the spectrum of potential misuses and abuses that can effect mediation participants and diminish probabilities of success. This session is one-hour of “domestic violence” credit.

**“MEDIATOR ETHICS PANEL.”**

Moderator: Ross W. Stoddard, III, *Attorney-Mediator (civil & probate)  
Irving (Las Colinas), Texas*

Panel: Donna Doyle, *Attorney and Circuit Civil Mediator, Orlando, Florida*  
Clem Hyland, *Attorney and Circuit Civil Mediator, Orlando, Florida*  
Juliet Roulhac, *Attorney and Circuit Arbitrator, Miami, Florida*

Mediator ethics may be the last topic any of us want to study, but the unique and “neutral” role of the modern mediator is rife with challenges that are waiting to ambush even the most conscious and ethical mediator. This panel brings to the subject almost 100 years of legal practice, and perspectives of the litigator, the corporate counsel, and the mediator. Panels of this breadth and depth are rare and exceptional. Come discuss those thorny issues and your perspectives with an incomparable panel of experts. This session is one-hour of “ethics” credit.

**2:25 – 3:15 BREAKOUT SESSION THREE, SELECT FROM THE FOLLOWING:**

**“ETHICAL ISSUES IN CLOSING THE DEAL.”**

Michele Riley, *Attorney and Mediator  
New York, New York*

Repeat of 10:45 a.m. session, see above.

**“APPLYING DALE CARNEGIE TO MEDIATION.”**

Dr. Beverly Pennachini, *Dale Carnegie of Central Florida  
Orlando, Florida*

Repeat of 10:45 a.m. session, see above.

**2:25 – 3:15 BREAKOUT SESSION THREE, CONT.**

**“CONFLICT RESOLUTION”**

Dr. Deri Joy Ronis, *Mediator*  
*Sarasota, Florida*

Repeat of 10:45 a.m. session, see above.

**“MEDIATOR ETHICS.”**

Ross W. Stoddard, III, *Attorney-Mediator (civil & probate)*  
*Irving (Las Colinas), Texas*

Repeat of 10:45 a.m. session, see above.

**3:20 – 5:00 BREAKOUT SESSION FOUR, SELECT FROM THE FOLLOWING:**

**“DIFFICULT CONVERSATIONS.”**

Kim Kern, *Attorney and Mediator,*  
*St. Louis, Missouri*

Repeat of 12:40 p.m. session, see above.

**“AVOIDING PESSIMISM IN MEDIATION.”**

John Trimble, *Attorney and Mediator,*  
*Indianapolis, Indiana*

Repeat of 12:40 p.m. session, see above.

**THE ABUSIVE USE OF TECHNOLOGY WITHIN DOMESTIC VIOLENCE**

Haley Cutler, *Manager of Professional and Community Education,*  
*Women In Distress of Broward County, Inc., Ft. Lauderdale, Florida*

Repeat of 12:40 p.m. session, see above.

**“MEDIATOR ETHICS PANEL.”**

Moderator: Ross W. Stoddard, III, *Attorney-Mediator (civil & probate)*  
*Irving (Las Colinas), Texas*

Panel: Donna Doyle, *Attorney and Circuit Civil Mediator, Orlando, Florida*  
Clem Hyland, *Attorney and Circuit Civil Mediator, Orlando, Florida*  
Juliet Roulhac, *Attorney and Circuit Arbitrator, Miami, Florida*

Repeat of 12:40 p.m. session, see above.

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

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

**9:00 AM INTRODUCTIONS AND REMINDERS, RAFAEL GONZALEZ**

**9:15 – 10:05 AM TAKING MEDICARE'S INTERESTS INTO CONSIDERATION: MANDATORY INSURER REPORTING**

John Williams, President and CEO, Gould & Lamb  
Mark Popolizio, JD, Vice-President, NuQuest  
Todd Belisle, Vice-President, The Center for SNT Administration, Inc.

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

**10:05 – 10:20 AM BREAK**

**10:20 – 11:10 AM TAKING MEDICARE'S INTERESTS INTO CONSIDERATION: MEDICARE CONDITIONAL PAYMENTS**

Roy Franco, Esq., Vice President, Safeway  
Rochelle Lefler, Esq., Corporate Counsel, PMSI  
Floyd Faglie, Esq. The Law Office of John Staunton, PA

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

**11:10–12:00 PM TAKING MEDICARE’S INTERESTS INTO ACCOUNT: MSA ALLOCATIONS, APPROVALS, AND ADMINISTRATION**

Angela Wolfe, RN, Esq., Med-Fi  
Jacqui Green Griffin, Esq., Eraclides, Hall et al  
Danny Alvarez, Esq., The Center for MSA Administration, LLC

The panel will go through a comprehensive overview of Medicare Set Aside (“MSA”) allocations, the MSA approval process, and MSA professional administration. Within this context, the panel will discuss the Medicare Secondary Payer Act and CMS Memorandums. The panel will address the benefits and drawbacks of private and professional administration and what they mean to the Medicare beneficiary, the employer/carrier, and the attorneys representing the parties.

**12:00–1:00 PM LUNCH, ON YOUR OWN**

**1:00 – 1:10 PM AFTERNOON INTRODUCTIONS AND ANNOUNCEMENTS, RAFAEL GONZALEZ**

**1:10 – 2:00 PM PROTECTING SUPPLEMENTAL SECURITY INCOME AND MEDICAID ELIGIBILITY: SPECIAL NEEDS TRUSTS**

Jana McConnaughay, Esq., Waldoch & McConnaughay, PA  
John Staunton, Esq., The Law Office of John Staunton, PA  
Leo Govoni, The Center for Special Needs Trust Administration, Inc.

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

**2:00 – 2:15 PM BREAK**

**2:15– 3:00 PM THE UNKNOWN FRONTIER OF MEDICARE SET ASIDES: MSAs AND LIABILITY CLAIMS**

Michael Wescott, NAMSAP President, Moderator  
Tom Basserman, CMS San Francisco Regional Office  
Sally Stalcup, CMS Dallas Regional Office

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

The Multi-State Workers' Compensation Laws Breakout Session at the Workers' Compensation Educational Conference in Orlando is more than just another program on Wednesday of the Conference—it is a mirror of how the workers' compensation claims world now works. The Multi-State Workers' Compensation Laws Breakout Session focuses on the workers' compensation laws of Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas.

**MORE INFORMATION COMING SOON.**

# **We Will See You There!**

## **The National Association of Workers' Compensation Judiciary, August 21-24, 2011**

### **Marriott World Center, Orlando**

