Lex and Verum

The National Association of Workers' Compensation Judiciary

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Thoughts from the NAWCJ President

By Hon. Ellen Lorenzen

I have had to have a few hearings recently where a party was unrepresented and as always, such an event leads me to question how best to carry out my duties as a judge. Generally it's the claimant who is unrepresented but sometimes I have an unrepresented employer in my hearing room. Besides the usual difficulty in dealing with an unrepresented individual, an unrepresented employer poses the problem of what, if anything, to say about the potential problems that the failure to have insurance can cause. For starters, in Florida an employer who is required to have workers' compensation coverage but does not has committed insurance fraud and can be convicted of a felony. Who is supposed to advise that employer about her/his 5th amendment right? Failure to have insurance can also allow the injured employee to file a tort action against the employer. Who is supposed to suggest to the employee that (s)he may have the opportunity to seek a monetary judgment in a civil lawsuit or suggest to the employer that (s)he notify her/his liability carrier, in the unlikely event there is liability coverage? I have enough problems just figuring out how much I can tell the unrepresented party about procedural issues and case law decisions to try to decide if I should wade into the waters of civil law and constitutional law. So what can I tell unrepresented parties about the workers' compensation law and the rules that control what the parties and I may and may not do? After 7 years of sitting as a judge, I decided to try to find some answers, on the theory of better late than never.

First I looked at Canon 3 of the Florida Code of Judicial Conduct. That Canon starts off with the requirement that I must perform my duties impartially and then sets out the adjudicative responsibilities that I have. One of those requires me to be "faithful to the law and maintain professional competence in it." Another requires me to have "order and decorum" in proceedings. The Canon reminded me that, while I must treat both sides to the case equally and without bias, prejudice or preference, I can determine how the hearing will proceed.

Next I turned to the opinions of the Judicial Ethics Advisory Committee, the Florida committee that provides advisory opinions to judges (both elected and appointed) on ethics questions to see what it suggested about the limits of what I can tell pro se litigants. I located two opinions, both arising out from inquiries of judges who heard family law matters. Opinion 79-8 informed the judge that the majority of the committee felt that a judge "has a right and duty to assist the unrepresented litigant in uncontested matters to obtain information necessary to the court's decision, with the caveat that the judge not become an advocate or interfere with the trial tactics of counsel in the case." Apart from the obvious question (why would there be any trial tactics if the matter were uncontested), this opinion was of little assistance to me because I am concerned about unrepresented litigants in contested matters.

The second opinion, 94-46, was more helpful. The committee felt that a judge could advise a pro se litigant regarding "procedures" but the judge could not provide legal advice to a party. Opinion 94-46 referred to Paulson v. Evander, 633 so.2d 540 (Fla. 5th DCA 1994), in which petitioner sought to have Judge Evander removed from his case because he alleged the judge had redrafted had redrafted pleadings for petitioner's former wife. Both petitioner and his former wife were unrepresented. The court held that the lower court judge could not redraft pleadings for a party but had to rule on the case as the parties presented it. However, the court also said that a judge could explain the basis for a ruling "whether or not this may indirectly assist a litigant...."

I was also able to locate a second case, Barrett v. City of Margate, 743 So.2d 1160 (Fla. 4th DCA 1999). In that case appellant/plaintiff was unrepresented and the lower court judge, after dismissing appellant's complaint two times,

attempted to explain what appellant needed to do in order to draft a complaint which would withstand a motion to dismiss. The third complaint was no better and it was dismissed also. Appellant complained that the judge had an obligation to tell him the weakness of his case and to assist him. The court pointed out that the judge could not assist a pro se litigant to the detriment of the opposing party or to the point where the judge's impartiality was called into question, even in cases where procedural rules allowed a judge to assist a party in the presentation of evidence.

What conclusions did I draw from my research? First, I cannot advise unrepresented parties. So I cannot warn a party about a potential felony charge or suggest (s)he might want to refuse to answer a question. I cannot tell the injured employee that there is a separate personal injury system that might provide her/him with a remedy beyond what I can provide. Neither can I tell the employer that he might be open to suit and that he should notify his liability carrier of the accident. I decided that, for me, those activities were those belonging to someone who could advocate a party's interests, not a judge.

Second, I can tell the party(ies) about our procedural rules and what they require a party to do and not do. I decided this meant it was alright to explain what the necessity of filing evidence timely and what to do after I entered a final order if a party wanted to appeal my ruling.

Third, I can explain the basis for my rulings, even if this will inform the pro se party what (s)he needs to do in the future. I think this ability allows me to inform the party what the statute requires and what case I am relying on in making my ruling.

Fourth, I decided that I can take the lead in asking questions at a final hearing on direct examination of a party. For me, this means I can ask questions about facts I need to know in order to arrive at my decision on the benefits sought or the defenses raised. I am less comfortable asking questions as cross-examination of an unrepresented party if there is an attorney who has asked questions on direct examination. I think that once I do that I may cross the line into representation.

These are my personal decisions. I would love to hear from you regarding your approach to these issues and any ethical rules or case law you rely on. Email me, Ellen_Lorenzen@DOAH.state.fl.us.

Live Oral Argument at NAWCJ Judiciary College 2011

At NAWCJ Judiciary College 2011, the Florida First District Court of Appeal will hear oral argument in Keeton v. Kentucky Fried Chicken/Yum Brands, case 1D10-5789. Judiciary College attendees may wish to download the parties' briefs http://nawcj.webs.com//combined%20brief%2010-5789.pdf (the appellant and appellee briefs are combined in one document for your convenience).

In Florida, the employer/carrier has the authority to select much or all of the injured workers' medical care providers. Each party to a workers' compensation claim has access to a singular independent medical examination or "IME."

Florida has enacted a statutory process for resolving medical disputes. When there is a conflict in medical evidence, any party may ask for the appointment of an "expert medical advisor," or "EMA." The EMA is allowed access to medical records, and may examine the injured worker. The EMA's resulting opinion is presumed correct, unless clear and convincing evidence convinces the Judge of Compensation Claims to disregard the EMA opinion. The expense of the EMA process falls generally upon the party that sought the opinion.

In Keeton, the dispute is centered on whether the employer/carrier is bound by the opinions of their IME provider. The employer/carrier obtained an IME, and was dissatisfied with at least some of the opinions rendered. The E/C then successfully sought appointment of an EMA to resolve the conflict between treating physicians whom they had selected and the IME they had likewise selected.

