

Lex and Verum

The National Association of Workers' Compensation Judiciary



Number XXVII, November 2011

President's Message

By Hon. Ellen Lorenzen, President, NAWCJ

I happened to have two final hearings in one week this past month in which both injured employees had significant mental health issues. In one, the claimant's complaints were not related to the accident but were causing problems in the provision of medical care because most of the treating physicians refused to see the claimant after varying periods of time because of claimant's threats and behavior. The pain management doctor, who tolerated the claimant the longest and who testified he always saw claimant as soon as he showed up for his appointment so that the other patients in the waiting room would not get frightened and upset, finally backed out of the case two days before my trial. I alerted my security guard ahead of time about potential problems during the hearing but, as it turned out, all claimant did in my hearing room was cry (for 3 hours) with his elderly mother sitting behind him, also crying.

In the second case, the claimant had significant physical injuries (a displaced calcaneal fracture, multiple facial fractures with trigeminal nerve entrapment, a biceps tear with shoulder impingement, and, as you might expect, low back pain) and was very depressed over his physical condition but he was also intensely angry over a delay in medical care (an anger fueled by his orthopedist who lamented that the claimant had been sent to him too late after the accident for the necessary emergency surgery to reduce the heel fracture and that all he could do after the fact was to try to salvage as much ankle function as possible). Fortunately, claimant's psychiatrist was available by phone the morning of the hearing and he had worked hard through counseling and medication to get claimant past the boiling point so that the hearing itself (all six hours of it) went fairly smoothly, although claimant's anger was evident to all present.



Kimberly Papillon, California Judicial Council, Administrative Office of the Courts, San Francisco, CA Spoke at Judiciary College 2012 on bias and perceptions.



Judges from over 13 Jurisdictions attended the 2012 Judiciary College.

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Judiciary College 2012 included a live oral argument of a pending Florida case.



Judiciary College 2012 included a live surgery!



There were Elvis sightings at Judiciary College 2012's evening entertainment.

President's Message, from Page 1.

In between the Monday and Thursday of these hearings, I had several telephone calls and visits from a nephew of mine who suffers from some sort of mental health disorder and who was convinced that an acquaintance was stalking him, his brothers, and his father. He was frantic to prevent what he perceived as imminent doom to his family, even though the rest of the family assured me everything was fine.

With all of this going on, I started looking on line to see what guidance I could find to help me deal with mentally ill claimants and I located a link to a publication of the California court system, <http://www.courts.ca.gov/partners/documents/Chapter11.pdf>.

Unfortunately I could not trace the link back to determine its date but I found the material quite interesting. First it pointed out that the urge to help someone who is mentally ill is quite strong. That comment let me know that my unconscious brain (the part Ms. Papillon introduced us to at our August college) might take over and influence my rulings, so I had to be particularly careful to make sure I ruled based on facts. It also reminded me, as reinforced by my discussions with my nephew, that I am not always going to be able to explain my perception of reality to one whose own perception is skewed by illness. Lastly, the article reassured me that asking the second claimant's psychiatrist if he thought the claimant (who was not present when his doctor was testifying) would be a danger to anyone in my hearing room was not an overreaction on my part.

There were several suggestions I found helpful in the article. If the claimant is not represented, provide her/him with the same information about what (s)he will need to do in order to prove her/his case but also let the person know that you tell everybody these things so that (s)he does not feel singled out. Do not be overly aggressive in asking questions or overly insistent that the person provide answers; this may increase an already anxious person's level of anxiety and lead to increased aggressive behavior or responses. Just relax and do not react to argumentative, unhappy folks but indicate you are trying to help within the limits of what you can do. Let the individual express her/himself but stay in charge and call a halt to the proceedings if the claimant gets out of hand.

I am sure that all of you have encountered mentally ill individuals in your hearing rooms as well and have your own strategies for dealing with them and their family members. I would enjoy hearing your suggestions and particularly would like to hear your thoughts on how we can best protect ourselves and our staff without causing the claimant to become even more agitated or threatening. As always, e-mail me at Ellen_Lorenzen@DOAH.state.fl.us.

Body Language Boardroom Basics: The Non Verbal Signals You Must Decode!



By: Eliot Hoppe*

Ed. Note: the following is chapter one of the book bearing the title above. The chapter is titled “The Three Types of Body Language.” The entire book, and multiple other body language books and articles are available on his website, <http://www.paramountlearning.com/>

Anytime a group of people is assembled, hundreds of silent signals are flying back and forth. Sometimes we pick up on those unintentional clues; more often, we miss them.

Learning how to “hear” those nonverbal messages is critical to your success. Imagine what your board room meetings would be like if you had no control over the words that came out of your mouth. What would conversations be like if everyone involved spoke a different language? Chaos! Without control over our communication, no one would be able to accomplish anything!

Our nonverbal communication is muddled, but not because everyone is speaking a different language. In fact, body language is a universal form of communication. No, we misinterpret messages because we don’t know what to look for, or understand how to interpret what we see.

But, before you can interpret body language, you must learn how to spot the signs. Humans display body language in three different ways:

- Intentional behavior
- Intentional but hidden behavior
- Unintentional behavior

These three types of behavior are constantly in play in every boardroom. Understanding how to differentiate between the three is the first step.

Intentional Behavior

Intentional behavior includes the body language we consciously demonstrate, usually to send a clear and direct message. For example, we purposely cross our arms and scowl to communicate anger, and shrug when we don’t have answer. Intentional behavior is much easier to identify and read, because the message is being obviously stated.

Intentional but Hidden Behavior

Intentional behavior is another example of a conscious decision to act. However, the exact message is usually disguised in some way. When we hide our true opinions with exaggerated body language, such as a wide smile and enthusiastic nod in response to an idea we dislike, we are using intentional but hidden behavior.

Another way to use hidden language is to use a gesture or signal discreetly, so that only a select person or group gets the true meaning of the signal. A subtle roll of the eyes when the speaker isn’t looking, for example, is one way to deliberately communicate a veiled message.

