Lex and Verum

The National Association of Workers' Compensation Judiciary

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President's Page

By Hon. Ellen Lorenzen, President, NAWCJ

If you attended the college in August, I'm sure you remember Professor Ehrhardt showing portions of a movie to illustrate evidentiary problems. Coincidentally in August the ABA's Journal contained a list of 30 books recommended by attorneys who had been asked to name a book they would recommend to other attorneys to read. Most of the recommendations were non-fictional, either memoirs or biographies. But others were commentaries on ethical and social problems which attorneys encounter. The two literary pieces that came to my mind that illustrated moral/ethical dilemmas in a social context were Arthur Miller's play, The Crucible, and the movie, Lion in Winter. I am sure you all have your favorites, as well. In thinking about the issue of books and the law, I began to wonder about the influence of popular culture--movies, books, television, music--on our jobs.

In 1975, three years before I was admitted to the Bar, John Malloy published a book entitled, Dress for Success, which was my bible after I began practicing. I had a true blue, Navy suit (matching jacket and pants, white blouse, navy shoes with neutral colored pantyhose) to wear when I planned to select a jury and make my opening statement. I had a white, pure as a virgin, suit with a pale blue blouse and those same navy shoes to wear when I made my closing statement. I never wore jewelry other than my wedding band. Somewhere along the way, I ditched the skirts and began wearing slacks, lost the heels and pantyhose, and decided I could wear an additional ring and maybe even a bracelet or necklace. I still dress very conservatively and I can no longer tell you if I dress this way because I want to or because a 36 year old publication molded my belief that this is the way I am supposed to dress.

Popular culture changes continually and I make no effort to keep up. What interests/concerns me, however, is ways that popular culture might be playing a role in our courtrooms. For example, one of the requirements in our procedural rules is that an attorney, before filing a motion, must personally contact the opposing counsel to discuss the motion and attempt to resolve whatever the issue is. It is only after that event takes place, that the attorney is supposed to file her/his motion and seek a ruling from me. Because of this rule, I expect language in a motion that says, "I, Attorney Smith, have personally conferred or attempted to confer with Attorney Jones on 10/1/11 about this motion." What do I get? Ninety times out of one hundred, the word personally is left out of the motion. Sometimes the attorney will say (s)he sent a letter, fax, e-mail or text. Sometimes the attorney will indicate her/his staff made a phone call. Now I know from talking to my adult children and many of my friends that I am incredibly backwards because I refuse to accept texts on my phone. And I still remember the retired federal judge who taught my trial practice class in law school telling the story about an attorney who refused to accept phone calls because, "Nobody ever called who wanted to do anything to help me." But I somehow cannot accept the popular notion that sending the words, "do you agree or disagree with me on this issue" in an e-mail or text is a substitute for having a verbal exchange, even though everyone under the age of 40 believes this.

I see the relaxed culture of informality entering my office every day. For years every attorney I knew (including me) kept a suit coat and a dress shirt/blouse hanging behind the office door in case an emergency appearance in court was required. Today attorneys routinely appear in jeans and knit shirts for mediation and then apologize to me for their appearance when, during mediation, they find an immediate ruling on a discovery issue or whether I will grant a continuance would be helpful and my mediator walks them into my office. I really do not care that much how someone dresses but I cannot help but think that an attorney would want to show some respect to his client by appearing dressed for business.

I recognize that the aging process affects my viewpoint on the world. And I am concerned that my viewpoint unduly affects what I expect and accept from attorneys and parties alike. But I would sure like to see a popular television show with a hero/heroine who behaves civilly and respects people who disagree with her/him. Maybe I am just too old and wound too tight? As always, send your comments and any good books to Ellen_Lorenzen@doah.state.fl.us.

Assessing Credibility and Demeanor of Witnesses who Testify through Interpreters

By Michael Froomkin*

Judge Posner's decision in *Apouviepseakoda v. Gonzales*, 05-3752 (7th Cir., Feb. 2, 2007), has an interesting twist.

It's one of the great fetishes of US law that triers of fact, be they juries, judges, or administrative officials (including ALJs and Immigration Judges), deserve deference for their credibility determinations as they saw the live witness and the reviewer of the cold record did not. We don't question jury determinations — they're a black box, and juries are not called upon to give reasons for their decisions as to who to believe. The same is not true, however, of either judges or administrators. We expect them to issue reasoned opinions, and call foul when they fail to and when the reasons they give fail to hold water.

Indeed, one of the puzzles of administrative law is the so-called *Universal Camera* problem — suppose that an initial trier of fact reached one decision on the evidence but that the higher-ups in the agency appeals process reached an opposite conclusion. When the matter goes to the court of appeals, what weight should the court put on the trier's views? The issue implicates two competing values in administrative law: on the one hand the great deference to the front-line assessment of credibility, on the other hand the command in the Administrative Procedure Act that the agency, in deciding a matter, has full power to determine it (i.e. that its hands are not tied by lower-level officials). It's very hard for both of these to be true at once: if we give weight to demeanor then the front-line official has de facto power to limit the decisions of his/her bosses. If on the other hand we don't give any extra credence to the factual findings of the person who actually received the evidence, we've undermined an ancient principle of Anglo-American jurisprudence. We square that circle by saying that the trier's decision is part of the record that binds the agency. So it's free to make any decision, but its decision must be based on the record. The trier, we say only somewhat convincingly, hasn't bound the agency, he's just made part of the record.