This appeal argument will be thought provoking. The briefs filed by the parties suggest interesting arguments of law and statutory construction.

Read the briefs, attend the argument. We look forward to seeing you there!

Federal District Court: In "Reluctant Plaintiff" Context, Subrogee Insurance Company Can Sue In Name of Worker Even When Underlying Action Is For Wrongful Death

By Hon. David Torrey

I. Introduction

The Pennsylvania employer that has paid workers' compensation has broad subrogation rights with regard to the claimant's third-party recovery. Section 319 of the Act, 77 P.S. § 671. However, the subrogation right does not rise to the level of an assignment. The subrogee carrier cannot sue in its own name. To the contrary, precedent is clear that the employer's rights must be worked out through an action brought by or in the name of the injured worker. *Reliance Ins. Co. v. Richmond Machine Co*., 455 A.2d 686 (Pa. Super. 1983).

Because of these two rules, a problem occasionally arises in terms of vindicating the employer's subrogation right when the injured worker refuses or otherwise fails to file suit against the third party tortfeasor. This situation has been traditionally referred to as the "reluctant plaintiff" problem.

The answer in state court has been "use" practice. Analysis of the early cases demonstrates that such practice was commonplace in the enforcement of an employer's subrogation rights. *See Smith v. Yellow Cab Co.*, 135 A. 858 (Pa. 1927); *Mayhugh v. Somerset Tel. Co.*, 109 A. 213 (Pa. 1920); *Moltz v. Sherwood Bros., Inc*., 176 A. 842 (Pa. Super. 1935). Indeed, the Supreme Court has indicated that the employer is not to be denied its right of subrogation because the employee does not sue, but may institute the action in the latter's name. *Scalise v. F. M. Venzie & Co*., 152 A. 90 (Pa. 1930).

Although use practice is not provided for in the contemporary version of the civil procedure rules (as far as I can tell), neither is it prohibited. Indeed, Pa. R.C.P. Rule 2002 at least passively implies that it is still a valid method of assertion of a subrogee's rights.

The legitimacy of an action commenced by the subrogee through use practice is entirely consistent with the tenet that the cause of action "abides" in the injured employee. Through use practice, the subrogee is attempting to exercise not its *own* cause of action but that of the injured worker. The better rule, accordingly, is that the subrogee may assert its subrogation right through an action brought "on behalf of the injured employee" through use practice. *Florists' Mut. Ins. Co. v. Uniontown Hosp.*, 13 Pa.D.& C.4th 93 (1991) (permitting action); *Nationwide Ins. Co. v. Rigid Ply Rafters, Inc*., 4 Pa.D. & C.4th 444, 1989 WL 229395 (1989) (court allowing action in case denominated as "Nationwide Ins. Co. as subrogee of Springfield Floor Company and Eric E. Schnetzka", holding that case complied with *Reliance Ins. Co. v. Richmond Machine Co.*, 455 A.2d 686 (Pa. Super. 1983): "a cursory look at plaintiff's complaint indicates that plaintiff is seeking to establish the liability of defendants to Schneztka, the injured employee. The action was brought on behalf of Schneztka.").

II. Reluctant Plaintiff and Death Cases

What about reluctant plaintiff cases where the plaintiff is the executrix of an estate and the cause of action would be a Survival and/or Wrongful Death Action? To this writer's knowledge, authority from Pennsylvania state courts does not exist. (One case is close. *See Miller v. WCAB (Giant Food Stores, Inc.)*, 715 A.2d 564 (Pa.Cmwlth.1998) (procedural history indicates that it was the *employer* who "instituted an action for the wrongful death of Mr. Miller against various third party tortfeasors. Mrs. Miller retained her own counsel and, through him, assumed control of the third party action.")).

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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.

Reluctant Plaintiff, from P.3

III. New Federal Court Case

In an intriguing new federal court case, *Selective Way*, *supra*, the proper party to bring a "reluctant plaintiff" personal injury lawsuit in the accidental death context was at issue. As will be seen, so were the intricacies of the Federal Rules of Civil Procedure. A skilled industrial worker, Sensenig, was employed by Sensenig & Weaver Well Drilling. He died in a work-related traumatic accident on December 28, 2007. Employer's carrier, Selective Way, voluntarily paid initial medical treatment (inferred), and then benefits to dependents. Selective Way, in any event, soon held a lien of over $600,000.00.

Third parties were allegedly negligent in the accident. These third parties were Gunnebo Johnson Corporation and Blue Tee Corporation. For reasons that are not stated in the opinion, Mr. Sensenig's estate did not assert any action against these potential defendants.

On the eve of the expiration of the two-year statute of limitations, Selective Way asserted its own action against the defendants. Specifically, it filed a Writ of Summons in Lebanon County Court of Common Pleas. Plaintiff was designated, "Selective Way Insurance Company, as subrogee of Sensenig & Weaver Well Drilling." Within a few weeks, Selective Way filed a complaint, and thereafter the case was removed to federal court.

At that point, defendants moved to dismiss on the grounds that "'Selective Way as subrogee of Sensenig & Weaver' was not the proper plaintiff and had no standing to bring the claims that it had." In response, Selective Way on March 25, 2010 filed an amended complaint which redesignated itself by adding the phrase "and/or [subrogee of] Mary Sensenig as Executrix of the Estate of Floyd Sensenig." As this point, however, more than two years had passed since the accident.

The defendants again sought dismissal of the complaint, this time on limitation of actions grounds. Plaintiff argued that the amendment should "relate back" to the time of the initial, timely filing of the writ. The magistrate and district court (ratifying the latter's ruling), however, rejected the "relation back" argument and dismissed the case as untimely.

As a preliminary matter, the court reviewed the authorities (that is, those cited above), and declared:

> There is thus no real dispute that section 319 is the exclusive remedy for an insurer seeking to enforce its subrogation rights, and that section 319 requires an insurer to bring an action on behalf of the injured or deceased employee. *Reliance Ins. Co. v. Richmond Machine Co.*, 309 Pa. Super. 430, 455 A.2d 686, 690 (Pa. Super. 1983). *Accordingly, Selective Way as subrogee of Mary Sensenig is the proper plaintiff; Selective Way as subrogee of Sensenig & Weaver Well Drilling, Inc., is not.*

The court then addressed the subrogee's first argument, which was that its change of name was merely an amendment to the claims asserted in the original pleading. Selective Way invoked, in this regard, Federal Rule 15(c)(1)(B). The court, however, replied that this rule "is about adding claims or defenses, not adding plaintiffs." Selective Risk also invoked Federal Rule 15(c)(1)(C), which allows relation back when the "amendment changes the party or the naming of the party *against* whom a claim is asserted." (Emphasis added). This argument was likewise futile: "The Third Circuit has explicitly held that 15(c)(1) is inapplicable to amendments to add parties plaintiff."