Both forms of intentional but hidden behavior are easy to spot, especially if you are the targeted recipient. Interpretation doesn’t take much effort either, because the message is sent with an unmistakable intent to say something specific.

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NAWCJ National Association of Worker's Compensation Judiciary

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"Body Language," from Page 3.

Unintentional Behavior

Unintentional behavior includes the postures, expressions, and gestures we subconsciously display during verbal communication. Most of us are unaware that we are sending these signals, but they are an essential part of our personality.

Unintentional behavior is manifested in our characteristic body language, personal habits, and individual mannerisms. Therefore, without a conscious effort, we have no way to control what messages we send, or how these messages are interpreted. Though we all have a specific style, and a unique physical response to certain emotions, the basic signals are universal. Once you understand the fundamentals of unintentional body language, you will be able to leverage this knowledge to get exactly what you want in every situation.

Because unintentional behavior is the most difficult body language to perceive and decode, this ebook will focus on developing two specific skills:

1. You will learn how to identify and interpret the unintentional body language others subconsciously display.
2. You will learn how to manage you own behavior by keeping unintentional behavior in check and using intentional behavior to communicate your messages.

Eliot Hoppe is a leading authority in the field of body language communication, non verbal influence and deception detection. An accomplished speaker and facilitator, Eliot has trained thousands internationally and worked with leading organizations like 3M, Cartier, Nexen and TELUS to help develop the skills of their employees in body language communication and non verbal influence. Eliot is the co-author of the Amazon best-selling book, **Selling: Powerful New Strategies for Sales Success**. His E-Learning program Body Language Communication: **The Science of Silence** is already being regarded by many as being the most comprehensive program available today, on the subject of non verbal sales influence and body language communication. He has written many articles on Body Language Communication and is consulted by the media to decode the emotions and body language of notable people in the news, politicians and celebrities.

Texas Department of Insurance makes Conference Presentations Available Online

The Texas Department of Insurance Division of Workers' Compensation (TDI-DWC) has PDF versions of presentations made at their 2011 Workers' Compensation Educational Conference. Many of the presentations are Texas-specific, but may be of general interest. Topics included their benefit review conference process, their health care practitioner intake process, and their pharmacy closed formulary rules.

There is also an excellent paper on healthcare reform and the Implications of the Patient Protection and Affordable Care Act for Workers' Compensation, presented by the Executive Director of the International Association of Industrial Accident Boards and Commissions, Gregory Krohm.

The presentations will be online until December 12, 2011.

<http://www.tdi.texas.gov/wc/events/edconference.html>

NCCI Reports on Workers Compensation Claim Frequency

By: Jim Davis and Yair Bar-Chaim

OVERVIEW

The Great Recession of 2007–2009 is likely the most serious and long lasting economic contraction since the Great Depression. Several factors related to the recession, which will be discussed in this paper, have had a considerable influence on claim frequency. Claim frequency for workers compensation injuries increased 3% in 2010, marking the first increase since 1997. Although claim frequency is up, the good news is that NCCI's latest data reveals that the growth in average indemnity and medical cost per claim slowed in 2010.

This paper is subdivided into three sections, which are listed below along with key findings. The first section is based on NCCI's Financial Aggregate Data, which provides the latest available information (through Accident Year 2010). Sections two and three are based on NCCI's *Statistical Plan* data. Though not as recent as financial data, *Statistical Plan* data contains detailed policy information that allows us to analyze frequency by various categories (e.g., by claim characteristics, by employer characteristics).

2010 Overall Trends

- Claim frequency for lost-time claims in Accident Year (AY) 2010 was 3% higher than in AY 2009, according to preliminary estimates. Prior to this year's uptick, claim frequency had been declining at an average rate of 4.3% per year since 1990, with the only other increases occurring in 1994 and 1997.
- A number of recession-related factors may have put upward pressure on the AY 2010 frequency measure, including an increase in new hires as the recovery began to take hold and a possible influx of small lost-time claims that may have been medical-only claims in previous years.
- For indemnity and medical combined, the change in average cost per lost-time claim was 0% for 2010.

Various Frequency Measures

- Claim frequency measured relative to payroll (frequency per payroll) varies far more by class than frequency measured relative to premium (frequency per premium).
- Changes in industry mix typically have a greater impact on frequency per payroll than on frequency per premium measures.
- The decline in the construction industry resulting from the recession placed downward pressure on frequency per payroll and upward pressure on frequency per premium.

Frequency Changes by Claim Characteristics and by Employer Characteristics

- Prior to the increase in Accident Year 2010, the decline in frequency had been widespread. Based on Statistical Plan data, over the latest five complete policy years (which reflect data prior to 2010):
 - Frequency declines were observed for all industries, geographic regions, and employer sizes, as well as for most claim types.
 - Claims considered "Likely-to-Develop" exhibited a larger percentage frequency decline than those considered "Not-Likely-to-Develop."
 - Some of the more complex claims, such as lower back, declined more than average over the latest five years.
 - Frequency changes varied considerably by type of injury.
 - Frequency declines were relatively consistent by size of loss for claims under \$50,000. Claims above \$50,000 exhibited less of a decline.

Continued, Page 6.

2010 OVERALL TRENDS

Exhibit 1 is based on NCCI’s Financial Aggregate Data Call, representing experience for NCCI-affiliated carriers. The results for Accident Year 2010 are preliminary.

As communicated at NCCI’s *Annual Issues Symposium 2011*, Exhibit 1 indicates that workers compensation claim frequency for lost-time claims has increased 3% in 2010. This represents the first increase since 1997 and only the third time that frequency has increased in the last 20 years. Reductions in claim frequency have been a major bright spot for workers compensation. Prior to this year’s uptick, injury rates had fallen by 56.4% from 1990 through 2009, an average decrease of 4.3% per year.

