Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XXXIX, November 2012

Thoughts from the NAWCJ President

By Hon. Ellen Lorenzen

"How can a society that exists on instant mashed potatoes, packaged cake mixes, frozen dinners, and instant cameras teach patience to its young?" Paul Sweeney. (Mr. Sweeney has written several books about Irish economics.)

"Patience can't be acquired overnight. It is just like building up a muscle. Every day you need to work on it." Eknath Easwaran (Mr. Easwaran developed a system of meditation called passage meditation.)

"Lord, give me patience and give it to me right now." I have no idea who is responsible for this one; I learned it from my mother. (You know my mother: got a ticket for driving 90 mph on I-405 in Los Angeles when she was in her 80s. Who knew anybody could ever drive that fast on the 405?

Why is patience my topic this month? Aside from all the political commercials the last few months (those of you who do not live in swing states do not know what you have missed), we have amended rules of procedure here in Florida that went into effect at the end of October. I am readying myself for several weeks, if not months, of explaining to attorneys what the changes are and why I expect them to know and observe the changes. There is nothing I find more frustrating than having to explain why someone can no longer do what (s)he used to do or must change the way (s)he has always done something.

For example, attorneys (and Judges) have always mailed pleadings and orders to each other by physically inserting copies into envelopes, putting stamps on the envelopes and putting them in an official U. S. Postal Service mailbox. I haven't researched this myself, but I suspect the requirement for attorneys to exchange motions with each other at the same time that they file them with the court has existed since there were first rules of procedure. It is certainly a concept that began as soon as the courts developed the concept of due process. Even when facsimile machines came into use, attorneys were still required to mail or hand-deliver their pleadings to the other side.

In the last few years, the Florida workers' compensation judges have become accustomed to providing our orders electronically to attorneys. The savings in postage and envelopes, not to mention staff time, is amazing. Not all attorneys, however, have been as interested in making use of the technology. It took a long time to persuade attorneys that they could no longer mail pleadings to our local offices but must upload them electronically instead. My fellow judges and I in Tampa finally started returning mail to the attorneys so that, if they wanted their pleadings docketed, they had to either re-mail them to Tallahassee or file them electronically. Today, by rule, the only way pleadings are accepted is electronically.

Our recently amended rules have gone step further. Not only are we prohibiting attorneys from filing pleadings with us any way other than electronically, we are requiring the attorneys to serve their opposition with the mandatory copy of the pleading simultaneously by e-mail as well. Our electronic filing portal will automatically provide electronic service of pleadings if the attorneys elect to use that feature. But if they do not, then the attorney will have to email the copy of the pleading to the other side using the email address registered with us. Of course, this means that every attorney who practices before the workers' compensation judges must register an email address with us.

This is a big change to the way things have always been done. Aside from reducing income for the USPS, it also eliminates the 5 mailing days that Florida attorneys frequently used to rely on to cover late mailing and eliminates the excuse, "I never got the mail." It complicates office procedures for mail handling. It used to be if the receptionist was out, somebody else could always pick up the mail from the front desk, open it and distribute it.

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"Thoughts" from Page 1.

Now, if both individuals who registered their email addresses with my agency happen to be out, no one at a firm will be receiving mail that day. USPS always delivers but computers and file servers are not always functioning. So there are new problems to solve and those attorneys who exist only by always putting out fires and never planning strategy will have some difficult days ahead.

For me as a judge, the primary problem will be getting attorneys to follow this rule, as well as the other recent amendments. And this problem leads me back to patience. I do not have a lot of patience and I do not regard myself as the best person to educate or train others in new ways because of this shortcoming. I remember quite well a conversation I had with my father when I was deciding what electives to take in my senior year in high school and he insisted I take typing so that I could find work as a secretary because, as he quite rightly said, I did not want to be a nurse and neither one of us could envision me having enough patience to be a teacher. But I sometimes have to take on the role of teacher, even though I am a judge, if I want to spend time in my hearing room discussing the merits of a case and not wasting it arguing over procedural deficiencies. That observation leads me to this last quotation:

> Teaching can be a rewarding experience. It is a way to inspire young minds, and encourage thinking. A teacher's main asset is patience. A good teacher must remain patient with his or her students at all times. However, that doesn't mean the teacher should let the students get away with whatever they want to. Discipline and fairness must be used as well.

Sith Penguin, found at hubpages.com. (I have no idea who Sith Penguin is but he wrote a blog about teachers that I liked.)

I like the thought: patience combined with discipline and fairness. I will remind the attorneys about the changed procedures, ask them why they did not or could not comply, and deny their motions if necessary to correct the behavior. All without looking annoyed. Wish me luck and patience, lots and lots of patience.

As always, email me at Ellen_Lorenzen@doah.state.fl.us.

Professor Terrell of Emory University lectured on effective Judicial writing at the 2012 Judiciary College in Orlando.

The Multi-Jurisdictional Law Panel 2012 featured Judges Dixon (MS), Alvey (KY), Medina-Shore (FL) and Szlabewicz (VA, not pictured). This panel is always a favorite of Judiciary College attendees.

New Study Suggests Technology is a Continuing Challenge for Us All

How do you feel about your work? More specifically, how do you feel about the impacts of technology on your work. In the workers' compensation adjudication process, we see an ever more pervasive nature of technology. Where once there were typists, now there are dictation programs like Dragonspeak. Where once there were secretaries opening and straightening paper documents, delivered daily at roughly the same time, there are now clerks who instead monitor electronic filing programs or retrieve document images from incoming emails that arrive sporadically as they are sent, unconstrained by the mail carrier's schedule.