Comes now Judge Posner in *Apouviepseakoda* to ask a really good question about credibility determinations by administrative agencies (and implicitly also by judges, although not juries):

> The fact that she was testifying through an interpreter has a significance that my colleagues do not appreciate when they say that "The IJ spent 6 hours in a hearing room, face to face, with Ms. Apouviepseakoda. We have never met her." I take this to be an allusion to the common though not necessarily correct belief that being present when a witness testifies greatly assists a judge or juror in determining whether the witness is telling the truth. Even if so in general, it cannot be so when the witness is a foreigner testifying through an interpreter, especially if the judge cannot even hear the foreigner, but only the interpreter. Reading the facial expressions or body language of a foreigner for signs of lying is not a skill that either we or Judge Brahos possess.
>
> We understand the dilemma facing immigration judges in asylum cases. The applicant for asylum normally bases his claim almost entirely on his own testimony, and it is extremely difficult for the judge to determine whether the testimony is accurate. Often it is given through a translator, and even if the applicant testifies in English, as a foreigner his demeanor will be difficult for the immigration judge to "read" as an aid to determining the applicant's credibility. Unfortunately, the Department of Homeland Security and the Justice Department, which share responsibility for processing asylum claims, have, so far as appears, failed to provide the immigration judges and the members of the Board of Immigration Appeals with any systematic guidance on the resolution of credibility issues in these cases.

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Assessing Credibility, from P.2

> The departments have not conducted studies of patterns of true and false representations made by such applicants, of sources of corroboration and refutation, or of the actual consequences to asylum applicants who are denied asylum and removed to the country that they claim will persecute them. Without such systematic evidence (which the State Department's country reports on human rights violations, though useful, do not provide), immigration judges are likely to continue grasping at straws—minor contradictions that prove nothing, absence of documents that may in fact be unavailable in the applicant's country or to an asylum applicant, and patterns of behavior that would indeed be anomalous in the conditions prevailing in the United States but may not be in Third World countries—in an effort to avoid giving all asylum applicants a free pass. The departments seem committed to case by case adjudication in circumstances in which a lack of background knowledge denies the adjudicators the cultural competence required to make reliable determinations of credibility.

The concern that demeanor evidence is less probative — or is being judged by people who are not properly trained to assess it — when testimony is rendered through an interpreter, is one that Judge Posner has raised before, notably in Djouma v. Gonzales, 429 F.3d 685, 687-88 (7th Cir. 2005), and more thoroughly in Iao v. Gonzales, 400 F.3d 530, 534 (7th Cir. 2005), where speaking for the court, Judge Posner wrote:

> We close by noting six disturbing features of the handling of this case that bulk large in the immigration cases that we are seeing:
>
> …
>
> 4. Insensitivity to the possibility of misunderstandings caused by the use of translators of difficult languages such as Chinese, and relatedly, insensitivity to the difficulty of basing a determination of credibility on the demeanor of a person from a culture remote from the American, such as the Chinese. E.g., Lin v. Ashcroft, 385 F.3d 748, 756 n. 1 (7th Cir.2004); Ememe v. Ashcroft, 358 F.3d 446, 451-53 (7th Cir.2004); Mendoza Manimbao v. Ashcroft, 329 F.3d 655, 662 (9th Cir.2003); He v. Ashcroft, 328 F.3d 593, 598 (9th Cir.2003); Deborah E. Anker, "Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment," 19 N.Y.U. Rev. L. & Social Change 433, 505-27 (1992); Neal P. Pfeiffer, "Credibility Findings in INS Asylum Adjudications: A Realistic Assessment," 23 Tex. Int'l L.J. 139 (1988). Behaviors that in our culture are considered evidence of unreliability, such as refusing to look a person in the eyes when he is talking to you, are in Asian cultures a sign of respect.
>
> 5. *Reluctance to make clean determinations of credibility. Gontcharova v. Ashcroft,* 384 F.3d 873, 877 (7th Cir.2004); *Diallo v. Ashcroft, supra,* 381 F.3d at 698-700; *Mendoza Manimbao v. Ashcroft, supra,* 329 F.3d at 660-61; *Diallo v. INS,* 232 F.3d 279, 287 (2d Cir.2000). When an immigration judge says not that he believes the asylum seeker or he disbelieves her but instead that she hasn't carried her burden of proof, the reviewing court is left in the dark as to whether the judge thinks the asylum seeker failed to carry her burden of proof because her testimony was not credible, or for some other reason.

This issue of demeanor in translation (and the implications for deference on appeal) seems like an important question. There must be a good student note or two in here somewhere.

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Blurring the Lines between Workers' Compensation Retaliation and Disability Discrimination

By Lynsie T. Gaddis*

A new trend in Kentucky has recently emerged where plaintiffs are attempting to base their workers' compensation claims on evidence that their employers allegedly mistreated them while they were on light duty or exercising some other type of accommodation after a work-place injury. Whether purposeful or accident, plaintiffs are blurring the lines between workers' compensation retaliation and disability discrimination. When trial courts let this evidence in, they are essentially allowing plaintiffs to morph a workers' compensation retaliation claim into a disability discrimination claim in actions where plaintiffs would not otherwise be permitted to plead disability discrimination because they do not have a "disability" under the Americans with Disabilities Act ("ADA"). Instead of focusing their evidence on whether the pursuit of workers' compensation benefits was a substantial and motivating factor in the adverse employment action, plaintiffs are focusing on evidence that they were mistreated while on light duty or while exercising some other type of accommodation after a work related injury. And some Kentucky trial courts are permitting it. It is important to curtail this type of evidence from the very start of an action that includes a claim for workers' compensation retaliation but does not include a disability discrimination claim.