Accident year frequency, as measured here, is the number of lost-time claims for injuries occurring in a given year per \$1 million of earned pure premium adjusted to current average weekly wages and current voluntary loss cost levels.

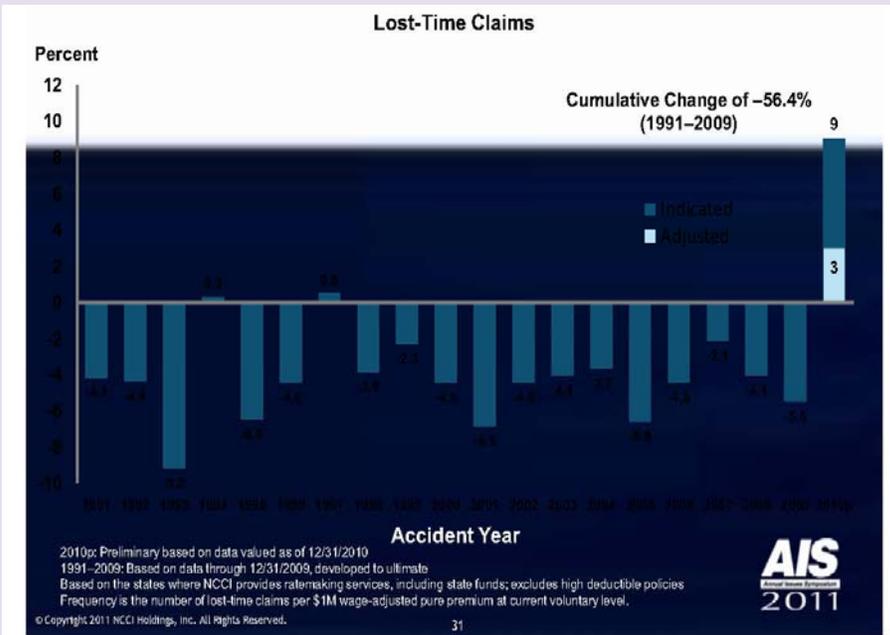


Exhibit 1: Lost-Time Claim Frequency Increases in 2010

The most recent recession is now viewed by most economists as the most severe economic downturn since the Great Depression. NCCI determined that several distortions in the data, stemming from the recession and subsequent recovery, had a significantly greater effect on frequency than would be expected in a normal economy. NCCI’s standard calculation initially yielded an increase in frequency from Accident Year 2009 to 2010 of 9%. However, NCCI identified three factors that were distorting the frequency measure in 2010: change in industry mix, change in hours worked per week, and change in premium audits. Once adjustments are made for these factors, frequency is still up 3%.

Continued, Page 7.

**“Second Fridays”
Returns, Free
Educational Programs
from the NAWCJ**

November 18, 2011

(We know it is the 3rd Friday, we are observing Veteran’s Day on November 11)

Dr. James McCluskey

"Will I Ever Get Better?"

A serious workplace injury is a scary thing – not only for the patient and their family but also for the employer. Questions range from “Will I ever get better?” to “Will this employee ever return to work?” Instead of an antagonistic relationship, the workers’ compensation system is intended to alleviate the concerns of everyone but often this is not the case. In most instances, it is a lack of information on the part of both parties that fuels the intensifying dialogue. Better communication between the workers’ compensation team of employee, employer, insurance adjuster and providers is the obvious culprit – and solution.

December 9, 2011

Dr. Elizabeth H. Maples
Harmony in the Workplace.

January 13, 2012

Dr. Ray Harbison
Evidence Based Science for
Causation Analysis

February 10, 2012

Rafael Gonzalez
The Center for Medicare Set-aside
Medicare set-aside update

March 9, 2012

Dr. Steve Boyd
Effective public speaking

**Make plans today to
tune-in**

Your 2011 NAWCJ Board of Directors

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NCCI Reports, from P.6

The first recessionary factor analyzed was a continued shift in industry mix away from the construction sector in 2010. The contracting industry group generally has a lower frequency per premium than all industries combined (see section below titled "Various Frequency Measures"). Hence, the decline in contracting put upward pressure on Accident Year 2010 frequency per premium.

The second factor studied was an increase in average weekly hours¹ in 2010. Exhibit 2 displays changes in average hours worked per week by quarter over the latest five years. Following decreases in 2008 and 2009 as a result of the recession, average weekly hours for all private employment increased in 2010 by approximately 0.6%. An increase in hours worked per week is expected to generate an increase in claims, which, without a corresponding increase in number of workers, will put upward pressure on frequency.

NCCI estimates that approximately one percentage point of the 2010 indicated change in frequency of 9% can be attributed to the two factors above.