The adjudicator role includes wearing many hats. One must be a listener, an organizer, a planner, a manager, a researcher, a drafter, a proof-reader, and often a lecturer and teacher. As with the movement of documents, technology is influencing the performance of these other tasks also. Digital recording products now enable us to quickly and inexpensively review testimony from a trial. Word-processing programs help with proofing orders, both spelling and grammar. Software helps us monitor when our staff arrives at and leaves work, while we are performing our main tasks of conducting hearings or drafting orders, and cannot be personally on top of the time and attendance issues which good management require. In short, technology is changing the way we work and manage.

Many of those technological innovations are old news. Word processing is an innovation of the eighties. Similarly, the internet is an innovation of the nineties. In the twenty-first century, the innovations such as electronic filing have dominated changes to the adjudication process. Late in the 2000s as the second decade of the twenty-first century began, innovations in software, hardware, and fiber-optics allowed innovations in how we interact over long distances; the telephone paradigm is being challenged by platforms such as video teleconference systems, audio-video communications over the internet like Skype and ooVoo, and collaboration/instruction platforms like Webex and Go to Meeting.

The very nature of workers' compensation systems is diverse. Each state has its peculiarities, strengths and challenges. This is illustrated by the wide diversity of the states in their progress towards embracing these various technology tools. Last month stories on WorkCompCentral included updates on a variety of innovations. New York announced implementation of a new level of Electronic Data Interchange ("EDI"), as a platform for electronic first reports of injury and more. The Indiana Board announced "extremely favorable" results from testing of their online form submission project, effectively e-filing, and announced that use of the new paradigm would be mandatory soon. Kentucky announced that it is deploying their Online Open Records Portal on December 1, 2012. This will allow both filing and retrieval of documents online. These each illustrate an evolution in the workers' compensation dispute process and progress with technology leverage.

How do you feel about the implications of these changes in technology? Virtually all of us will be threatened to some degree. Some occupations will feel that theirs will be the next to go the way of the so many occupations overtaken, and replaced, by technology. Even those who are confident that their role cannot be replaced by a machine may nonetheless be concerned with the challenges of maintaining or attaining skills to utilize and leverage technology. One adjudicator recently related that he has a secretary that helps him with his email. She opens the messages, prints them, and he writes responses on the paper, which she then types as responses to the email. This is one way to answer the challenge of a new paradigm like email, but is not likely the best way. This adjudicator is avoiding technology rather than embracing and leveraging it.

A recent study by Dell and Intel has addressed "The Evolving Workforce."[1] The results may tell us a great deal about where the workforce is headed generally, and as a result where the issues of workplace injuries may be headed. These perceptions may also help us understand how the adjudication processes we are familiar with may adapt to technology that is here and that which is on the way. This survey considered over eight thousand workers in eleven countries,[2] in both the public and private sector, and considered a spectrum of issues.

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NAWCJ Judicial College 2012!

THANKS!

The Judiciary College 2012 has concluded. We are proud to thank our phenomenal speakers!

Professor Timothy Terrel
Atlanta, GA
Emory University

Honorable Jennifer Hopens
Austin, TX
Texas Department of Insurance, Division of Worker's Compensation

Honorable Michael Alvey
Frankfort, KY
Kentucky Workers' Compensation Commission

Honorable Melba Dixon
Jackson, MS
Mississippi Workers' Compensation Commission

Honorable *Sylvia Medina Shore*
Miami, Florida
Florida Office of Judges of Compensation Claims

Honorable James Szablewicz
Richmond, Virginia
Virginia Workers' Compensation Commission

James McCluskey, M.D., MPH, PhD.
University of South Florida
Tampa, FL

Professor Charles Ehrhardt
Florida State University
Tallahassee, FL

Steven E. Weber, D.O.
From Orlando Orthopaedic Center, Orlando, FL

Susan Constantine – As seen on CNN, MSNBC, ACB, CBS, and HLN.
Orlando, FL

HONORABLE STEVEN ROSEN
ST. PETERSBURG, FL

HONORABLE MELISSA JONES
Washington, D.C.
District of Columbia Department of Employment Services

ELIZABETH RISSMAN
ORLANDO, FL

WILLIAM WIELAND, ESQ.
ORLANDO, FL

HONORABLE NIKKI CLARK
TALLAHASSEE, FL

HONORABLE WARREN MASSEY,
ATLANTA. GA

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WCI Workers' Compensation Institute

"New Study" from Page 3

There is much in the report that bears consideration. Obviously, the sponsors' interests revolve around the role that technology does and will continue to play in the work environment of tomorrow. The study notes that "across the globe, people are seeing the benefits of technology in enabling more flexible working, discovering new ways of accomplishing tasks and enhancing productivity." In the adjudicator's role, we see potentials for collaboration on orders or processes. Web-based conferencing systems allow "face to face" discussions between adjudicators across long-distance. Video-teleconference systems enable judges to hear trials from great distances, effecting synergies and support that are otherwise unrealistic in large states, due to the geographic distances involved. As electronic filing becomes the norm, adjudicators are enabled to perform their review and adjudication of motions and stipulations from virtually any location, and are far less tied to the office, which was the standard of the non-digital world.

Respondents to The Evolving Workforce Study evidenced a concern that understanding technology is a critical work-skill. People across diverse geographical and experiential spectrums seem to accept that "technology skills are required to be competitive." The study notes that this perception was expected in "developed countries," but was notably evidenced in the responses in "places like China and India." The results support that employees appreciate and understand the leverage that technology can apply to the workplace. Trends toward greater cooperation and collaboration through technology are apparent in the study results. The respondents supported this as "particularly evident" in engineering, media, and education. Predictably, the younger the workers, the more prone respondents were to agree that they wish for technology to allow them to "do business in different ways."