Imagine a situation where an employee slips and falls at work, injuring his back. He is diagnosed with a low back strain and the physician issues certain restrictions, forbidding him to squat or lift anything for several weeks, which prevents him from continuing his normal job duties. Essentially, the employee is put on "light duty" and is permitted to do administrative work for the employer until the restrictions are lifted. During this time period, he continues to receive his full wage and benefits from his employer. Meanwhile, because he is seeking medical treatment, he files a workers' compensation claim. Because the employer created a light duty position for him and he was not required to take any time off work, he receives no income benefits (i.e. total temporary disability ("TTD") or permanent partial disability ("PPD")) from the employer's workers' compensation carrier. The workers' compensation carrier only pays his medical bills, otherwise known as "medical benefits." The employee violates the employer's safety policy while engaging in his light duty position and is terminated as a result of the safety violation. The employee subsequently files suit alleging workers' compensation retaliation. Instead of alleging that he was terminated because he was pursuing workers' compensation benefits, the employee claims that he was mistreated by his supervisor while on light duty and terminated because the supervisor thought he had been on light duty too long.

The important question to pose to the trial court is:
Is accepting a light duty position from the employer and receiving a wage from the employer after a work-related injury a statutorily protected activity pursuant to KRS 342.197? The answer to this question is no. While Kentucky has limited case law interpreting KRS 342.197, the published opinions that exist make it clear that the legislature intended for this cause of action to be a *narrow* public policy exception. Allowing plaintiffs to base their workers' compensation retaliation claims on benefits they are receiving from their employer and not from the workers' compensation carrier is inconsistent with controlling law. It would also seem that this result is inconsistent with the spirit of KRS 342.197, which is to protect employees from being retaliated against when they are exercising their rights and receiving benefits under the Workers' Compensation Act – not benefits they are receiving from their employer.

The landmark case establishing a cause of action for workers' compensation retaliation, *Firestone Textile Company Division v. Meadows*, 666 S.W.2d 730 (Ky. 1983), held:

> The only effective way to prevent an employer from interfering with **his employees' rights to seek compensation** is to recognize that the latter has a cause of action for retaliatory discharge when the discharge is motivated by the desire to punish the employee **for seeking the benefits** to which he is entitled by law. Id. at 732-734.

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Blurring the Lines, from P.4

Therefore, to prevail, a plaintiff is required to prove that the alleged retaliation was based upon his or her collection of compensation or benefits that are provided to employees under Kentucky's Workers' Compensation Act. The assignment of an employee to a light duty position after a work-related injury is not a benefit provided under Kentucky's Workers' Compensation Act. KRS 342.001 defines "compensation" under the act as "all payments made under the provisions of this chapter representing the sum of income benefits and medical and related benefits." KRS 342.001(14). Income benefits under Kentucky's Workers' Compensation Act are defined as "payments made under the provisions of this chapter to the disabled worker or his dependents in case of death, excluding medical and related benefits." KRS 342.001(12). Medical benefits are defined as "payments made for medical, hospital, burial, and other services as provided in this chapter, other than income benefits." KRS 342.001(13).

These definitions of "compensation" and "benefits" make it clear that assignment to a light duty position after a work related injury is not a benefit within the scope of Kentucky's Workers' Compensation Act. This makes sense because, in the scenario described above, the employers' workers' compensation carrier is not paying the employee's wage or his or her "income benefits" while the employee continues to work on light duty. In this common scenario, the employee never applied for nor received income benefits due to a finding of temporary total disability, permanent partial disability, or permanent total disability.

This is an important distinction to point out to the trial court, because to make a *prima facie* case for workers' compensation retaliation, the employee *has* to prove that the retaliation stemmed from his or her collection of workers' compensation medical or income benefits. As defined under Kentucky's Workers' Compensation Act, accepting a light duty position does not fall under any of these categories of benefits. Therefore, employers should aggressively seek dismissals as a matter of law when plaintiffs in Kentucky base their workers' compensation retaliation claims on allegedly being mistreated while on light duty. If the trial court refuses to grant a summary judgment motion, employers should move to exclude this evidence at trial to ensure preservation of the issue on appeal.

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Workers' Compensation Resources

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When an Employee Tweets

By David J. Walton

Another day. Another TWITTER event. This time it involves the National Football League. Last week, star running back Arian Foster sent a copy of a MRI image showing his severely injured hamstring to all of his followers by TWITTER. His "tweet" included an explanation of where his hamstring was specifically damaged.

The problem is that NFL teams fight hard to keep this type of information private. Foster is one of the top running backs in the league and his availability for the first week of the season, which starts next weekend, was in question. NFL teams often guard this information zealously. They do not want the opposition to find out how injured their players are. Even if a player is not going to play, NFL teams want their opponents to have to prepare as if Foster or another star player would be available.

There is also the gambling angle. The league administration has strong and very specific rules about the disclosure of injury information. Teams must be accurate in the disclosure of their information so that other teams aren't prejudiced. This, of course, is used by the gambling industry to make sure that the betting lines are accurate. One can only image how quickly the betting line moved before the Houston Texas operator after Foster sent his MRI to the world. Once can also imagine that his MRI was viewed by the team physicians for the other 31 other teams in the league, including the Texans first opponent, just to determine the likelihood that Foster was going to be able to play. On the way to work this morning I was listening to sport talk radio show, where one of the commentators, an ex-NFL player said that Foster's MRI showed his opposition exactly where they needed to hit him to do the most damage

On the same show, they interviewed Brian Kelly, the head coach of the Notre Dame Fighting Irish football team, about his players' use of TWITTER. During his interview, he made a great point. He said that TWITTER and Facebook and other forms of social media are here to stay. You cannot tell players, even college ones, that they can't use it. So, instead, he teaches them how to manage it.