The subrogee's second argument (inferred) was that, regardless of the proper captioning of the complaint, it, Selective Way, *was in fact the real party in interest*. The court rejected this argument, stating that under the substantive law, this was simply not so:

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National Association of Worker's Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

Reluctant Plaintiff, from P.5

> The substantive law in question is tort law, which covers the strict-liability claims alleged in the complaint. In arguing that it is the real party in interest, plaintiff seems to have forgotten that the real party in interest is the one who originally held the claim – the one who died, Floyd Sensenig – and then his widow as the executrix of his estate. The real party in interest is not the insurance company that simply pays benefits.

Further, although room existed under Federal Rule 17 to allow a claim to be timely *once the true real party in interest* is added, the circumstances required were not present here:

> As Wright and Miller [the treatise writers] have observed, Rule 17(a)(3) is sometimes invoked in conjunction with Rule 15(c) to allow substitution of a real party in interest to relate back to the time that the original action was filed…. However, since "a literal interpretation of Rule 17(a)(3) would make it applicable to every case in which an inappropriate plaintiff has been named," Wright and Miller urge that "the rule should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice."

Here the court could perceive no such injustice:

> In this case, there was neither any difficulty in determining the right party to bring suit nor any understandable mistake that was made. … Here, the law governing the claims in question is clear and has been clear for at least eighty years. *E.g. Scalise v. F.M. Venzie & Co.*, … 152 A. 90, 92 (Pa. 1930) (explicitly stating that the employer – into whose shoes an insurer could step – must institute a subrogation action in the injured employee's name)…. [S]elective Way was never, in its own right, the proper plaintiff to bring a claim, nor was there any reasonable basis to argue that it was.... Rule 17(a)(3) is meant to prevent injustice resulting from a reasonable mistake or misunderstanding. It is not meant to be a shield against the consequences of easily preventable errors.

Slip op. at 14-15 (distinguishing a case where a plaintiff was the correct plaintiff in the state where she sued, but *incorrect plaintiff* under the laws of the state that defined her cause of action; in that situation, late addition of the real party in interest *was* allowed).

This article was originally published in the Pennsylvania Bar Association Workers' Compensation Law Section Newsletter and is reprinted here with permission.

Judge Dave Torrey, is creator and author of the four-volume treatise *Pennsylvania Workers' Compensation: Law & Practice* (West 3rd ed. 2008), is a Workers' Compensation Judge for Allegheny County, Pennsylvania. He was appointed to his position during the Casey Administration. He is also a member of the Department of Labor & Industry WCJ Rules Committee and a Board Member of the NAWCJ.

Your NAWCJ Board of Directors 2011

Recycled Medication, Legalities and Ethics

By Brandi Ajpacaja

The Bioethics and Health Law Center, along with Mississippi College School of Law's Health Law Society, recently hosted a panel discussion: "Anesthetic Gas Reclamation- Medical Invention from a Legal and Health Care Provider Perspective. Panelists included Dr. James Berry and Mr. Steve Morris, inventors of the device. Dr. Elizabeth Heitman, Dr. John Hall, and Ms. Betty Ruth Fox also took part in the panel discussion including the perspectives of a practicing physician and an environmental lawyer.

When a patient is placed under anesthesia, the gas is pumped into the patient by a machine and a second tube collects the anesthetic gas as it is exhaled. These gases are not metabolized in the body; instead, they are breathed out by the patient. 95% of the gas provided to the patient during a procedure is breathed out before they leave the hospital. As the hazards of these exhaled gases were brought to light, OSHA mandated that actions be taken to diminish this workplace hazard. Currently, large, central vacuum systems are present in most operating suites. These vacuums suck in so much air that 3-5 complete air changes take place per hour in the operating suites. Through a complex pipe system, the anesthetic gas is pumped out of the hospital into the atmosphere.

Despite the fact that the hazardous gases are diluted when they leave the hospital system, there are still approximately 500,000 gallons of anesthetic gas released in the atmosphere per year. These modern anesthetics are fluorinated ethers, which allow them to be chemically more stable than previous generations of anesthetic gas. However, these gases are 1800 times worse on the environment than carbon dioxide. As the Environmental Protection Agency becomes more involved, it is clear that hospitals will soon have to look to other options for disposal of these gases.

Berry, Professor in the Department of Anesthesiology at Vanderbilt University, along with engineer, Morris, have invented a device that will revolutionize the anesthetic industry as a whole. Their device is based upon a closed vacuum system that instead of continuously pulling in massive amounts as air as their predecessors, will open only when there is something other than air to pull in. Then, product collected inside the machine is cooled to negative 1000 degrees Celsius and collected through cryogenic condensation. This product is then transported back to the company for purification purposes.

There are three major anesthetic gases which can be distinguished and separated through fractional distillation from each other as well as any dirt or dust that may have accumulated. Because the patents have expired on all the major anesthetics, this company can then market the purified recycled gas as a generic formulation of anesthetic gas.

Several legal issues come to play in the production and marketing of this gas beyond the environmental issues. Not only are there questions of patient consent, but also of ownership. Is it enough for a patient to know that the product has been approved by the FDA, or must they be informed of the process that created this product? When the patient or their insurance company pays for the drug, does it become theirs or is it simply on loan?

Ownership of removed cells and organs has been addressed in the judicial system in *Moore v. Regents* (51 Cal. 3d 120). As technology changes, the legal system will abound with these issues. Not only will this emerge as an issue with anesthetic gasses, but also with other drugs that are not metabolized in the body. Chemotherapy comes at an exorbitant price, but ultimately, is excreted from the body through urine, unmetabolized. The future of prescription drug recycling is a very real possibility that could revolutionize modern healthcare.

There are already situations in which "disposable" medical devices are recycled. There are even situations with products or parts being transferred between humans. These include: blood transfusions, corneal transplants, vascular grafts, and even morselized bones. Even breathed air is shared between individuals. As technology advances, legal issues that surround the technology will arise. At what point, does a person abandon his or her body or body parts? Being both fascinating and frightening, future possibilities with "recycled" drugs will uncover many thought-provoking issues in the coming years.