Respondents clearly understand that the advances of technology come with a price. Concerns they voiced include:

Information technology (IT) problems are a regular frustration
Outsourcing is a threat
Working remotely erodes team spirit
Work life encroaches on private life
Need to keep up with technology to be effective
Under pressure to work longer hours

Many workers' compensation adjudicators will likely find that at least some of these concerns resonate on a personal level.

The study respondents evidenced a perception that employees feel they need to work longer hours to remain competitive. However, 59% of public employees and 63% of private employees believe that their performance should be measured based upon the quality of their work, "rather than time spent in the office." In some part, this conclusion is likely influenced by the confluence of two of the concerns above: feelings that work is encroaching on private life, and therefore private time, and the feeling of pressure to work longer hours. As our workload becomes increasingly portable, more responsibilities will follow us into non-traditional, eight to five, work hours. The access afforded by electronically filed documents and web-based docket management programs renders the adjudication function very portable. Most adjudicators have likely entered orders from home or vacation, either transmitting them to the parties or back to an office staff member for service on the parties.

Some study results are fairly predictable. We would expect younger workers to be more in tune with technology; they grew up with it. There are employees in our offices that do not remember the world before cell-phones and others who still struggle with cell-phones.

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"New Study" from Page 5

There are employees in our offices who have never used a computer that lacked a mouse or a "point and click" interface like Windows. Regardless of what technological point of reference we were each born into, the challenge is in how we react to each new technological challenge/opportunity as it arises. Those perfectly comfortable with today's technology because they were born into it may find themselves as challenged by tomorrow's advances as others of us feel with today's.

Some study results were more counterintuitive. Respondents were asked whether business and their employment benefit from technology allowing alternative methods. In other words, are the technology-enabled changes in the method of performing work a "good thing." Large percentages of Mexican and Brazilian workers believed this would be positive, but American and British workers were less likely voice that belief. Intuitively, perhaps, the expectation would have been for greater belief in benefits of technology in more developed economies. The reality, however, is that the perceptions in developing economies are more positive.

The study includes the following hypotheses and conclusions:

> *Hypotheses: The workforce of the future, for many industries, could be thousands of people working in different places. Is cloud computing and other ICT applications going to make it easier to distribute more tasks and services and to invite input from a community through crowdsourcing?*

The report concludes that a majority of workers see benefits from the emerging technologies and the potentials for collaboration among geographically separated individuals. The promise of diverse and dynamic team collaboration is recognized and anticipated. The technologies that will allow this new paradigm include the examples of Webex, Go to Meeting, and videophone platforms like Skype, ooVoo, and others. Not surprisingly, younger workers are more likely to accept the effectiveness of these platforms and to integrate them into their work processes. Using these platforms, workers can collaborate on revisions to a document, share perspectives with pictures and diagrams, and otherwise work together from great distances. As unexpected challenges arise, additional individuals can be rapidly integrated into the conversation without the expense or delay that would be necessitated by travel by that new individual to a meeting site.

> *Hypotheses: Standardized measures of productivity based on numbers of hours inputted would become less relevant in a knowledge-based economy. What are going to be the newer, softer metrics to assess productivity?*

The study concludes that employers and employees are already "largely ready and willing to accept the potential tradeoff s in terms of work-life balance." There is a trend to flexible work hours, telecommuting and other accommodations. Telecommuting has already presented workers' compensation adjudicators with challenges like the personal comfort doctrine, the going and coming rule, and primary causation. The study recognizes that acceptance of these flexibilities varies, but there is evidence of growing acceptance.

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Your NAWCJ Board of Directors 2012

"New Study" from P.6

Study respondents perceive that the tradeoff for flexibility is heavier workload and stresses, related to blurred lines between work life/time and personal life/time. Likely everyone reading this responds to work emails, revises or drafts orders, or processes other work tasks at home, in the evenings, and on weekends. We will all recognize that technology has enabled this, and as noted by the study is therefore the "root cause of this trend." The study recognizes that Information technology professionals will face the challenge of promoting the benefits of new technologies, while confronting our concerns that those new innovations will cause further invasion of our increasingly precious private time.

> *Hypotheses: The number and types of devices are proliferating and changing. Choice of device would become more about the situation, location and occasion. Are employers and the current systems and processes going to allow for increased end-user utility and choice?*

The study notes that there is a wrinkle in the adoption of new technologies. They refer to this as "legacy infrastructures." This refers to the fact that each innovation can either be based upon the last innovation, in such a way that we are encouraged to continue in a succession. A great example of this is word processing. Once an organization commits to Word or Word Perfect, it is likely to continue with that software as future iterations of the program come to market.

Staff becomes accustomed to the program(s), and therefore future hardware purchases are made with consideration of whether the potential new hardware choices accommodate that software. Likewise hardware increasingly interacts with other hardware in our offices. Desktop computers interact with servers for example. Therefore, future desktop purchases will be influenced by whether they will interact with existing servers or other peripherals. Because of this "legacy" implication, change to new hardware or software will likely be more expensive and more stressful.

The study notes that acceptance of new devices is more likely in environments without "legacy infrastructures." Information Technology professionals will likely have this complication in mind as they address needed changes in infrastructures and software platforms. They will recognize that if they do not focus attention on current infrastructure changes to facilitate future flexibility, they will be impeded in their future efforts to advocate changes in devices such as tablets, pads, laptops, or innovative desktop alternatives.