Employers should use the same approach. Don't try to prohibit outright use of TWITTER by your employees. Social media is here to stay. I recently read an article that predicted that -- in three to five years -- e-mail accounts run by social media sites will be used for 80% of the business e-mail in the world. This is stunning. One can only imagine the implications.

Social media isn't going anywhere and TWITTER, much to the chagrin of many, isn't going anywhere either. Employers should assume that their employees will use TWITTER; an outright prohibition on TWITTER and social media is doomed to fail.

Employers must also adopt a specific policy. This policy must specifically identify the company information that should not be disclosed by employees by either via TWITTER or other forms of social media. The policy is important be If you ever tried a case in front of a jury, you quickly realize the jurors are not interested in applying the technicalities of the law. Juries are interested in fairness. After they issue a verdict and they walk out of the courtroom, they want to feel like they spent their time dispensing justice, not legal technicalities.

This is why a policy is so important. It is inherently fair to fire an employee for using TWITTER after they have been advised in writing that doing so could result in their termination. Fair notice is an essential element of the fairness that juries look for when they are deciding cases. This is why a policy is so important.

Like Coach Kelly, employers should train their employees on the right way to use TWITTER and other forms of social media. Just like with email, employees must assume that every "tweet" will end up on the front page of *The New York Times*. As everyone knows, "tweets" are potentially discoverable. "Tweets" could be saved for several months or even longer on Blackberries, iPhones and iPads. During this training, employees must also be told that they need to avoid the impulse to TWITTER right away about a work event. You can't take a tweet back; there is no "pullback"

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Some Thoughts:

If you have integrity, nothing else matters. If you don't have integrity, nothing else matters.

~Alan Simpson

Character is much easier kept than recovered.

~Thomas Paine

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Tweets, from P.6

button. Once a tweets is on the internet, its there forever. Employees should be encouraged to be very judicious in their work-related "tweets," to the extent they are even authorized to do them. And before pushing the send button, employees should be encouraged to think about the way a potential "tweet" could be used against them or used by the company's competition.

To protect their confidential information, employers should also monitor the use of TWITTER and other forms of social media. To protect confidential information in the courts, employers must prove that they took reasonable efforts to protect the secrecy of that information. For certain types of employers who know that their employees essentially engage in social media and are authorized to do it for some business purposes, these employers should actively monitor the internet to make sure that their confidential information and trade secrets are not being disclosed by their employees to the rest of the world.

In the same vein, employers must be very careful to limit access to the most secret information to a small group of employees. As Mark Zuckerberg, Facebook's founder and CEO stated, privacy in the world is essentially dead. Keeping this in mind, employers should work with their IT departments to make sure that their most confidential information is protected by limiting internal and external access; by setting up the data so that it cannot be transferred, copied, and/or printed; and by using software that easily tracks who accesses the document, when and what has been done with it.

So, once again, though the world of TWITTER can provide valuable insight for employers, the Employer must manage its use and educate employees. The NFL literally spends millions of dollars trying to protect information regarding player's injuries. Players are often told not even to tell their family about their injuries because teams will fear that this information will be divulged. Now, because of an iPhone and TWITTER, the world can see a very clear picture of Arian Foster's MRI showing a significant injury to his hamstring. And there is no way for him to pull it back. This is the kind of story that keeps most employers up at night, and it's an important lesson for us all.

Dave Walton is a member in Cozen O'Connor's Labor & Employment Practice Group and co-chair of the firm's E-Discovery Task Force. He concentrates his practice on all aspects of employment litigation. He has extensive experience in litigating matters involving restrictive covenants, trade secrets, fiduciary duties, and defending employers targeted by discrimination lawsuits. Dave also is an expert in the emerging area of e-discovery. He is an active member of The Sedona Conference, most recently speaking at its national conference and is a contributing member of The Sedona Conference's drafting team on proportionality. Dave is a frequent speaker at other national conferences on e-discovery and digital forensics and has also published numerous articles in these areas.

Pennsylvania Commonwealth Court Concludes Armed Robbery is a "Normal Working Condition"

Pennsylvania provides two levels of appellate review for workers' compensation awards. In *PA Liquor Control Board v. Workers' Compensation Appeal Board (Kochanowicz)*, the trial Judge awarded of benefits for a "work related psychic injury." The Pennsylvania Workers' Compensation Appeal Board affirmed the Judge's award, and the Commonwealth Court of Pennsylvania reviewed these decisions. Their analysis concluded that armed robbery can be a "normal working condition."

The Commonwealth Court noted that the parties did not present a factual dispute. The facts portrayed a thirty year employee of the Liquor Control Board, working as a manager in a retail liquor establishment. A "masked man" robbed this store "brandishing" guns, which were pointed at the employees. A gun was placed against the claimant employee's head as he was "prodded" during the robbery. The store's two employees were then tied to chairs with tape as the robber escaped. Neither employee suffered physical injury during the robbery.