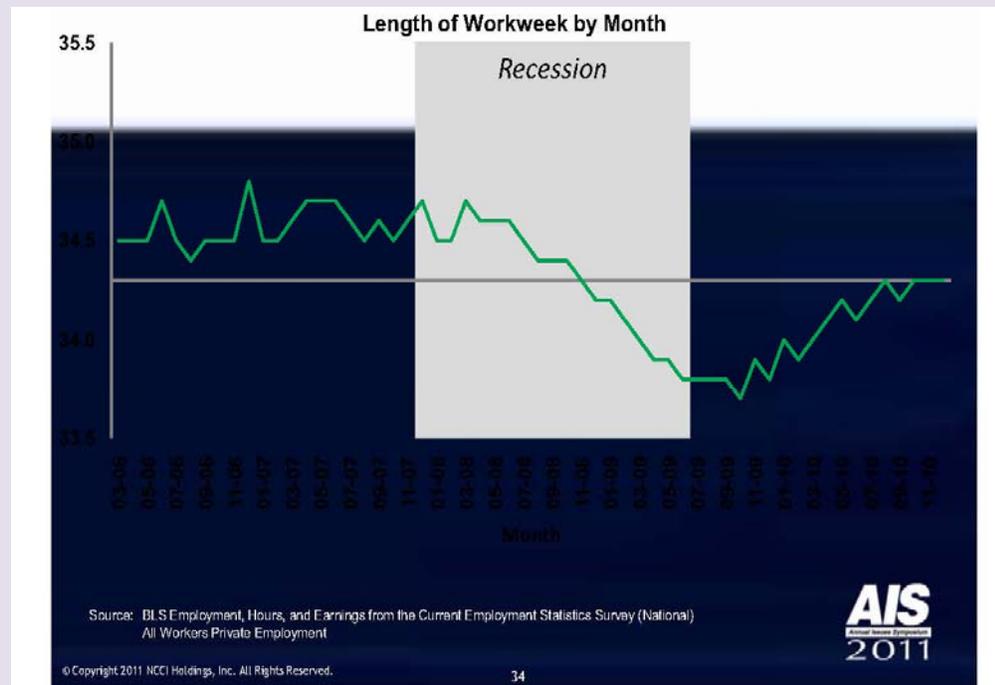


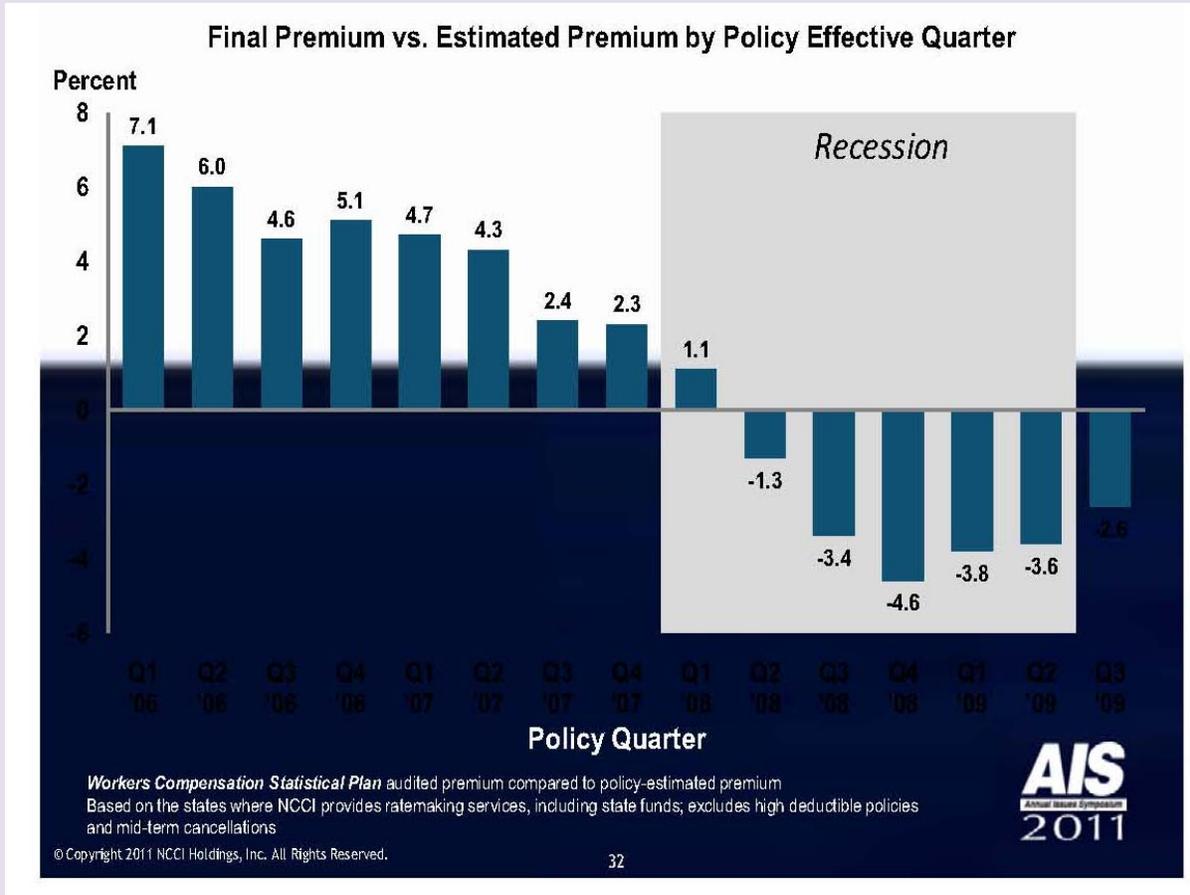
Exhibit 2: Average Hours per Week Increased in 2010

The third factor reviewed had, by far, the largest impact on the 2010 change in frequency. The denominator of the NCCI accident year frequency measure is calendar year earned premium, which includes audit premiums related to prior years' policies. Audits booked (and earned) in 2010 were significantly lower than anticipated as a result of the recession. Under more stable economic conditions, premium audits typically produce additions to premium. However, during the recession, it became apparent that estimated payrolls overstated final payroll, and, therefore, audits resulted in return premiums. This change in the direction of premium audits had a significant impact on the calendar year earned premiums used in the denominator of the NCCI accident year frequency calculation.

Continued, Page.8.

NCCI estimates that the Calendar Year 2010 premium understated the premium on actual exposures earned by 3%. In contrast, the Calendar Year 2009 premium overstated the premium on actual exposures earned by 2%. These distortions combined to produce a five-percentage-point overstatement in the claim frequency change for 2010, as measured using calendar year earned premium.

Exhibit 3 shows the dramatic impact that the recession had on premium audits. Most notably, the declines in premium audit adjustments that occurred during 2010 stemmed from policies with effective dates from late 2008 through late 2009.



Several factors may have contributed to the abrupt halt in 2010 in the long-term decline in frequency:

The increase was likely supported by the firming job market and modest increase in employment since the start of the recovery in the middle of 2009. New hires generally have higher claim frequency than longer-term employees.