Will your agency adopt the benefits of the ipad, with all of its benefits in user-friendliness, or will the complications of integrating its use with concurrent use of a Windows-based office environment impede adoption? A persistent complaint about ipads is the absence of a USB connection, which accommodates the memory sticks (flash drives) we all embrace today, but which we resisted so few years ago. Is the stress of learning a new paradigm like Dropbox for file transfers to and from the ipad worth the benefits?

> *Hypotheses: There will be more intergenerational knowledge transfer between younger 'digital natives' and the older generation. However, is there an increased risk of conflict and tension between workers of different ages, backgrounds, knowledge and skills?*

The Study notes that age influences how we understand and accept our work environment and its demands. Some characteristics of the young are based upon lack of experience. Others are based upon the greater willingness of the young to accept and leverage technology. These two combine to render the young also more amenable to change, as they are less likely to be impeded by "the way we have always done it" and more likely to accept the premise that technology is their friend. Intertwined in the analysis of age were findings that younger workers are "more likely to have increased expectations of their employers and feel disconnected from their corporate IT departments."

This will alter the workplace as workers expect and anticipate access to technology. In other words, the younger worker expects the accommodation of and transition to the ipad. They see this as important, and reasonably expect that their employer will strive to accommodate their remaining at, or close to, the cutting edge. As important, however, these employees will seek greater autonomy from restrictions, will be more likely to use employer technology for their own ends, such as surfing Facebook at work (or at home if they are telecommuting), and will be more likely to see the technology as a "given" and not a benefit. Older workers will present equally significant, but different, challenges. Older (those over 25 according to the study) will be more resistant to changes in software or hardware, will be less motivated to overcome technology challenges, choosing to revert to paper than fixing the software, and will be a greater training and maintenance challenge for the IT department. The IT department will be challenged with multiple paradigms in the same office environment as some embrace and pursue technology while others ignore or shun it.

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"New Study" from P.7

It is likely that information technology (IT) professionals in state government will face many challenges in coming years. The mix of age groups will continue to be dynamic in adjudication departments, as in government agencies generally. There will be conflicts between the newest judge and the most senior judge over the needs for and uses of technology. Older judges and staff (over 24 years old) will struggle with technology on a virtually continual basis, while younger judges and staff will take technological experience and ability for granted.

Agency leaders will face the management challenges that come from all of these perspectives. Technology purchases will be required to keep pace with the public and policymaker's expectations. Transitions to e-filing, electronic data interchange, and more will require managers to continuously upgrade hardware, software, and services. The public will demand it, and we will deliver it. As we do so, we will have to be conscious of how much change our departments or staffs can accommodate. Part of our challenge will depend on the peculiarities of our geography, as that will dictate, to some degree, what our communications needs are. Some will depend on the extent to which collaboration is required between geographically diverse judges, litigants, administrators and managers.

There will be a struggle both to accommodate the calls for change and to make change with as little disruption as possible for the staff that must accept and leverage that technology for there to be a successful outcome. The interests of different age groups within and without our organizations will be diverse and managers/planners will have to be conscious of these diversities and the challenges they will face in accommodating the personal resistance to change.

If you are an IT professional, you have already experienced some of this. If you are a manager, you have already been confronted by the people affected. If you are a judge, you may well feel that this is "not my job." At the end of the analysis, change will happen. Deciding to ignore it or deny it will not insulate you. Change is difficult for everyone, but change is inevitable. Perhaps the foregoing better prepares us to understand that it affects us all. Perhaps we will better understand how the changes that challenge us individually may present similar or even greater challenges for others.

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1 http://i.dell.com/sites/doccontent/shared-content/campaigns/en/Documents/Report2_The_Workforce_Perspective_Global.pdf

2 The United States, Brazil, Canada, Mexico, United Kingdom, France, Germany, Australia, China, India, and Japan.

"Second Fridays" Free Educational Programs from the NAWCJ

Upcoming programs:

November 9, 2012 (12:00 p.m. Eastern)

Alex Cuello, of Miami, is Board Certified in Elder Law, and earned an LL.M. in Elder Law from Stetson University College of Law. He will bring to life the trials and tribulations of a workers' compensation claimant that cannot protect her or his own interests, and how their needs are protected by law and the courts.

December 14, 2012 (12:00 p.m. Eastern)

Judge David Langham. The Code of Judicial Conduct, letters of recommendation, personal references, and the potential conflicts of litigation.

Make Plans Today to Tune-in

Conference call-in codes are available by emailing judgelangham@yahoo.com. There is no charge for Second Fridays programs. Attendees are responsible for submitting their individual applications for credit in their respective jurisdiction.

Did you Know?

"Dutch researchers found that city dwellers living near parks and gardens were 25 percent less likely to be diagnosed with depression than those with nary a patch of grass in sight. Study author Jolanda Maas, Ph.D., says that frequent exposure to nature may help people recover from the stress and mental fatigue of urban life."

Men's Health, By Christa Sgobba, , Posted Date: November 28, 2011; http://www.menshealth.com/best-life/frown-towns

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2012 SAWCA All Committee Conference

November 13-16, 2012; Hotel Monteleone, New Orleans, LA

Featuring the Adjudicator's Roundtable

Thursday, November 15, 2012
2:00 – 5:00

Moderated by Wade McGuffey, Esq, a founding partner in Goodman McGuffey Lindsey & Johnson, LLP and is CEO for the firm. Wade leads the firm's multi-state workers' compensation practice. He practices in Georgia and Florida from the Atlanta and Orlando Offices.