The claimant employee thereafter began suffering "anxiety, depression, and flashbacks, and could not return to work." He testified that "he thought about the robbery every day, and that it disrupted his sleep, caused nightmares, anxiety, stress, and difficulty relating with his family." A psychologist under whose care the employee claimant came diagnosed post-traumatic stress disorder (PTSD). On the basis of this diagnosis, the employee claimant filed a claim for total disability benefits. He alleged that the PTSD resulted from the robbery at gunpoint. He testified that "he did not feel that he had improved to the point that he could return to his previous position with Employer because he was in fear for his life and he feared that something like that would happen to him again."

The Employer presented evidence that robberies and fights occurred in their stores. They noted that almost one hundred armed robberies had occurred in a five county area in the six years prior to the employee claimant's robbery. Because of these risks, the employer had instituted training on a monthly basis regarding issues in the stores and "a refresher on workplace violence and thefts."

The trial Judge concluded that claimant met his burden of proof, that "he was subjected to abnormal working conditions and that the workplace violence he experienced caused his psychic injury." This conclusion was affirmed by the Pennsylvania Workers' Compensation Appeal Board.

The Commonwealth Court, however, concluded that armed robbery was "normal" in this industry. In Pennsylvannia, "when the claimant alleges a psychic injury, he must prove that he was exposed to abnormal working conditions and that his psychological problems are not a subjective reaction to normal working conditions." *Babich v. Workers' Compensation Appeal Board* (*CPA Dept. of Corrections),* 922 A.2d 57, 63 (Pa. Cmwlth. 2007). The Court noted that "Psychic injury cases are highly fact-sensitive and the working conditions must be considered in the context of the specific employment. *Pa. Department of Corrections v. Workers' Compensation Appeal Board (Cantarella)*, 835 A.2d 860, 862 (Pa. Cmwlth. 2003)." If an event happens with sufficient frequency, which can be proven by the provision of training and education on such potential events, then "that working condition could have been anticipated." The Court concluded therefore that the employee claimant "could have anticipated being robbed at gunpoint." The Court held that the frequency of robberies and the proximity of those robberies to the employee claimant's store supported the conclusion that "robberies of liquor stores are a normal condition of retail liquor store employment in today's society."

An interesting dissent is predicated upon the proposition that the determination of whether such an event was "normal" or "abnormal" is essentially a factual analysis. The dissenter faulted the majority for declining to defer to the factual findings of the trial judge. Essentially, the dissenter returns to the standard of review, whether the trial judge's conclusions "are supported by the record." The dissent asserts that the majority opinion is not appellate review, but instead a re-weighing of the evidence, some of which is alleged to be "uncredited" evidence. The dissenting opinion provides significant analysis of the standard based essentially upon "whether there is substantial evidence to support the WCJ's findings of fact, citing, Bethenergy Mines, Inc. v. Workmen's Compensation Appeal Board (Skirpan), 531 Pa. 287, 291, 612 A.2d 434, 436 (1992)."

Public Speaking Tips from Steve Boyd*

1. Watch the Masters
If you've got a speech or presentation in your future, start looking for what makes successful public speakers so successful. Note their styles and habits and keep them in mind as good examples.

2. Fix Up, Look Sharp
If you're in a position where public speaking is required, let's hope you've already got a handle on the importance of personal grooming. If not, take heed: The better you look, the more ready and professional you'll feel. A lot of people are going to be looking at you -- make sure you look your best.

3. Hello, Room. Nice to Meet You.
If at all possible, check the specs of the room where you'll be speaking. Is it football stadium big or conference room big? What about the sound system? If you'll be using a microphone, it's a good idea to test it out beforehand. The more familiar you are with your environment, the more comfortable you'll be at the podium.

4. Don't Give It Away
If it really, truly makes you feel better to announce to the room that you're so nervous before you begin, go ahead. But your speech will have a lot more weight if you don't. Chances are good that you're the only one who knows you're shaking in your boots -- why show the cracks in your armor? Let them believe you have it under control, even if you don't feel like you do.

5. The Eyes Have It
People trust people who look them in the eye, so look at your audience when you're speaking to them. Don't look at the floor -- there's nothing down there. Don't look solely at your notes -- the audience will think you haven't prepared. You appear more confident when your head is up, which puts your audience at ease and allows you to take command of the room.

6. Your Errors Are Okay
So you tripped on the microphone cord. So what? So you said macro when you meant micro somewhere in your speech. So you accidentally said the name of your sister's ex-boyfriend during your toast instead of the name of her new husband -- so what! Everyone makes mistakes. Acknowledge them and move on.

7. It's SO Not About You
The more you can take the focus off of yourself, the better. After all, it's not likely you're being asked to give a presentation of your life story. So concentrate on the message and find freedom in just being the messenger.

8. Fake It 'Til You Make It
The old saying "fake it 'til you make it" is actually pretty good advice. Even if you have zero confidence in yourself, try acting like you do. The longer you fake it, the more comfortable it will feel, until, voilà, you're a bona fide confidence machine.

9. Be Yourself
We're all human. We're all a little afraid of the podium, the microphone, or the boardroom. Despite what you may believe, people don't want you to fail. They ultimately want to see you succeed. Give them what they want by just being the best you that you can be.

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*A professional speaker, seminar leader, and communication consultant, Steve Boyd is an effective motivator and trainer. Stephen D. Boyd has been involved in the study and practice of communication all of his adult life. His experience and expertise is in improving presentation skills, interpersonal skills, and listening skills.

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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.