Ms. Ajpacaja is a law student at Mississippi College School of Law. This article originally appeared in the MC Legal Eye, and is reprinted here with permission.

The Deficit Deal's Impact on Workers Compensation

By Joe Paduda

When Congress reaches agreement on a deal to increase the debt limit, there will almost certainly be parts that significantly affect workers comp. Medicare and Medicaid are on the table, with both likely to lose hundreds of millions in funding over the next ten years. And as we all know, what happens in Medicaid and Medicare affects work comp via cost-shifting, fee schedule changes, reimbursement rules, and altered provider practice patterns.

It is not a question of 'if' these huge programs are cut, but rather "how much." Accounting for 23% of the Federal budget, Medicare and Medicaid have to be on the table if there's to be any measurable deficit reduction. Here's what may happen in the ultimate deficit reduction agreement. Along with my assessment of potential impact on work comp - Reductions in the amount Medicare pays hospitals for bad debts resulting from Medicare beneficiaries' failure to pay deductibles and co-payments; right now CMS pays 70 percent of those debts after the hospitals make "reasonable efforts" to collect.

Impact - hospitals will look to increase reimbursement from work comp and other private payers; work comp is usually the most profitable payer for hospitals; I'd expect this to increase. Cuts to Medicare payments to teaching hospitals for physician training and other programs.

Impact - more incentive to seek additional reimbursement from work comp - Allow or require CMS to negotiate directly with pharma for drug prices.

Impact - possible cost shifting to comp as pharma and other stakeholders seek additional funds to offset lower Part D reimbursement - reductions in Federal subsidies for Medicaid.

Impact - incentive for providers to cost shift; however Medicaid providers may not treat many work comp claimants so impact may be minimal. Give more power to the Independent Payment Advisory Board (IPAB) created by the Affordable Care Act; set a target of holding Medicare cost growth per beneficiary to GDP per capita plus 0.5 percent beginning in 2018.

Impact - possibly positive, as improvements in delivery systems, reimbursement, pay-for-performance, clinical guideline adoption and acceptance, and other tools/processes would help improve care and reduce errors. Reduced reimbursement for durable medical equipment (seen any scooter ads lately?)

Impact - lower margins for DME manufacturers and distributors will motivate cost-shifting, however fee schedules may mitigate those efforts. Watch for creative ways around fee schedules and 'upselling.'

Public opinion will help shape the outcome; recent polls suggest the public is more willing to accept some reductions rather than a wholesale overhaul of Medicare and Medicaid. That said, the health industry's various stakeholders are already hitting the phones hard to forestall - or more likely minimize - reductions to their favorite programs.

What does this mean for you? We're the mouse; CMS is the elephant; keep your head up, watch out for those big feet, and be nimble. Work comp will be affected by the ultimate deficit reduction agreement; success favors the aware and the well-prepared.

Joseph Paduda is the principal of **Health Strategy Associates**. The foregoing was originally published on his web blog Managed Care Matters at http://www.joepaduda.com/. It is republished here with the permission of the author.

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Pennsylvania Act Amended To Add Firefighters' Cancer Presumption: and Unfortunate Use of Phrase "SUBSTANTIAL COMPETENT EVIDENCE"

By: Hon David Torrey

Pennsylvania House Bill 797 amends the Act by expanding the ability of a career or volunteer firefighter to secure benefits for certain cancers. The new law creates an occupational disease, that is, certain cancers in firefighters, and establishes a rebuttable presumption of causation.*

Unfortunately, the legislature has provided that an employer may rebut the presumption by "substantial competent evidence" that shows that the firefighter's cancer was not caused by the occupation of firefighting. "Substantial competent evidence" is not, however, a concept of trial evidence but is, instead, the criterion of appellate review that is employed by the Appeal Board and the Commonwealth Court. When the Board and Court review for whether the WCJ's fact findings can survive review, these entities, employing substantial evidence review, inquire "whether there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Republic Steel Corp. v. WCAB*, 421 A.2d 1060 (Pa. 1980).

The usual trial burden of proof in compensation cases is, in contrast, preponderance of the evidence. *Giallonardo v. St. Joseph's College* (Pa. Super. 1955); *Mathies Coal Co. v. WCAB (Tau)*, 591 A.2d 351 (Pa. Commw. 1991) (appeal denied) (in fatal claim case, circumstantial evidence supported by the preponderance of the evidence proposition that deceased miner, found dead in coal mine, had died from electric shock-related heart attack).

WCJ's and the Commonwealth Court will likely treat the phrase "substantial evidence" the same as they would "preponderance." All may be *obliged* to do so, as "substantial evidence" as a trial evidence burden of proof is meaningless.

The law is, in any event, effective immediately. The final provisions of the bill state, "Section 4. The provisions of this act shall apply to claims filed on or after the effective date of this section…. Section 5. This act shall take effect immediately." The statute is provided below for analysis.

In general, the legislature accomplished the statutory change by tweaking Section 301(c)(1) and Section 301(c)(2), 77 P.S. §§ 411(1), (2); and by adding new Sections 108(r), 77 P.S. § 27.1(r), and 301(f) (codification undetermined).

1. ***Section 108***. Section 108 is, of course, our long list of occupational diseases, *viz*., diseases paired with certain at-risk occupations. When a worker presents in court with one of the diseases, and he has labored in the field at or immediately before onset, he enjoys a presumption of causation under yet another proviso, Section 301(e), 77 P.S. § 431.

New Section 108(r) provides as follows:

> (r) Cancer suffered by a firefighter which is caused by exposure to a known carcinogen which is recognized as a Group 1 carcinogen by the International Agency for Research on Cancer.

2. ***Section 301(f).*** New Section 301(f), meanwhile, provides as follows.

> (f) Compensation pursuant to cancer suffered by a firefighter shall only be to those firefighters who have served four or more years in continuous firefighting duties,
>
> [w]ho can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and

Continued, Page 10.

Substantial Competent Evidence, From P.9

> [w]ho can establish direct exposure to a carcinogen referred to in section 108(r) relating to cancer by a firefighter and
>
> [h]ave successfully passed a physical examination prior to asserting a claim under this subsection or prior to engaging in firefighting duties and the examination failed to reveal any evidence of the condition of cancer.
>
> The presumption of this subsection may be rebutted by substantial competent evidence that shows that the firefighter's cancer was not caused by the occupation of firefighting.
>
> Any claim made by a member of a *volunteer fire company* shall be based on evidence of direct exposure to a carcinogen referred to in section 108(r) as documented by reports filed pursuant to the Pennsylvania Fire Information Reporting System and provided that the member's claim is based on direct exposure to a carcinogen referred to in section 108(r).
>
> Notwithstanding the limitation under subsection (c)(2) with respect to disability or death resulting from an occupational disease having to occur within three hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease, claims filed pursuant to cancer suffered by the firefighter under section 108(r) may be made within six hundred weeks after the last date of employment in an occupation or industry to which a claimant was exposed to the hazards of disease.
>
> The presumption provided for under this subsection shall only apply to claims made within the first three hundred weeks.