Hon. Cindy Polk Wilson is an ALJ with the Mississippi Workers' Compensation Commission. She received her Juris Doctor from the University of Mississippi Law Center. She serves on the Administrative Law and Workers' Compensation Section of the Mississippi Bar, and is a frequent lecturer on Mississippi Workers' Compensation law.

Hon. John Lazzara is the Judge of Compensation Claims in Tallahassee, Florida. He has served since 1990. He has served as President of the Florida Conference of Judges and as President of the National Association of Workers' Compensation Judiciary. He earned his B.A. and Juris Doctor degrees from the University of Florida.

Hon. Virginia Wilson Mounger is an ALJ with the Mississippi Workers' Compensation Commission. She was initially appointed in 1994. She earned a B.A. from Mississippi State University and her Juris Doctor from the University of Mississippi Law Center. She completed graduate studies at University College, Oxford University, Oxford, England.

Hon. Meg Hartin is and ALJ with the Georgia State Board of Workers' Compensation. She mediates and adjudicates workers compensation cases. She was initially appointed in 1997. She earned her B.A. from Converse College and her Juris Doctor from the University of Georgia.

Topics Will Include:

Resolution process for medical issues; Dealing with discovery issues, social security records, social media & medical records; Electronic filing & service of process issues; Bankruptcy of an employer; MSA's impact on adjudication of claims and/or resolution of claims.

Tuesday November 13

Executive Committee Meeting 2:00pm -5:00pm
Executive Committee Reception & Dinner 6:30pm -9:00pm

Wednesday November 14

General Session: "Real Issues - Real Answers"
9:00am – 12:00pm Bankruptcies & Defaults

- MSAs: What is the Fear Factor? What are the Solutions? Join Distinguished Panels of Industry & Regulatory Professionals For In-Depth Analyzes of the Challenges & Issues Faced By Employers & Regulators Alike. Bring Your Questions - Take Home Actionable Answers.

2:00pm - 5:00pm Committee Meetings:

- Administration & Procedures - "In the Weeds With MSA's"
- Self-Insurance & Insurance - "Bankruptcy Nightmares" Do You Have A Plan?

6:00pm - 8:00pm President's Reception

Thursday November 15

9:00am - 12:00pm Committee Meetings:

- Medical Rehabilitation - Kentucky Rep. John Tilley details how HB1 delivered a wake-up call to "Pill Mills" and rejuvenated Prescription Electronic Reporting in the battle on prescription drug abuse.
- Claims Administration - "Emerging Trends in Workers' Compensation Claims"
  Join Steve Novak (Trean), Chief Judge Sheral Kellar (LA), Tom Glasson (AIG), & Steve Heinen (Insurance Office of America) for an interactive presentation of the new trends.

12:00pm Convention Lunch
2:00pm - 5:00pm Committee Meetings:

- Management Information Systems - "E-Billing /Companion Guide
- Adjudicator's Roundtable - An "All-South" ALJ Judges Panel Takes All Questions

8:30pm - 10:00pm Coffee Cordials & Confections

Friday November 16

8:00am Farewell Breakfast
9:00am - 11:00am General Session Convention Wrap-up

- Committee Reports & Adjourn

Work Comp Pharmacy – The Latest Scam

By: Joe Paduda*

Gotta hand it to those…"entrepreneurs," they are one creative bunch. One day it's repackaging drugs at hugely inflated prices, then compounding drugs (oops, how'd that turn out??), next its some bizarre new way to measure muscular strength. That good 'ol American in-ja-noo-ity sure found a home in work comp!

Here's the latest example…stick with me here folks, this is probably happening to you too…

PMSI, through its PBM Tmesys, has received claims for Voltaren Gel 1% in 100gm tubes billed using a NDC indicating it was a repackaged medication (NDC 35356-0187-03). Since that's how Voltaren Gel comes from the manufacturer, the good folk at PMSI found it a bit odd that the drug was "repackaged" and assigned a NDC different than the manufacturer's NDC.

So, PMSI contacted the repackager (LAKE ERIE MEDICAL AND SURGICAL SUPPLY) to gain additional information as to what they are repackaging. As it turns out, LAKE ERIE MEDICAL AND SURGICAL SUPPLY is taking the manufacturer's product, relabeling with a LAKE ERIE MEDICAL AND SURGICAL SUPPLY proprietary label, assigning a new NDC and AWP (the new AWP being 2.8 times that of the manufacturer AWP) and selling the relabeled product to physicians within and outside of New York for physician dispensing. Side note – Lake Erie is the top repackager used by Automated Healthcare Solutions, the physician dispensing "technology" firm/lobbying powerhouse.

From a brief, very un-scientific poll of a few friends at payers, it turns out transactions for this "repackaged" product are relatively common, most (if not all) coming from a pharmacy in Flushing NY. Also, you have to ask yourself why are they doing this? My guess is that this pharmacy figured out that the margins are better if they process this as a repackaged drug than as a typical dispensed item.

It caused some of PMSI's folks to wonder just how it works. Are they squeezing out the gel and putting it into tiny tubes? Turns out they are just putting a new label on it. So the plan works like this:

a) Get a cheap tube of a drug.
b) Take the tube and do nothing to it. File for a new NDC.
c) Get the new NDC – create your own expensive AWP.
d) Put new label over old label – charge a lot more money.

Michael Rosenblum (a PMSI VP and pharmacist, and the one who figured this out) tells me that normally this drug comes in packages of 3. So maybe what these guys are doing is breaking the package up as single tubes, creating a new NDC, slapping a new label on it, and charging the same price for one tube as would be charged for 3 tubes . . ..