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*

2011 All Committee Conference

November 1-4, 2011 Annapolis, Maryland

Conference Outline:

Tuesday November 1

Ex. Committee Meeting 2:00 p.m. -5:00 p.m.
Ex. Committee Dinner 6:30 p.m. -9:00 p.m.

Wednesday November 2

Continental Breakfast 8:00 a.m. - 9:00 a.m.
General Session: Guest Speaker 9:00 a.m. - Noon
Committee Meetings: 2:00 p.m. - 5:00 p.m.
Medical Rehab / Administration & Procedures
President's Reception 6:00 p.m. - 8:00 p.m.

Thursday November 3

Continental Breakfast 8:00 a.m. - 9:00 a.m.
Committee Meetings: 9:00 a.m. - Noon
Self Insurance & Insurance / Claims Administration
Convention Lunch Noon
Committee Meetings: 2:00 p.m. - 5:00 p.m.
Mgmt Info Sys. (MIS) / Adjudicator's Roundtable
Coffee Cordials & Confections 8:30 p.m. - 10:00 p.m.

Friday November 4

Continental Breakfast 8:00 a.m. - 9:00 a.m.
General Session: Guest Speaker 8:00 a.m. - 11:00 a.m.
Committee Reports & Adjourn

Attendees Will Include:

State Regulators & Legislators / Insurance Executives / TPAs / ALJs /Self-Insured & Insured Employers / SI Group Funds / State Guaranty Associations / IT & EDI Professionals / Medicare Compliance Firms / Defense & Plaintiff Attorneys Health Professionals / Claims Adjusters / Occupational Health Nurses / Pharmacy Management / Surveillance & Investigation Professionals

*Marriott Waterfront * Annapolis, Maryland*

Member $350 & Non-Member $500;Spouse-Companion Registration:$100; Hotel Accommodations: $195
For Convention Information Visit www.sawca.com / call Gary Davis - (859) 219-0194

Upcoming Conferences:

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

Tennessee Workers' Compensation Conference, November 17-18, 2011; Embassy Suites Nashville; $547.00 for 13 hours

http://www.mleesmith.com/tn-comp-11

WCRI Annual Conference, November 16-17, 2011; The Boston Park Plaza Hotel & Towers; $595.00 to $750.00.

http://www.wcrinet.org/conference_details.html

Oregon Workers' Compensation Educational Conference; Nov. 9-10, 2011; Salem Conference Center, Salem Oregon; $275.00-$350.00.

http://www.cbs.state.or.us/wcd/communications/ed_conference/ed_conf_8_11.pdf

Alabama Workers' Compensation Organization Conference; November 7-8, 2011; Westin Hotel, Huntsville, Alabama; $125.00.

http://awco.memberlodge.com/Default.aspx?pageId=576836&eventId=363668&EventViewMode=EventDetails

Eight Questions to help you Decide what Deserves your Energy

By: Steve Meyer

Some things you do because your boss tells you to. But where you focus your energy is often your call. To help you decide what's worth doing and what's not, time management expert Patricia Fripp suggests you ask yourself these questions:

1. Does this earn a living for me? We all have responsibilities that cannot be ignored.
2. Can I learn from this? Can I grow as a human being by doing this particular piece of work? Will I acquire new skills or insights?
3. Who am I helping? Who is depending on me to do this and why? Sooner or later any piece of useful work involves us with other people. Will this action bring me together with people in a worthwhile way?
4. Will I have a chance to do this again? Some opportunities come just once. Is this one? Or am I pretending it is because I really want to do it?
5. What would happen if I didn't do it? Am I doing this because I'm the right person, or because no one else will? Can this be delegated?
6. What will I have to give up to do this? How will it affect me now and in the future? What sacrifices will I and those around me have to make?
7. Am I being "emotionally blackmailed"? For example, am I doing this task just so someone's feelings don't get hurt? That may be a valid reason, but if it happens a lot it means you're advancing someone else's interests at your own expense.
8. Can I have fun? If I don't need to do it and don't have to do it and I can't enjoy at least some aspect of it, then it's probably not worth doing.

For more insights on how to make the most of your time, check out the free video "Time Management: Why it's Not about Time" at the Rapid Learning Institute, www.pwc.com.

WorkCompCentral.com is a vast repository of workers' compensation news and commentary from around the country. The material on pages 12-13 is reprinted with the permission of WorkCompCentral.com. The NAWCJ thanks WorkCompCentral.com for their support of this newsletter and the ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.

From www.workcompcentral.com

Texas DWC Approves Plan for Auditing Results of Lumbar Spinal Fusions

By Bill Kidd, Central Bureau Chief

The Texas Division of Workers' Compensation announced on Tuesday that it plans to study lumbar spinal fusions to determine if injured workers benefit from the surgery or suffer long-term problems. The "lumbar spinal fusion plan-based audit" is intended to set out the basis for the division to take disciplinary action against providers who perform large numbers of unsuccessful or unnecessary surgeries. "There has been and continues to be a dramatic rise in spinal fusion surgeries in the United States," stated DWC medical adviser Dr. Donald Patrick in announcing the plan.

Lumbar fusion typically involves use of plastic or metal devices to stabilize vertebrae in the back. Several national studies have questioned the effectiveness of lumbar fusions in workers' compensation cases, particularly as an initial treatment choice for chronic back pain.

The stated purposes of the audit are to:

- Promote delivery of quality health care to injured workers in a cost-effective manner.
- Assure that providers follow "medically accepted standards of care" in performing lumbar fusions.
- Assess return-to-work outcomes of workers who undergo lumbar fusions.