Some insurance experts have suggested that workers, fearful of losing their jobs, may have postponed filing workers compensation claims, but now appear less hesitant to file claims as the economy has shown signs of modest improvement. While the extent to which this phenomenon occurred is unclear, it may have contributed to the observed increase in claim frequency in 2010.

There is evidence of an influx of small lost-time claims in 2010, which may have been medical-only claims in previous years. A lack of available light duty jobs for injured workers to return to might have contributed. NCCI will be researching this issue further in the coming year.

It remains to be seen if the 2010 uptick in frequency represents a —new normal or a minor blip in the long-term decline in frequency.

The foregoing was reprinted from the initial pages of the August 2011 NCC Research Brief “Workers Compensation Claim Frequency.” The original report is available on the website of the National Council on Compensation Insurance, <https://www.ncci.com/nccmain/pages/default.aspx>. The original report is far more comprehensive than suggested by the summary above, and details further issues including medical costs, frequency issues by industry, by employer characteristics, by size of loss, by part of body injured, by nature of injury, by cause of injury, by market type and by geographic region.

From Law Ha Ha, McClurg's Legal Humor Headquarters

Important Warnings and Instructions for the Model XP-200 Stepladder

Important: This product contains a warning label known to the State of California to cause cancer.

1. General Warnings and Information. Judging from the number of lawyers on our company softball team, ladders are extremely dangerous products. Our legal department advises us to expect nearly 5,000,000 injury claims this year since that is how many ladders we sold last year. After years of study by top industry experts, we have determined that the foremost danger of a ladder is falling off it. However, these same studies show that ladders can be very safe household products when treated with proper care and respect and kept stored in the garage.

2. Determine Your Level of Product Sophistication. Using a stepladder requires a minimum amount of product sophistication, which you may lack. Prior to getting on a ladder, take the following test:

If you think:

- "Black & Decker" is a big law firm . . .
- "Air bag" is a technical medical term for "lung" . . .
- "Burn the candle at both ends" is helpful product information . . .
- This warning serves a useful purpose other than to cover our you-know-whats . . .

Use ladder as follows

- Do not climb above third step.
- Do not climb above the second step.
- Use ladder only under the supervision of a qualified mental health professional.
- Do not go near a ladder.

3. Set Up. Set ladder up on solid, level ground. Do not set ladder up in mid-air, underwater or on unstable surfaces such as steeples, moving amusement park rides or the moon. To assure ladder is set at proper angle, perform this easy check: level your vision with the plane of the ladder. If you see the ground approaching, stick your arms out quickly and try again.

4. Safety Recommendations. Our legal department held an important meeting at a popular downtown bistro which resulted in a cell phone call to Marketing, instructing, in that snide way Legal has, that we include the following recommendations for safe ladder use to preserve the important legal defense of *Weus Toldicto Uso*. Always follow these basic safety precautions: Step 1: Spray two tons of foam insulation around base of ladder. Step 2: Encase yourself securely in plastic bubble wrap (DO NOT POP BUBBLES. THIS IS SERIOUS.). Step 3: Wear a helmet approved by the National Football League, but not the one Troy Aikman uses. Step 4: Hire an independent contractor to climb up the ladder and get the hell out of the way.

5. Climbing the Ladder. Begin by grabbing the sides of the ladder firmly with both hands. Place one foot securely on the first step. Pull yourself up. Stop! Do not over-exert yourself. Take your pulse. Proceed only if your heart rate is below 120 beats per minute. *Never have a heart attack on a ladder.* Repeat procedure, until desired height is reached, but never stand on the top step. Don't ask us why we put it there if you can't stand on it, just take our word for it and don't do it. If you're ever tempted to disobey this instruction simply call our toll-free number and we'll send one our lawyers out to slap you around.

6. Common Ladder Mistakes.

- (1) Avoid contact with electrical current. Never attempt to plug in a ladder.
- (2) Avoid contact with lawyers. Statistics show most ladder accidents involve lawyers.
- (3) There is no such thing as "Safe Sex" on a ladder.
- (4) This sticker gets slippery when wet. That's why we put it on the side. If you're standing on this sticker you've got the ladder pointed the wrong way.

- (5) Never use ladder during hurricanes, tornados, earthquakes, civil unrest, Running of the Bulls, Grand Prix auto races or other activity likely to upset ladder. If ladder becomes upset, give it a chance to calm down before climbing all over it.
- (6) Ladders are not toys. Keep all ladders out of the reach of children. Kids, if you're reading this, No, No, No!
- (7) Be careful when moving ladder around work site. You could poke somebody's eye out with this thing!
- (8) Never drink and climb. Always have a designated climber on hand.

7. Ladders Don't Kill People, People Do. At least that's what we thought until we had a big corporate meeting over this whole warning-label fiasco. Marge Lipscomb from Marketing lost it and whacked Hal Weenicker from Legal in the pelvis with a Handy-Home-Stepmate Model 404. Weenicker fell over on Joe Bugler who toppled onto Laura Keenbeam. Weenicker died in an ambulance accident on the way to the hospital. His estate is suing us for failing to warn of this obvious ladder risk. Keenbeam is also suing Bugler for sexual Harassment. So, please, if you get irritated with someone, just use a handgun like everyone else.

8. Partial Warnings Only. See Owner's Manual, Volumes 1-29, for complete instructions and warnings in 37 languages and gang signs. Coming to stores soon: Totally safe virtual ladder climbing.

Enjoy Your XP-200 Stepladder!

The foregoing was originally published under the title Rungful Suits in the June 1997 issue of the American Bar Association Journal. This copyrighted material is republished here with the permission of the author and should not be reproduced without further permission. This and more is available at www.lawhaha.com. Professor McClurg is a nationally recognized scholar and teacher in the areas of tort law, products liability, privacy law and firearms policy. He currently is a professor and holds the Herbert Herff Chair of Excellence in Law at the University of Memphis Cecil C. Humphreys School of Law. From 2002-06, he was a member of the founding faculty at the Florida International University College of Law. Previously, he was the Nadine H. Baum Distinguished Professor of Law at the University of Arkansas at Little Rock, and also has taught at Wake Forest University, the University of Colorado, and Golden Gate University.