To quote another PMSI exec, it "Looks like a crazy system has gone insane. In the case of Voltaren Gel, the act of putting a new label increased the cost 2.8 times the original cost."

Not crazy, just another day at the office in the work comp world…

What does this mean for you? Check those NDCs now, stop paying the inflated prices now, demand refunds for any bills already paid, and get your SIU on this now

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The foregoing was originally published on Managed Care Matters, http://www.healthstrategyassoc.com/wordpress/. It is reprinted here with permission.

*Joseph Paduda is a nationally recognized expert, speaker, media source and author on managed care in group health and in workers' compensation. He translates complex data into actionable knowledge and is able to take an aerial view or to drill down into intricate niches. His practical approach and nearly 20 years experience in the field give clients precise direction and applicable programs.

Italy's Supreme Court Affirms Conclusion that Cell Phone Use Can Cause Tumors

A recent decision in Italy is making the rounds on the internet. Innocente Marcolini's job entailed up to six hours per day on his cellular telephone, over a twelve-year career. He developed a tumor near his left ear, and sought workers' compensation benefits. He contended that the phone emitted radiation and that this radiation caused his tumor. His employer denied the compensability of his injury, contesting the causation of the tumor. Mr. Marcolini sought a decision on his claim through the Instituto Nationale Per L'Assicurazione Contro Gli Infortuni Sul Lavoro,[1] or "INAIL." This agency is the substantial equivalent of a workers' compensation board, agency, or commission in the United States.

The INAIL rejected Mr. Marcolini's claim. It concluded that there is insufficient scientific evidence linking cell phone use to tumors. In support of its conclusions, it relied upon the 2010 Interphone Study whose conclusions have been echoed or adopted by the World Health Organization (WHO), essentially that "to date, no adverse health effects have been established as being caused by mobile phone use."

The WHO conclusions are similar to those views expressed by the United States National Cancer Institute (NCI) on their website.[2] That site provides explanation about the type of energy that cell-phones emit, and their conclusions regarding concerns of cell-phone use. The NCI is not supportive of conclusions that cell-phones are causally related to tumor formation. Among others, the Cancer Institute has published the following conclusions:

- Cell phones emit radiofrequency energy (radio waves), a form of non-ionizing radiation. Tissues nearest to where the phone is held can absorb this energy.
- Over time, the number of cell phone calls per day, the length of each call, and the amount of time people use cell phones have increased. Cell phone technology has also undergone substantial changes.
- Exposure to ionizing radiation, such as from radiation therapy, is known to increase the risk of cancer.
- Although many studies have examined the potential health effects of non-ionizing radiation from radar, microwave ovens, and other sources (including cell-phones), there is currently no consistent evidence that non-ionizing radiation increases cancer risk.

Mr. Marcolini's claim proceeded from the INAIL denial to an appeal to a civil court. The court relied upon research from Sweden, suggesting that cell phone use for extended periods of time can lead to greater risks of tumors. This research was published by Lennart Hardell, M.D., PhD. Dr. Hardell has been involved with extensive research of cell-phones and non-ionizing radiation. In making its determinations, the appeal court deemed the conclusions of Hardell's research more "reliable" because it was perceived as being more independent. The Court noted that some larger studies have been funded in part by the cell phone industry.

Dr. Hardell's participation in studies of cell-phone radiation has been extensive. His studies have concluded that there is no association between use of cellular or cordless telephones and salivary gland tumors,[3] non-Hodgkins lymphoma,[4] or testicular cancer. However, in a 2007 study, he concluded that long-term (greater than ten years) use of cellular phones is associated with an increased risk of brain tumors.[5] He noted that studies on the use of mobile phones for more than ten years "give a consistent pattern of increased risk for acoustic neuroma and glioma."

This 2007 study concluded that there is increased risk, and suggests that consideration should be given to industry standards regarding what levels of exposure should be deemed appropriate. In a related study, Dr. Hardell concluded that use of mobile phones by children increases the risk of such rumors by 500%.[6]

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The greater risk for children is thought to be related to the extent of skull development and thickness and density of the bone, and thus the extent of protection afforded to the soft tissues within, and the amount of non-ionizing radiation that is absorbed during cell-phone use.

Dr. Hardell concludes that "owing to the proximity of the brain to the radiation antenna, with the potential for absorbing a comparatively large amount of electromagnetic energy. An increased risk for brain tumors would be an indication of other potential health effects, but it would also imply that the current guidelines for microwave exposure during phone calls are inappropriate."

Mr. Marcolini next found himself before Italy's highest court. On this appeal, the Italian Supreme Court affirmed the appellate court conclusions. The determinations of INAIL have thus been conclusively overturned and the law of the land in Italy accepts that there can be a causal connection between tumors and cell phone use.

Science is ever-evolving. We understand more each day. A character in the movie Men in Black describes our certainty about science with "fifteen hundred years ago everybody knew the Earth was the center of the universe. Five hundred years ago, everybody knew the Earth was flat" and "Imagine what you'll know tomorrow." Against this historical backdrop, adjudicators are consistently challenged by the evolutions of science. The adjudicator is presented with conclusions of scientists and physicians. Unfortunately, there is often conflict in those conclusions, and tomorrow's research and conclusions may contradict the conclusions that seem absolute today.