3. ***Section 301(c)(1).*** Section 301(c)(1) has been tweaked. The proviso now states (addition in italics):

> (c)(1) The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employee, regardless of his previous physical condition, *except as provided under subsection (f),* arising in the course of his employment and related thereto …

4. ***Section 301(c)(2).*** Section 301(c)(2), meanwhile, is tweaked as it assigns "employer liable" (addition in italics):

> The employer liable for compensation provided by section 305.1 or section 108, subsections (k), (l), (m), (o), (p) [or], (q) *or (r),* shall be the employer in whose employment the employee was last exposed for a period of not less than one year to the hazard of the occupational disease claimed….

5. ***Miscellany.*** The law concludes with the following miscellaneous provisions:

> Section 3. The Department of Labor and Industry shall submit data on the amount of successful claims processed under section 301(f) to the chairman and minority chairman of the Labor and Industry Committee of the Senate and to the chairman and minority chairman of the Labor and Industry Committee of the House of Representatives two years following the adoption of this act and every two years thereafter.
> Section 4. The provisions of this act shall apply to claims filed on or after the effective date of this section.
> Section 5. This act shall take effect immediately.

This article was originally published in the Pennsylvania Bar Association Workers' Compensation Law Section Newsletter and is reprinted here with permission.

Judge Dave Torrey, is creator and author of the four-volume treatise *Pennsylvania Workers' Compensation: Law & Practice* (West 3rd ed. 2008), is a Workers' Compensation Judge for Allegheny County, Pennsylvania. He was appointed to his position during the Casey Administration. He is also a member of the Department of Labor & Industry WCJ Rules Committee and a Board Member of the NAWCJ.

The U.S. Post Office Bankrupt?

By John Gelman, Esq.

The Washington Post reported recently that the US Postal Service (USPS) may declare bankruptcy and cited high combined benefit costs as a major cause for its financial instability. The quasi-governmental agency is running into problems it claims because of its requirement to pre-fund $5.4 billion to a retiree health benefit fund and pay $2.5 billion to the federal workers' compensation fund.

The USPS's troubles mirror that difficulties strangulating the nation's network of state workers' systems caused by the inability to fund soaring medical costs enhanced by complications caused by duplicate administrative costs engulfed by a multiplicity of collateral programs. In contested claims injured workers are shifted to other benefit programs to pay for medical costs. Those secondary programs ultimately seek reimbursement from the primary benefit program, workers' compensation coverage, and literally clog up administrative dockets and create greatly enhanced processing costs and monumental delays.

While the USPS will seek assistance from the Republican majority in the U.S. Congress, it is uncertain what financial aid will be forthcoming, or whether Congress will take a deeper look at the nation's workers' compensation entirely. The last time the Republican's dominated
Congress proposals were suggested by the former Speaker, Newt Gingrich, to over haul the national system entirely.

The medical component is now in critical condition. It remains uncertain if it will be addressed in the next congressional term, or whether it will be the can that is kicked down the road to be dealt with in the future. The growing trend remains, that Federalization of the medical delivery component is the probable solution to both the USPS's compensation difficulties as well as the nation's.

This article was originally published on http://workers-compensation.blogspot.com/.

Jon L. Gelman is nationally recognized as an author, lecturer and skilled trial attorney in the field of workers' compensation law and occupational/environmental disease litigation. Over a career spanning more than three decades he has been involved in complex litigation involving thousands of clients challenging the mega-industries of: asbestos, tobacco and lead paint. Gelman is the author NJ Workers' Compensation Law (West-Thompson) and co-author of the national treatise, Modern Workers' Compensation Law (West-Thompson).

"Second Fridays Seminars" Returns to "Live" Format in 2011-12

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.

The schedule for 2011-12 will include the programs on wage and hour law, Medicare CMS issues, cultural diversity, and medicine. Plan now to join us for these exceptional programs at noon Eastern time on the second Friday of each month September through May, at no charge to NAWCJ members. Watch for details in the September *Lex and Verum*.

Workers' Compensation Leaders Gather

The 2011 Judiciary College will be attended by the Chief adjudicators of at least eight jurisdictions. In conjunction with the NAWCJ program, the Florida Workers' Compensation Institute will hold its 66th Annual Workers' Compensation Educational Conference (WCEC). Over 8,000 attendees are expected. This program will include a Regulatory Roundtable hosted by the Southern Association of Workers' Compensation Administrators (SAWCA) including agency heads from Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, and Texas.

The Wednesday Multi-state WCEC program includes regulators from Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Tennessee. WCEC and NAWCJ Judiciary College 2011 offer unprecedented opportunities to meet and learn from leaders of various workers' compensation systems. As budget and workload issues challenge Judges and administrators across the country, this rare opportunity to share ideas and to learn how a variety of jurisdictions are addressing these issues.

No other conference offers the variety of opportunities for adjudicator continuing education, judiciary collegiality, and interaction with judicial and administrative leadership from such a variety of jurisdictions and perspectives. NAWCJ Judiciary College and WCEC 2011, are a unique opportunity. There is still time to register for NAWCJ Judiciary College which includes all of these programs.

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Report: Chronic Pain Costs Up to $635 Billion, New Strategy Needed

A report released Wednesday by the Institute of Medicine urges a national effort to change how the country deals with chronic pain -- something experienced every year by at least 116 million adult Americans, at a cost of between $560 billion and $635 billion annually.

Much of that pain is preventable or could be better managed, the committee that wrote the report contends. The committee called for coordinated, national efforts of public and private organizations -- including workers' compensation and health care plans -- to create a cultural transformation in how the nation understands and approaches pain management and prevention.

"Given the large number of people who experience pain and the enormous cost, in terms of both dollars and the suffering experienced by individuals and their families, it is clear that pain is a major public health problem in America," said committee Chair Philip Pizzo, dean of the Carl and Elizabeth Naumann Professor of Pediatrics, and professor of microbiology and immunology at Stanford University School of Medicine in California.