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Upcoming Conferences:

The 2011 Annual Worker's Compensation Holiday Conference, December 2, 2011, Tampa, FL, \$120.00.

http://www.wccp.org/events/event_details.asp?id=180514

California Workers' Compensation Defense Attorneys' Association, December 1-3, 2011, Half Moon Bay, CA, \$595.00.

http://www.cwcdaa.org/w11_conf_info.htm

The 19th annual California Division of Workers' Compensation educational conference, February 23-24, 2012, Los Angeles CA and March 5-6, 2012 Oakland, CA.

http://www.dir.ca.gov/DWC/educonf18/DWC_EducationalConference.html

31st Annual New Mexico Workers' Compensation Association Conference, May 16-18, 2012, Albuquerque, NM.

http://www.wcaofnm.com/Annual_Events-2012_Annual_Conference/c23_28/p40/2012_Annual_Conference_MEMBER_Registration/product_info.html?osCsid=84fd829fdb45d5cfd52c1e93cdc9ad0

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

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

Each year, LexisNexis honors a select group of blogs that set the online standard for a given industry. The LexisNexis Workers' Compensation Law Community Staff is currently in the process of making their selections for the 2011 Top 25 Blogs for Workers' Compensation and Workplace Issues. In selecting their Top 25, LexisNexis reviews such factors as: the quality of writing, frequency of posting, topics covered, interaction with the Internet community, format and design of blogsite, impact on workers' compensation and workplace issues, and Google ranking and/or mentions by other sites. The comment and suggestion period closed October 21, 2011, and then make final determinations for the top 25 blogs and announce the honorees on the web center. Their 2010 selections were:

Columbus Workers' Compensation Law Blog
<http://www.columbusworkerscompensationblog.com/>

Navigable Waters
<http://navwaters.com>

Work Comp Complex Care Blog
<http://www.workcompcomplexcare.com/>

Comp Time by Roberto Cenicerros
<http://www.businessinsurance.com/section/blogs02>

Workers' Comp Insider
<http://www.workerscompinsider.com/>

Colorado Workers Comp Blog
<http://coloradoworkcomp.blogspot.com/>

Course and Scope: Connecticut Workers' Compensation
<http://aspelllaw.blogspot.com/>

Delaware Detour & Frolic
<http://law.lexisnexis.com/practiceareas/Workers-Compensation-Law->

EAMS Blogs Reference Page
<http://www.lexisnexis.com/Community/workerscompensationlaw/blogs/workerscompensationlawblog/archive/2010/03/20/eams-blogs-reference-page-updated-3-23-2010.aspx>

George the Bartender Series
<http://www.ktflaw.us/memos.html>

Georgia Workers Compensation Blog
<http://www.georgiaworkerscompblog.com/>

Massachusetts Workers' Compensation Lawyer Blog
<http://www.massachusettsworkerscompensationlawyerblog.com/>

Nevada Workers' Compensation Law Blog
<http://www.nevadaworkerscompensationlaw.com>

New York Workers' Compensation Alliance Blog
<http://www.nyworkerscompensationalliance.org/>

North Carolina Workers' Compensation Lawyer Blog
<http://www.northcarolinaworkerscompensationlawyerblog.com/>

Ouch!
<http://rolandlegal.wordpress.com/>

Pennsylvania Workers' Compensation Lawyer Blog
<http://www.pennsylvaniaworkerscompensationlawyerblog.com>

Workers Comp Zone
<http://workerscompzone.com/>

Managed Care Matters
<http://www.joepaduda.com/>

The Official Medicare Set Aside Blog and Information Resource
<http://www.medicaresetasideblog.com/>

Weekly Toll
<http://weeklytoll.blogspot.com/>

Working Immigrants
<http://www.workingimmigrants.com/>

SafetyAtWorkBlog
<http://safetyatworkblog.wordpress.com/>

The Workers' Comp Gazette
<http://workerscompgazette.com/>

Workers' Comp Kit Blog
<http://blog.reduceyourworkerscomp.com/>

Visit their website for more complete descriptions of the blogs and to register in preparation to participate in the 2012 award suggestions. <http://www.lexisnexis.com/community/workerscompensationlaw/blogs/topblogs/archive/2010/10/28/lexisnexis-top-25-blogs-for-workers-compensation-and-workplace-issues-2010-honorees.aspx>



From the Pages of **workcompcentral**®

Court Explains How ADA Plays Into Bankruptcy Terminology

An employer could not defeat a disability discrimination action by arguing that its Chapter 11 bankruptcy proceedings had discharged the suit, because the employer's own legalese exempted the worker's suit from the bankruptcy proceedings, the U.S. 8th Circuit Court of Appeals ruled.

The 8th Circuit published a decision on Friday clarifying the effects of Northwest Airlines' Chapter 11 bankruptcy proceedings on the disability discrimination suit in *Sanchez v. Northwest Airlines*. The federal district court ruled that plaintiff Carlos Sanchez's disability discrimination suit was discharged by bankruptcy proceedings -- only to be reversed by the appellate court because that decision conflicted with prior case law.

In its decision to reverse, the 8th Circuit concluded that an Americans with Disabilities Act suit falls within a subset of bankruptcy claims called "administrative claims based on liabilities incurred by a debtor in the ordinary course of its business." This decision played a key role in the case, because it ultimately meant that the plaintiff was excused from having to notify the bankruptcy court about his claim before a specific bankruptcy deadline. Had the court decided that the ADA claim fell under a different classification, the ADA suit could have been barred by the plaintiff's failure to meet that deadline.