Over recent history we have been challenged with a multitude of developments. Orthopedic surgeons have rendered opinions based upon x-rays. We have heard about more sound diagnoses based on the magnetic resonance image (MRI), created by using large electromagnets to excite the protons causing them to send out electronic signals, which a computer interprets and renders into a three-dimensional image or picture of the body. We have heard that contrast injected into the body for such scans is critical, we have heard that contrast is unnecessary, we have heard that contrast is harmful. We have heard that as good as an MRI is, diagnostic sonogram is better. We have heard that sonogram is neither appropriate of effective for diagnosis of orthopedic injury. We have heard that the "state of the art" is the thermogram, an imaging system that measures heat signatures in the body and produces a picture showing the location of the heat and thus the location of the problem. We have heard that thermogram is not indicative of injury and should not be relied upon. We have heard that narcotics are the solution to chronic pain.

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Comings and Goings

New Mexico Welcomes a New Workers' Compensation Judge.

Reg C. Woodard will take office on November 26, 2012. He comes to the bench with thirty-five years of experience, sixteen of which practicing workers' compensation. Judge Woodard has been recognized as a certified specialist in workers' compensation. to serve as a workers' compensation judge since 2005. Judge Woodard earned his bachelor's and law degrees from the University of New Mexico. Judge Woodard will initially serve a one-year term, after which he will be eligible for reappointment to a five-year term.

New Mexico Workers' Compensation Judge Retires.

Judge Gregory Griego has served as a New Mexico workers' compensation judge for twenty-six years, since his appointment in 1986. Judge Griego earned his undergraduate and law degrees from Harvard University. Judge Griego has served as a faculty member of the National Judicial College, and as an adjunct faculty member of the University of New Mexico School of Law.

Florida Compensation Judge Takes the Circuit Bench

Judge Thomas Portuallo has served as Judge of Compensation Claims in Daytona Beach, Florida since 1996. In October, he was appointed by Governor Scott to the Circuit Court in and for Volusia County, Florida. Judge Portuallo earned his undergraduate degree from the University of Florida and his law degree from Stetson College of Law. Prior to his appointment in 1996, Judge Portuallo practiced workers' compensation law for over 10 years.

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We have heard that narcotics are harmful and should be prescribed with great caution. The list of conflicts we have heard would, come to think of it has, fill(ed) volumes.

A recurrent criticism of adjudicators, heard in a variety of jurisdictions and settings, is about our acceptance or rejection of scientific evidence ("how could the judge fall for that?"). Courts have struggled with what standards should be used to determine the admissibility of scientific opinion. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) long ago described the evidentiary standard which has been adopted by most states. This standard holds scientific opinion evidence is admissible if "the thing from which the deduction is made" is "sufficiently established to have gained general acceptance in the particular field in which it belongs."

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) is the standard more recently adopted by the Federal Courts. Some state courts have also accepted this more recently described standard, which has been described in the following parts: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community."[7] Adjudicators are asked to apply one of these standards, and to determine whether scientific evidence is admissible.

Often, however, the more difficult challenge is determining which of multiple, conflicting, admissible, opinions is more persuasive in a given case. That is the challenge faced in Mr. Marcolini's case. This conundrum is the challenge of the finder of fact. In some settings, the fact-finder is aided by the presence of the expert. The ability to perceive facial expressions, to hear voice inflection, to gauge reaction to cross-examination in person may certainly aid this determination of credibility, and thus which admissible expert opinion should be accepted, and which should be rejected.

Unfortunately, in the workers' compensation adjudication process, most expert opinions are rendered in document form, either in reports, records or deposition transcripts, leaving the adjudicator to make determinations of credibility in a much more sanitized environment. Workers' compensation adjudicators must make credibility determinations based upon the foundation and explanation of the expert. This may include citation to learned treatise or studies. It may include explanation of what signs and symptoms were observed in a patient and how those support the diagnosis or other conclusions. This credibility analysis should never devolve into an analysis of which expert went to some particular school or trained at some particular clinic. If the expert cannot provide explanation of the logic of their conclusions, adjudicators should never be lulled into the "just trust me, I went to Harvard" argument in support of a physician's conclusions.

In Mr. Marcolini's case, that credibility determination occurred more than once. It is not clear whether the initial decision at INAIL was made on an evidentiary basis or trial. However, on an administrative or hearing basis INAIL concluded that one scientific study, the 2010 Interphone Study, was more credible and it rendered its decision denying compensability of Mr. Marcolini's tumor in reliance upon it. The appeals court does not appear to have concluded that the Interphone Study was inadmissible. Their determination appears to be that the other study, the Hardell Study, was more persuasive, essentially re-determining the facts. In some context of "appeal" we might question whether an appellate court should appropriately engage in finding facts.

However, there are many examples of American appellate courts doing just that regarding expert opinions. Generally, the justification for such appellate forays into the factual realm is the documentary nature of workers' compensation determinations. It is rare for a physician or other experts to appear live for a workers' compensation hearing. Trial presentations of records, reports, and depositions are far more common in workers' compensation and similar administrative proceedings. Therefore, an appellate panel may feel justified concluding that they are in the same posture as the trier of fact; the courts conclude that each are considering a paper-record of opinions, and therefore by this logic each is similarly postured to make factual findings of the credibility of those various opinions. It is possible that the appellate court did just that in Mr. Marcolini's case.

It is also possible that the consideration by INAIL was not an evidentiary, adversarial proceeding. There are similar processes in American workers' compensation and other disability systems. The one most known to us all is likely the Social Security Disability system in which an initial determination of a claim's merits is made on a review of an application and accompanying documents. If this is the procedural process with INAIL, then the Italian "appellate court" may have been the first opportunity afforded for due process, and thus more of a trial than what we might call an appeal.

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If that is more descriptive of the Italian process, then the factual findings of the appellate court may have been from a position of greater access to information. Any analysis of this concern must be left to those with greater knowledge of the INAIL processes and appeals from those decisions.