Pizzo said that "all too often, prevention and treatment of pain are delayed, inaccessible, or inadequate. Patients, health care providers, and our society need to overcome misperceptions and biases about pain." Phil Denniston, president of the Work Loss Data Institute in Encinitas, Calif., publisher of the Official Disability Guidelines (ODG), said the treatment of pain -- chronic or otherwise -- is an extremely complicated issue.

The ODG chapter on chronic pain runs to 500 pages in the printed edition, Denniston said. He said the focus in treatment of pain should be on function, with the goal of "return to functionality" of the patient, whether to work or life activities. Denniston said there is recognition that painkillers, including opioids (narcotics), are being overused in some cases -- and that other medications may be overused as well.

Dr. Suzanne Novak, an anesthesiologist and Ph.D. who teaches at the University of the Texas School of Pharmacy in Austin, said that while she has not yet seen the study, it appears to confirm the need for taking "a tailored approach" to treating patients with chronic pain. The current system for deciding how to treat a patient may not include sufficient medical history information to allow an accurate diagnosis -- which must be the first step, Novak said. Without that, "there's bound to be incomplete treatment," she said.

Novak also said that it appears to be time to take a close look at the "strong emphasis currently on invasive treatment, including injections," and to recognize that many of the medications being used have potential negative aspects, including drug dependency. An analysis by the institute found that the medical costs of pain care and the economic costs related to disability days and lost wages amount to at least $560 billion, and lost productivity amounts to at least $635 billion annually. "Because the range does not include costs associated with pain in children or military personnel, it is a conservative estimate," the institute reported.

The report says health care providers, insurers, and the public need to understand that although pain is universal, it is experienced uniquely by each person, and that care, which often requires a combination of therapies and coping techniques, "must be tailored" to the individual patient. The institute comments that pain is more than a physical symptom "and is not always resolved by curing the underlying condition."

"Persistent pain can cause changes in the nervous system and become a distinct chronic disease."Moreover, people's experience of pain can be influenced by genes, cultural attitudes toward hardships, stress, depression, ability to understand health information, and other behavioral, cultural, and emotional factors," the institute said.

Continued, Page 14.

Chronic Pain, from P.13

The institute also recommends that most pain care and management "should take place through primary care providers and patient self-management, with specialty care services reserved for more complex cases." Health care organizations should take the lead in developing innovative approaches and materials "to coach and empower patients in self-management," the institute said.

Other recommendations include training programs for dentists, nurses, physicians, psychologists, and other health professionals in pain issues. A recent study found that only five of the nation's 133 medical schools have required courses on pain and just 17 offer elective courses. Licensing and certification exams should include assessment of pain-related knowledge and capabilities, and programs that train specialists or offer training in advanced pain care need to be expanded, the report recommends.

The report calls on Medicare, Medicaid, workers' compensation programs, and private health plans to find ways to cover interdisciplinary pain care. "Individualized care requires adequate time to counsel patients and families, consultation with multiple providers, and often more than one form of therapy, but current reimbursement systems are not designed to efficiently pay for this kind of approach and health care organizations are not set up for integrated patient management," the institute said.

The report also calls for greater attention within the National Institutes of Health (NIH, including that NIH designate a lead institute to move pain research forward and increase the scope and resources of its existing Pain Consortium.

The study was mandated by Congress and sponsored by the NIH. Pre-publication copies of "Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education, and Research" are available from the National Academies Press by calling 202-334-3313 or 1-800-624-6242 or on the Internet at http://www.nap.edu.

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GAO Looking into Fraud and Abuse in Federal Workers' Comp

***NATIONAL* [07/18/11]**

While Congress considers an overhaul of the federal workers' compensation program, the Government Accountability Office has launched an investigation into fraud and abuse of the existing system.

The GAO on Thursday posted an announcement that it is looking for information "on cases in which employees are currently abusing workers' compensation benefits." The office said fraud schemes might include a claimant working a second job, overstating his workers' compensation claim or collecting benefits for someone who is deceased.

Sen. Susan Collins, R-Maine, asked the GAO in January to audit the program to identify wasteful spending. Collins is a ranking member of the U.S. Homeland Security and Government Affairs Committee, which oversees administration of the Federal Employee Compensation Act, known as FECA. And Collins is not alone in her belief that more scrutiny is needed over the program. Last week, House Committee on Education and the Workforce approved a bill, House Resolution 2465, that would increase some benefits and modernize the system by allowing, for example, nurse practitioners and physician assistants to treat injured workers and allow the Department of Labor to cross-check a claimant's reported earnings with information held by the Social Security Administration.

The bill would also create a maximum benefit rate for all injured federal employees, capping benefits at 70% of wages. Currently the federal government pays a maximum of 65% of pre-injury wages for employees who have no dependents and 75% for employees who have dependents.

What's more, a budget proposal by President Barack Obama called for ending workers' compensation benefits when disabled federal employees reach retirement age. Collins has called for similar action. Congress, however, never voted on Obama's plan, having failed to adopt a budget in 2010.

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Live, From Biloxi, it's SAWCA!

A city that is a contrast of old world charm and modern civility, Biloxi, Mississippi hosted the Southern Association of Workers' Compensation Administrators 63rd Annual Convention the last week of July. The event was hosted in the Beau Rivage convention center and hotel, a towering, modern, presence on the Biloxi beach front. Biloxi is a community that was deeply traumatized by the landfall of Hurricane Katrina in August 2005. Some damage from this historic storm remains apparent six years later, but the tourist industry is very apparently recovered and thriving in what used to be a quiet little beach community. The casinos and hotels swell with people; walking back into the hotel from dinner on Thursday evening, the hotel's valet parking facility had filled to capacity and vehicles stretched one hundred yards down the driveway to the street, three abreast. In contrast to the modernity, the SAWCA events also included dining at Mary Mahoney's, a true Mississippi tradition for almost 50 years. Mahoney's, just across the beachfront highway is situated in a building dating to 1737. Despite Katrina's attempts to devastate all that was the Mississippi Gulf Coast, Mahoney's remains just as it ever was, a tribute to old world construction techniques and to the perseverance of the owners. The heart of this community is clear from the resilience of tried and true businesses like this one and from the amazing investment in infrastructure and industry obvious upon the trip into town.