Dorene Sarnoski, Sanchez's attorney in the case, said that she spent much of oral arguments fighting against the application of a 1997 decision called *McSherry v. Trans World Airlines*. "The most important part of the decision . . . is that the court specifically states that this *McSherry* case does not stand for the proposition that everything is knocked out just because of bankruptcy," she said. "And I think that is really important." In *McSherry*, the 8th Circuit ruled that any claim received after a bankruptcy court confirms a bankruptcy reorganization plan is barred by bankruptcy. However, Sarnoski successfully argued against the application of the *McSherry* decision, and the 8th Circuit ruled that Sanchez's claim was not barred because of how late it occurred in the bankruptcy process.

Northwest had filed for bankruptcy in 2006, and Sanchez was promoted -- then demoted because of his disability-- in March 2007. The bankruptcy court had confirmed Northwest's reorganization plan on May 31, 2007, a few months after Sanchez was allegedly discriminated against. As Sanchez awaited his right-to-sue letter from the U.S. Equal Employment Opportunity Commission, Northwest mailed out notices stating that creditors had until July 31, 2007, to file their "notice of claims." This deadline is known as the "administrative expenses bar date," because it bars most claims filed after that date. Sanchez did not receive his EEOC letter until after that deadline, and sued the employer in 2008.

In an effort to thwart Sanchez's suit, Northwest argued that he should have submitted his claim before the confirmation date of the reorganization plan, on May 31, 2007, and that failure to do so effectively "discharged" his claim. The 8th Circuit rejected this argument because Sanchez's claim did not occur until far too late in the bankruptcy proceedings, which meant he did not receive adequate notice of the reorganization plan.

However, the appellate court noted that Sanchez had undisputedly received timely written notice of the July 31, 2007, administrative expenses bar date, forcing the court to decide whether Sanchez's failure to meet that deadline should bar his suit. "The rub is whether Sanchez's claim survived after he failed to present it by the administrative expenses bar date," the court wrote. "The answer to this question, as we see it, lies in the close analysis of the text of the notice requiring submission of administrative expense claims by July 30, 2007, as well as concessions by Northwest." The notice mandated that creditors must submit all administrative expense claims, except for five exceptions. The district court was apparently unimpressed with the notice, calling it "dense with legalese." Sanchez successfully argued that his ADA claim fell within one of the notice's exceptions, which is called "liabilities incurred in the ordinary course of business by the debtors."

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The 8th Circuit did not have to look far to find support for this conclusion, as even Northwest's briefs stated that Sanchez's ADA claim fell within the "ordinary course of indebtedness." This caused the 8th Circuit to "agree" with Northwest's arguments, and in doing so, the 8th Circuit actually used Northwest's own language to rule against the airline.

"We agree with Northwest's characterization and, accordingly, conclude Sanchez did not have to file a request for payment by the administrative expenses deadline at any time," the appellate court wrote. "In reaching this conclusion, we are not breaking new ground."

The court cited a number of other decisions had reached similar conclusions, including:

- Fieber's Dairy, Inc. v. Purina Mills (8th Circuit decision from 2003).
- Matter of Eagle-Picher Industries (6th Circuit decision).
- Goldman, Sachs & Co. v. Esso Virgin Islands, Inc. (2nd Circuit decision).

"The Internal Revenue Service's regulation on what constitutes ordinary course indebtedness in a title 11 bankruptcy case is also telling," the court wrote, noting that the IRS regulations seemingly placed Sanchez's suit within the "liabilities incurred in the ordinary course of business by the debtor" category. All of these determinations led the court to another conclusion -- had Sanchez immediately taken the notice to an attorney and asked whether he should submit his ADA claim before the July 30, 2007, deadline, a reasonable attorney would have been justified in telling Sanchez, "No." "Under these circumstances, Sanchez did not receive a notice fairly apprising him of the possibility his claim would be discharged if not submitted by the bar date," the 8th Circuit concluded.

Sarnoski said that a similar case called Wesley Stockton v. Northwest Airlines also exists in federal district court. However, the two cases took different procedural paths. In both cases, Northwest filed motions for summary judgment relying upon the McSherry-styled bankruptcy defense. In Sanchez's case, the federal district court granted Northwest's motion for summary judgment, only to be reversed by the 8th Circuit.

In Stockton's case, the federal district court denied Northwest's motion for summary judgment. Northwest did not appeal the denial of summary judgment, so Stockton's case continued along at the federal district court. "The standard for summary judgment is, summary judgment is only granted if there are no material fact issues in dispute," Sarnoski said. "And the judge in the (Stockton) case, when he looked at this particular issue -- the bankruptcy -- he said there were issues in dispute, such as whether or not (the notice) had ever been received, and whether or not there was due process. As long as that is in dispute, you are not supposed to grant summary judgment."

Like Stockton's attorney, Sarnoski argued that her client never received the notice, and that barring his ADA suit would violate his right to due process of law. The 8th Circuit mentioned that argument, but ruled that even if Sanchez had received the notice, it still could not have barred his suit. Now that the 8th Circuit has clarified that Northwest's motion should have been denied, the case returns to the trial court, which will have a chance to rule on the plaintiff's motion for summary judgment, Sarnoski said.

Sanchez had filed a motion for summary judgment on the merits of his ADA case, but the trial court never ruled on it. According to the federal district court's docket, Northwest and Stockton appear to have settled the case in June, as both parties stipulated to dismiss the case shortly after a settlement conference. WorkCompCentral left messages for the defense attorney on the case, but did not receive a response before deadline.

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The NAWCJ acknowledges and thanks WorkCompCentral for their support of this newsletter and the ideal of promoting professionalism and collegiality among the nation's workers' compensation adjudicators.


From the Pages of **workcompcentral**®

SAWCA All Committee Conference, Annapolis, Maryland

October 31 – November 4, 2011

The Maryland Workers' Compensation Commission welcomed the Southern Association of Workers' Compensation Administrators (SAWCA) to Annapolis the first week of November with style. Maryland's Capitol, is not the state's population center, but rather a quaint village nestled on the Severn River as it joins the Chesapeake Bay. In November, a sea of sailboat masts dot the view, but few sails are noted in looking to the horizon, the sailing season all but over. The weather could have done anything last week, it snowed in western Maryland the week before the All Committee Conference (ACC). However, the ACC was blessed with sixty-degree daytime temperatures and clear skies.