The division released a draft study plan in July and took public comments. Patrick said no changes were made to the draft. The annual number of spinal fusions in the United States increased by 77% between 1996 and 2001, while during that same period, hip replacement and knee arthroplasty increased only 14%, according to the U.S. Agency for Healthcare Research and Quality, Patrick said.

Patrick said rates of lumbar spine fusions in the United States increased more than 250% over the prior 10 years, "without scientific or clinical evidence to demonstrate that fusions are effective for most back conditions," according to the medical journal Spine. "While fusions have been found to be efficacious in the treatment of back pain caused by segmental instability, there is little sound medical evidence to support its efficacy in the treatment of chronic back pain not associated with instability," Patrick said. Patrick said promoting fusions as a treatment option for chronic back pain in patients without evidence of spine instability has been the dominant cause of the increased fusion rates. He said further study is warranted because of the high cost and rapid increase in surgery rates, combined with the rapid rise in the number of subsequent operations and complications.

Carriers in Texas applauded the audit plan, but suggested it could be expanded to provide more information. Trey Gillespie, senior workers' compensation director, Property Casualty Insurers Association of America (PCI), said the audit "should provide meaningful information on the quality of care in the Texas workers' compensation system when the worker undergoes more than one spinal surgery." PCI hopes the audit will be expanded in the future "to look at the health outcomes of Texas workers who undergo spinal fusions compared to workers who undergo less extensive spinal surgery" compared to workers who do not undergo any spinal surgery when the patients have "similar clinical and radiographic profiles," Gillespie said.

Gillespie cited the "growing amount of medical evidence referenced in the division's adopted treatment guidelines" that spinal fusions frequently result in poorer health outcomes than less invasive surgeries and no-surgery alternatives. "There is concern that the large medical costs associated with spinal surgery may motivate some health care providers to prescribe unnecessary spinal fusions, despite the risk of poor health outcomes," Gillespie said.

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Lumbar Fusion, from Page 12

Steve Nichols, workers' compensation manager, Insurance Council of Texas, said the council also supports the study. "There have been some instances of possible overuse" of lumbar fusion in the Texas system, and the audit should provide a mechanism for detecting and correcting problems, he said.

The Texas Medical Association said earlier, in comments filed by its Ad Hoc Committee on Workers' Compensation, that it supports the division's efforts to assure quality care for injured workers. Dr. Bernard Swift, San Antonio, chairman of the committee, asked for clarification of questions to be used in the audit process. Swift was not available for comment on Tuesday.

The planned audit, to be conducted through the Office of the Medical Adviser, will look at providers who conducted lumbar fusions "as the first lumbar surgical procedure" with a re-operation rate of 20% or higher. The audit will consider the "medical necessity and appropriateness" of the surgeries based on the DWC's Medical Quality Review Procedures and provisions of the Labor Code.

The office will select not more than 10 providers with the highest re-operation rates for lumbar fusions, and will select enough procedures performed by each provider to produce a statistically valid sample. The data will be selected on first lumbar fusions conducted between May 1, 2007, and April 30, 2010. Providers currently under review by the Medical Quality Review Panel, or who were reviewed in fiscal year 2011 (which ended Aug. 31, 2011), will not be part of the new audit.

One Way to ID Scofflaw Employers: IRS Co Op

By David J. DePaolo

Al Capone wasn't brought down on racketeering charges.

No, it was income taxes. And now scofflaw employers who misclassify their workers as independent contractors will face similar fate if agreements between The U.S. Department of Labor (DOL), the Internal Revenue Service (IRS) and labor departments of up to 11 states prove fruitful. U.S. Labor Secretary Hilda Solis said at a ceremony in Washington, D.C., that she signed memorandums of understanding with the IRS and labor officials in Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington state.

Solis said state labor officials in Hawaii, Illinois and Montana, as well as New York Attorney General Eric Schneiderman, also have agreed to sign memorandums of understanding with the U.S. Labor Department's Wage and Hour Division. The agreements call for the state agencies and the IRS to share information with five federal agencies: the Wage and Hour Division, the Employee Benefits Security Administration, the Occupational Safety and Health Administration, the Office of Federal Contract Compliance Programs and the Office of the Solicitor General.

Under the terms of the memorandum:

- The IRS will evaluate and classify referrals made by the DOL and conduct examinations at IRS discretion.
- The IRS, at its discretion, will share employment tax referrals with state and municipal taxing agencies that are part of the agreements.
- The IRS will provide annual reports to the DOL summarizing the results of the referrals.
- The IRS will alert the DOL when employers file lawsuits following an examination based on a Labor Department referral.

The program has opposition from Associated General Contractors (ACG), a lobbying group for the construction industry. They're concerned that some employers will be unwittingly penalized due to the complexity of employment laws because the definitions of employee and independent contractor are different between IRS rules and the various state rules.

I disagree. The agreements between the Feds and the various states call for information sharing only. It will be up to the state labor departments to bring enforcement actions within the context of their own laws. Once the unscrupulous contractors start getting wind of cases being filed as a result of this information sharing they will either start complying, or will find other ways to evade the law and compete unfairly.

One element that I would urge state labor departments that are operating under these agreements is to institute an amnesty program that would allow formerly non-compliant employers, whether intentional or not, to mea culpa and bring their businesses into compliance.