SAWCA, formed in 1949, is an intriguing organization which has members from 19 jurisdictions, the District of Colombia, the Virgin Islands, Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia and West Virginia. Intriguing as much for what it is not as much as for what it is. SAWCA is not a continuing education seminar, with "classes" or "breakouts." The absence of the CLE mentality is refreshing; the tenor of the conference was simultaneously refined, genteel and relaxed. The dress code was casual. What the SAWCA Annual Convention is represents a value that cannot be quantified, or perhaps effectively verbalized, but in the end best experience for one's self.

The SAWCA Annual Convention was a unique opportunity to meet Administrators, Commissioners, Deputies, Judges and leaders from a great variety of States. The programs were about inspiration and perspiration, common problems and possible solutions, commiserating and brainstorming. Distinct from many programs, this was an environment of interactive presentations and discussions, driven in many instances by audience input and questions as much as any outline or syllabus of the speaker or speakers. The mood was inspiring, the interaction was invaluable, and the overall resulting experience unique.

The Annual Convention began Monday and early in the week included business meetings of the Association, and a Regulator Roundtable. On Wednesday the Convention began in earnest with a keynote speech by Gulfport, Mississippi Mayor George Schloegel. Gulfport is a "stone's throw" from Biloxi and similarly hugs the gulf-front. Mr. Schloegel is the former President and CEO of Hancock Bank, and possesses a distinct perspective on the challenges of running a business or government in our times. He brings to the table also the perspective of self-improvement and perseverance of a self-made success story.

On Thursday, the President of Makers Mark, Bill Samuels, Jr., provided insight on his company's journey of innovation from the perspective of a storied and venerable American industry. This distillery is the world's oldest, a National Historic Landmark, and produces an iconic brand. Despite this substantial foundation and history, however, Mr. Samuels recognizes the demands of the modern economy and exhibits a drive for innovation that is inspiring to anyone charged with managing a large organization, public or private.

The program included multiple committee meetings, which were facilitated by presenters, but which were more often driven by the audience interaction, questions, and comments. These programs were informative and motivating, both because of the subjects discussed and more so because of the opportunity to understand the issues faced by various state's workers' compensation systems and leaders, and the inspiring solutions and ideas that State's have conceived or implemented to address these concerns. SAWCA President-Elect, the Hon. Deneise Lott, perhaps best expressed the soul of this organization and event when she described this Convention. She said "it is about the people; that is what really matters."

In July 2012 the 64th Annual Convention will be held at the Homestead in Virginia's Allegheny Mountains. If you missed Biloxi, condolences; if you miss the Homestead, shame on you!

Visit SAWCA at: http://www.sawca.com

NAWCJ Goes Facebook!

Is the internet just a fad? May we expect it to fade from its position of prominence in our lives, in our lifetimes? There are those that believe it is possible and others that are at least hoping it is so. The future is hard to predict, and perhaps the critics are right. Many adjudication systems are dependent on the internet for email, e-filing and information dissemination. Until something better comes along, it is likely we will all be tied to the net to some degree. The National Association of Workers' Compensation Judiciary is invested in the internet. The NAWCJ has a website that includes volumes of information about the Association, archives of previous editions of the Lex and Verum, and news of what is happening with the Association. If you have not visited the site, it is worth the trip. www.NAWCJ.org.

The NAWCJ is venturing further into the world of the "wide web," by establishing a presence on both Facebook and LinkedIn. These are popular virtual communities that allow for networking and sharing among people with common interests. As we have learned, these are frontiers best challenged with the assistance of someone under the age of 25, and frankly teenagers are your best resource. If you have attended a state conference, or other gathering of adjudicators, which you found noteworthy, have a picture of an event or meeting that you believe would interest others in the workers' compensation adjudication systems around the country, and either have or are willing to establish a presence in these virtual communities, "click by" and drop us a note. Let us know what you think, contribute to the "wall" with a picture or comment.

Having recently (we wish) surpassed that age (teenage) at which such technologies might come as second nature, we admittedly are taking on a challenge by attempting to understand and use these these virtual communities. Undoubtedly, we will have challenges as we do. However, the Mission of the NAWCJ prominently includes the promotion of collegiality among those who adjudicate workers' Compensation disputes, and this is just one more way that we may work toward that goal. Welcome, and let us hear from you.

Find us on Facebook

LinkedIn

National Association of Workers' Compensation Judiciary

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
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Tallahassee, FL 32302
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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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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**

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.

Monday, August 22, 2011, Cont.

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**

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

9:45 - 10:00 PM **BREAK AND TRANSITION**

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**
All NAWCJ Judges invited!

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.

Tuesday August 23, 2011, Cont.

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.

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."

Wednesday August 23, 2011 Option One, Mediation, Continued

10:45 - 11:35 **BREAKOUT SESSION ONE, CONTINUED**
"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.

12:40 – 2:20 **SESSION TWO, CONTINUED**

"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.

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.

Wednesday August 23, 2011 Option One, Mediation, Continued

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.

"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

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

Wednesday August 23, 2011 Option Two, Medicare Set-Asides - ADVANCED

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.

Wednesday August 23, 2011 Option Two, Medicare Set-Asides – ADVANCED

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 McConnaughhay, Esq., Waldoch & McConnaughhay, 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.

Wednesday August 23, 2011 Option Three, Multistate Program

8:45 - 3:00 PM BREAKOUT ON MULTI-STATE WORKERS' COMPENSATION LAWS

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.

8:00 – 9:00 AM **CONTINENTAL BREAKFAST IN THE EXHIBIT HALL**

Program Moderator:
R. Briggs Peery, *Attorney*
Swift, Currie McGhee & Hiers
Atlanta, GA

The Multi-State group continues to grow each year. With the addition of Kentucky for 2011, the group is now comprised of legal experts from nine (9) different jurisdictions. In addition to Kentucky, represented jurisdictions are Alabama, Georgia, North Carolina, Mississippi, South Carolina, Tennessee, Louisiana, and Texas. Our experts present on the latest jurisdictional trends, case law, cost saving techniques and litigation strategies to assist claims' handlers and employer management groups conducting business in the Southeast and Texas. The format offered throughout the day encourages audience questions and participation in a manner that should not be missed.

The Breakout will begin with an opening general session to include an introduction of our participants. These participants are legal experts, workers' compensation judges, and state board regulators. The introduction will be followed by a panel discussion in which our experts will discuss significant legal issues and trends affecting employers and carriers within our nine jurisdictions. The incredible value of the general session is that it offers actual state board representatives discussing what is currently going on in their particular jurisdiction. You get the information directly from the source. Among the topics to be covered by our panel will be tips on how to identify and avoid getting in hot water with the judicial branches of our participating states, where each locale is on the electronic filing horizon, and what, if any, future legislative changes are being considered.