The 2012 SAWCA ACC was accommodated in the grand Marriott Annapolis Waterfront. The venue exudes a long and storied history, in the heart of the dockside attractions. The entirety of waterfront Annapolis is a mélange of storefronts featuring upscale couture, seafood restaurants, sandwich and coffee shops, fudge, ice cream, and the mandatory t-shirt/souvenir shops (everything 50% off, November obviously marks the season-point where empty shelves are pursued at any cost). The weather accommodated leisurely strolls and even lunch on the sidewalk at Middleton's Tavern. Middleton's has been there since 1750, a gastronomical historical landmark. Their crab cake was a tribute to the crustaceous addiction of the region. The ACC programs were diverse, and the participants both engaged and engaging. The Maryland Commissioners were gracious in their hospitality, and lively in the discussions.

Annapolis is also the home to The Kunta Kinte-Alex Haley Memorial, commemorating the place of arrival of Alex Haley's African ancestor, Kunta Kinte, to the New World, as told in the book *Roots*. The memorial stands at the base of Annapolis Harbor, steps from the Marriott Annapolis Waterfront. This walk-through tribute includes statuary and symbolism. The boundaries of the memorial are marked by granite pillars engraved with various quotes from Haley's writing. One in particular addressed the purpose of the ACC, "things don't ever get better unless you make them better," Tom Murray, *Roots*. This encapsulates the purpose of the ACC, and really the purpose of SAWCA, a focus on the improvement of workers' compensation systems through commiseration, conversation, and shared inspiration to change.

**"Things don't ever
get better unless
you make them
better."**

Tom Murray, *Roots*.

Wednesday focused on continuing regulatory concerns with medications and prescription practices. Participants were targeted upon the intricacy and complications of workers' compensation medical practice, beginning in a general session, but flowing over into the discussions of the Medical Rehabilitation and Administration Procedures Committees on Wednesday afternoon. Clearly, issues of physician dispensing and narcotic access remain at the fore of concerns for workers' compensation systems. The efficacy of the SAWCA roundtable model is clear in these instances, as the open forum of committee meetings provides outlet for frustrations and concerns as well as ideas from similarly situated peers from jurisdictions facing similar, sometimes eerily similar, concerns and issues.

Thursday afternoon brought the MIS Committee and Adjudication Committee meetings. The MIS theme centered on the potential for misperceiving the MIS department or effort as detached from the remainder of workers' compensation systems. In the modern age of workers' compensation, information management is critical to both efficiency and cost-containment. Despite the depth of technology's integration, however, the committee discussed a perceived disconnect between the MIS personnel and the workers' compensation regulation and adjudication functions. The MIS Committee meeting sought to re-introduce the MIS function, availability, and integration/involvement. As the MIS Committee looks to The Homestead and the SAWCA 64th Annual Convention next July, they will be working on a program to educate members on the evolution of the i-pad, cloud computing, and the various programs ("apps") that are the foundation of the i-pad revolution. Judge Belcher will undoubtedly be in attendance, she was the lucky winner of an i-pad door prize at the 2011 ACC!

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The Adjudication Committee Thursday was led by Judge Lott and New Jersey Court Administrator Guisepppe (“Joe”) Fazari, Ph.D. Dr. Fazari provided a perspective on the challenging interrelationship between court management and adjudicators. Judge Lott moderated the discussion and steered the group back to recurring docket management themes which are particularly challenging to workers’ compensation judges. Dr. Fazari reminded that justice delayed is justice denied, and stressed the perspective of the litigants on our adjudicatory processes. He advocated that the adjudicatory process is enhanced if there is a shared vision for the process, a collaborative model, trust and support, clearly defined roles, and frequent communication. In other words, we must conceive and understand our adjudicatory mission, work together both among the adjudicators and the clerk/staff functions, expect mutual support among the adjudicators and staff, understand our respective roles, and interact effectively in understanding and periodically refining those roles and efforts.

Dr. Fazari explained that the perspective of the litigant is not necessarily identical to the perspective of the attorneys or adjudicators. Recognizing that resolution or adjudication is important, Dr. Fazari stressed the importance of process, from the litigant perspective. These people, employers and injured workers, often lack workers’ compensation professional’s familiarity with workers’ compensation adjudication systems. Therefore the adjudicator must assure that events (hearings, mediations, conferences) have clear purpose, understood from the litigant perspective. This brings structure to the process, for those who do not live the process every day as do attorneys, judges and others. Noting that a very small minority of cases reach trial, he suggested that the non-trial events are optimal opportunities to involve and engage the litigants in the process, and to explain the process. He stressed that litigant and participant understanding of these events and processes builds public confidence in the adjudicatory process.

Dr. Fazari advocated for focused judicial control of our work-flow and process. He noted that if judges do not control the process-timing with the interests of all in mind, then attorneys will control the process-timing with their own or their individual client’s interests in mind. He concluded that the adjudicator must represent the public and the process, assure speed of decisions, promote cost savings and yet accommodate attorney schedules as practical in this process. He noted that this is important in the entire population of disputes, not merely in the minority of cases that reach trial. Each hearing, pretrial, mediation or other event must be used to reinforce public perception of our role, of the existence of a process that produces results, and used to educate the litigants as to what they may reasonably expect next as their case progresses to resolution or adjudication.

July 9-13, 2012 SAWCA will gather again at The Homestead in Virginia’s Allegheny Mountains. The opportunities will again be present to both teach and learn in the roundtable discussion. The brochure is available on their website <http://www.sawca.com/events.htm>.



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 foregoing information on the recent meeting of the Southern Association of Workers’ Compensation Administrators (SAWCA). 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. You can learn more about SAWCA by visiting their website, www.sawca.com

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