Workers' Compensation Research Institute Publishes *Prescription Benchmarks, 2nd Edition: Trends and Interstate Comparisons*

The Workers' Compensation Research Institute (WCRI) has published its second report documenting and comparing the use and pricing of prescription medications. Seventeen states (California, Florida, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Texas, and Wisconsin) were studied by WCRI, over a twenty-four month period of claims ending in March 2008. The dates of injury included in the study were between October 2003 and September 2007. The claims studied were those with seven days of lost time or greater, with at least one workers' compensation provided prescription. WCRI concludes that their methodology understates the quantity and costs of prescription medications, because of the prescription medications in many claims are utilized beyond the twenty-four month parameter that was studied in this analysis. They further note that statutory/regulatory changes in some study states, during the period studied, results in some challenges in interpretation and comparison of their data.

The report provides analysis of individual state results and comparisons among the seventeen study states. WCRI posits that the results of this analysis will be of interest to regulators and others as the issues of pharmacy fee schedules, physician dispensing and prescription patters are debated and reviewed. The results of the study do not appear to indicate any one factor is consistently the cause of changes in costs. The variety in state regulation, and apparently tradition or predilection for generic use, each contributed to the challenges of comparing various state's results.

The analysis considers such facts as the average prescription cost per claim, the average price per dose, the average price per prescription, the average doses per prescription, and the average number of prescriptions written per doctor visit. The study does not distinguish between "new" and "refill" prescriptions in these regards. Only medication which the patient took with them was studied, no medications administered in the doctor's office were included. The report's phraseology regarding how data was captured and studied illustrates that there are significant challenges in distilling the various state's data to common terms and doses in order to facilitate comparisons.

California had the highest percentage of claims with at least one prescription, at seventy-eight percent. Florida was a close second at seventy-seven percent. The lowest percentage states were Massachusetts (thirty-eight percent) and New York (forty-four percent). The report notes that the extent to which chiropractors act as the "sole treating provider" contributes somewhat to the variations. Regardless of the cause of the disparity, these examples of the highest frequency and lowest frequency aptly illustrate the marked divergence among the study states. California at seventy-eight percent is forty percentage point higher than the lowest state, Massachusetts at thirty-eight.

Florida, Louisiana and Maryland together led the study with the highest prescription costs per claim. Louisiana had the highest cost per claim at $1,182. This figure was fifty to seventy-five percent higher than costs in states that the WCRI characterizes as "the states with higher prescription costs." This is a notable and significant difference. WCRI identifies the causes, including higher medication utilization and physician dispensing:

> Among the stales with higher than average prescription costs per claim, higher utilization of prescription drugs (in Louisiana, New York, North Carolina, Pennsylvania, and Texas) and more frequent and higher priced physician dispensing (in Florida and Maryland) were among the main reasons for the higher prescription costs. Higher prices paid for common drugs (in Louisiana, New Jersey, New York, and Pennsylvania) and more frequent use of brand names (in Louisiana, New York, Pennsylvania, and Texas) also contributed to higher prescription costs.

Thus, although comparison of results is complicated by the variety of variables, it appears that specific variables can be identified for specific states.

The report notes that average costs per claim were reasonably consistent in the time period 2005 to 2008, except in Florida and Minnesota. The increase in Florida costs is attributed by WCRI to physician dispensing, while the Minnesota increase is attributed to increased utilization of particular medications.

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WCRI's data supports that physician dispensing is not a consistent element in cost issues regarding medications. The report identifies states in which physician dispensing is "not generally allowed (Massachusetts, New York, and Texas), and then divides the remaining states into those in which physician dispensing is "relatively uncommon" (Iowa, Minnesota, North Carolina, Tennessee, and Wisconsin), states in which "physician dispensing had a medium presence" (Indiana, Louisiana, New Jersey, and Pennsylvania) and states in which such dispensing is both "common and higher priced" (Florida, Illinois, Maryland, and Michigan). They conclude that market-share for dispensing physicians grew overall during the period that was studied.

The report explains that there are multiple factors that contribute to the cost of prescriptions. These include the pharmacy pricing, the comparative volume of name-brand versus generic formulations, and the volume of prescriptions which were "physician dispensed." For example, Tennessee and Minnesota both demonstrated marked increases in the average number of doses prescribed per claim during the study period. Some of the increase was attributed to increased dosage of "frequently used narcotics."

The results of the anaylsis supported that the price per dose paid to pharmacies was reasonably static overall during the study period. WCRI defines "little or no change" in pricing as less than three and one half percent. They note that the average price per dose from pharmacies decreased markedly in some instances, citing Indiana as an example (approximately six percent decrease). Despite the overall "static" pricing picture, they note that the price for certain categories, however, increased. These were noted in "the price per pill paid for sleep inducing, antidepressant, and anti-anxiety (SIDA) medications, gastrointestinal agents, anti-infective medications, and other categories."

In all, this report demonstrates an interesting but mixed series of results. The entire report and various other reports can be reviewed on the WCRI website, http://www.wcrinet.org/about.html.

The Workers Compensation Research Institute is an independent, not-for-profit research organization providing high-quality, objective information about public policy issues involving workers' compensation systems. Organized in late 1983, the Institute does not take positions on the issues it researches; rather, it provides information obtained through studies and data collection efforts, which conform to recognized scientific methods. Objectivity is further ensured through rigorous, unbiased peer review procedures.

Save the Date!

The National Association of Workers' Compensation Judiciary, August 19-22, 2012

Marriott World Center, Orlando

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THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2012 NAWCJ Judicial College August 19 through 22, 2012, in Orlando, Florida. If you are interested in sponsoring any of the following:

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