Following the conclusion of our general session, the special state breakout presentations will begin. This has proven to be a hugely successful way to present state specific law in detail in a fashion that encourages interaction between attendees and presenters. Each of the participating states will have presentations covering the uniqueness of their respective workers' compensation systems, some as stand-alone sessions, and others combined in a compare/ contrast type of presentation. Sample topics to be covered will vary depending on the state; however, the presentations will be sure to include state specific forms and form filing requirements, litigation pitfalls, tips on controlling medical expense, and much more. Some attendees choose to move from session to session to get specific information about each jurisdiction being presented. Questions from the attendees are not only welcomed, but encouraged. Where applicable, state forms and presentation outlines will be available in each breakout room.

The conclusion of the morning state breakout sessions will be immediately followed by a complimentary lunch for our attendees provided by the Multi-State Committee members. After lunch, a repeat presentation of the individual state breakout sessions will be offered thereby affording claims' handlers yet another opportunity to attend different breakouts.

To build on the success with which the 2009 and 2010 programs were met, the Multi-State Committee is once again offering a second afternoon program to run concurrently with the afternoon state breakout sessions. This year, we are offering something entirely different in the format of a panel discussion addressing a hypothetical workers' compensation case/fact pattern.

Specifically, we will ask our panel (and the audience) to dissect our hypothetical case in terms of settlement value. The presentation is designed to highlight how different, and in some cases similar, our jurisdictions view the same facts. What is a deal breaker in one state may not be viewed the same way in another. Following the conclusion of the afternoon state breakout sessions and settlement value panel discussion, the Multi-State program will end with a final, general session. Learning has never been more entertaining than how it is offered via our "Workers' Compensation Jeopardy." Back by popular demand, this game show/interactive format will include

our "celebrity" host leading and testing our competitors through a multitude of cross jurisdictional workers' compensation issues.

At the conclusion of the afternoon general session, the 2011 Multi-State Book of Workers' Compensation Laws will be provided to all break-out attendees. This book is extremely helpful for those conducting business in more than one state. The book includes the laws from each of our nine (9) participating jurisdictions. Due to high demand, please note, only one book can be offered per attendee.

8:45 – 9:30 AM **OPENING GENERAL SESSION: LEGAL TRENDS AND ISSUES FOR 2011**

State Regulators:
Gerald Stringer
Ombudsman, Department of Industrial Relations for the State of Alabama

Honorable Melodie Belcher
Director & Chief ALJ, Georgia State Board of Workers' Compensation

Honorable David Imahara
Administrative Law Judge, Georgia State Board of Workers'

Honorable Rick Thompson
Chairman & Appellate Division Judge, Georgia State Board of Workers' Compensation

Honorable Tasca Hagler
Administrative Law Judge, Georgia State Board of Workers' Compensation

Honorable Sheral Kellar (invited)
Chief ALJ, Louisiana Office of Workers' Compensation Administration

Liles Williams
Chairman, Mississippi Workers' Compensation Commission

T. Scott Beck
Chairman, South Carolina Workers' Compensation Commission

Honorable Rod Bordelon (invited)
Texas Commissioner of Workers' Compensation

Administrator of the Workers' Compensation Division of the Tennessee Dept of Labor and Workforce Development (invited)

9:30 – 9:45 AM **BREAK IN THE EXHIBIT HALL**

9:45 – 11:30 AM **INDIVIDUAL STATE OVERVIEWS WITH Q&A**

Individual State Presenters:

Alabama:

Kyle L. Kinney, *Attorney;* Michael P. Barratt, *Attorney*
Gaines Wolter Kinney, Birmingham, AL

Georgia:

Douglas A. Bennett, *Attorney;* R. Briggs Peery, *Attorney;* Michael Ryder, *Attorney;* Richard A. Watts, *Attorney;* Lisa A. Wade, *Attorney;* Cristine K. Huffine, *Attorney;* Charles E. Harris, IV, *Attorney*
Swift, Currie, McGhee & Hiers, LLP, Atlanta, GA

9:45 – 11:30 AM **INDIVIDUAL STATE OVERVIEWS WITH Q&A, CONTINUED.**

Individual State Presenters:

Kentucky:

Philip J. Reverman, *Attorney*
Boehl, Stopher & Graves, LLP, Louisville, KY

Louisiana:

Jeffrey C. Napolitano, *Attorney;* Dennis Paul Juge, *Attorney;* Matthew M. Putfark, *Attorney;* Keith E. Pittman, *Attorney*
Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley, Metairie , LA

Mississippi:

James M. Anderson, *Attorney;* David B. McLaurin, *Attorney*
Timothy D. Crawley, *Attorney;* J. Michael Traylor, *Attorney*
Anderson, Crawley and Burke, PLLC, Gulfport/Ridgeland/Tupelo, MS

North Carolina:

Trula Mitchell, *Attorney;* Sally Moran, *Attorney*
McAngus Goudelock & Courie, PLLC, Charlotte/Raleigh, NC

South Carolina:

Regan Ankney, *Attorney;* Mark Davis, *Attorney;* Mikell Wyman, *Attorney*
McAngus Goudelock & Courie, LLC, Columbia/Charleston, SC

Tennessee:

Terry L. Hill, *Attorney;* David J. Deming, *Attorney;* James H. Tucker, Jr., *Attorney;* John W. Barringer, Jr., *Attorney;* Heather H. Douglas, *Attorney*
Manier & Herod, Nashville, TN

Texas:

Robert D. Stokes, *Attorney;* Steven M. Tipton, *Attorney*
Flahive, Ogden & Latson, Austin, TX

11:30 – 12:30 PM **LUNCH (PROVIDED FOR ATTENDEES BY MULTI-STATE COMMITTEE)**

12:30 – 2:00 PM **REPEAT OF INDIVIDUAL STATE OVERVIEWS WITH Q & A (CONCURRENT SESSION)**

12:30 – 2:00 PM **WHY CAN'T WE ALL BE THE SAME?: A CASE/ FACT SETTLEMENT ANALYSIS BY EXPERTS FROM THE NINE MULTI-STATE GROUP JURISDICTIONS (CONCURRENT SESSION)**

2:00 – 2:15 PM **BREAK**

2:15 – 3:00 PM **CLOSING GENERAL SESSION:**
WORKERS' COMPENSATION JEOPARDY/DOOR PRIZES/RELEASE OF 2011 MULTI-STATE STATUTE BOOK