What we know, however, is that scientific evidence will be a consistent part of workers' compensation determinations. Workers' compensation adjudicators will be challenged by conflicting scientific opinion evidence. As to cell-phone emissions of non-ionizing radiation, it is fair to say that there is conflicting evidence, with Dr. Hardell's research on one side and the Interphone Study on the other. Following the Italian Supreme Court's affirmation of the acceptance of Dr. Hardell's conclusions, it is likely that non-ionizing radiation claims will become more common in the United States and workers' compensation adjudicators will face the determinations of admissibility and credibility associated with the conflicting science on this subject. Whether the WHO or the NCI will change their views and conclusions remains to be seen.

Workers' compensation adjudicators will struggle with the compensability of such claims. There is evidence that the United States has more cell phones than people. The pervasive nature of these devices is apparent all around us, and some of us perhaps wish it was less. Curiously, however, the average number of "voice minutes," that is the time we spend talking on these devices, has been seen as decreasing. The average cell-phone call in 2009 was 1.81 minutes, compared to 2.27 minutes in 2008.[8] There is support that this trend towards shorter calls has continued since. This trend is being attributed to the advent of the "smart phone" and the tendency to text or email rather than call. A Pew study in 2011 concluded that the average cell-phone user "makes or receives 12.3 calls per day.[10] It appears that most Americans are making fewer and shorter cell-phone calls. Therefore, the population whose use is consistent with Dr. Hardell's studies, or Mr. Marcolini's six hour per day use, may perhaps be small. How these cases are decided will be of interest to all worker's compensation adjudicators.

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1 Roughly translated "Italian Workers' Compensation Authority."

2 http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones

3 No association between the use of cellular or cordless telephones and salivary gland tumors, *Occup Environ Med*2004;**61**:675-679 doi:10.1136/oem.2003.011262, http://oem.bmj.com/content/61/8/675

4 Tumour risk associated with use of cellular telephones or cordless desktop telephones, http://www.wjso.com/content/4/1/74.

5 Long-term use of cellular phones and brain tumors: increased risk associated with use for ⩾10 years, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2092574/

6 Children who use mobile phones are 'five times more likely to develop brain tumors, http://www.dailymail.co.uk/news/article-1058989/Children-use-mobile-phones-times-likely-develop-brain-tumours.html

7 http://www.law.cornell.edu/wex/daubert_standard

8 New York Times, Cellphones Now Used More for Data than for Calls, http://www.nytimes.com/2010/05/14/technology/personaltech/14talk.html?_r=0

9 Hanging Up, The Economist, December 2010. http://www.economist.com/node/17797782

10 How Americans Use Text Messaging, http://pewinternet.org/Reports/2011/Cell-Phone-Texting-2011/Main-Report.aspx

"An appeal is when you ask one court to show its contempt for another court."

Finley Peter Dunne

Interesting Comp Blogs

DePaolo's Work Comp World
http://daviddepaolo.blogspot.com/

OUCH! Workers' Compensation News and Issues
http://rolandlegal.wordpress.com/

Workers' Compensation Blogspot
http://workers-compensation.blogspot.com/

Workers' Comp Zone
http://www.workerscompzone.com/

Maryland Workers' Compensation Blog
http://www.marylandworkerscompensationblog.com/

Work Comp Insider
http://www.workerscompinsider.com/

United States 5th Circuit Finds 1st Amendment Protection for Work Comp Blog

A Lubbock, Texas, claimants' attorney has won Round 2 in his battle with the state Division of Workers' Compensation over the domain name he chose for his blog on workers' compensation law. The U.S. 5th Circuit Court of Appeals in New Orleans ruled on Tuesday that a federal district judge erred by dismissing John Gibson's constitutional challenge to a Texas statute prohibiting the use of the words "Texas workers' compensation" in any advertisement or business name.

Gibson had been blogging at texasworkerscomplaw.com before February 2011, when the DWC sent him a cease-and-desist letter advising him that he was in violation of Section 419.002 of the Texas Labor Code. He filed suit alleging the law violated his free speech rights and other constitutional protections, but U.S. District Court for Northern Texas dismissed his complaint, finding he had failed to state a claim.

The 5th Circuit did not hand Gibson a clear victory on appeal, however, it merely remanded the case to the district court to determine whether the statute is necessary to advance a substantial state interest and whether the law is no more extensive than necessary to serve that interest. "Because Texas has made no serious attempt to justify this regulation as narrowly tailored to a substantial state interest, the district court's order dismissing Gibson's as-applied challenge was in error, and this case is remanded to allow Texas the opportunity to develop additional factual findings to support the statute's constitutionality," the court said in an opinion written by Circuit Judge Edith Brown Clement.

The 5th Circuit found that the district court had ruled correctly in rejecting Gibson's arguments that the law violated his 5th Amendment due-process rights and his 14th Amendment right to equal protection under the law. Gibson had argued that the statute deprived him of procedural due process because there is no means for a hearing to determine if there is a violation. However, Gibson had an opportunity to respond in writing to the DWC's cease-and-desist letter, but he did not do so, the court said. What's more, the DWC had threatened only to assess a $5,000 civil penalty against Gibson for violating the law, and its regulations allowed an appeal to an administrative hearing officer.

The court similarly found no merit in Gibson's argument that the statute subjects his business under controls not placed on similarly situated businesses or individuals, a violation of his 14th Amendment rights. The court said the statute on its face bears a rational relationship to a legitimate state interest and would not violate Gibson's equal-protection rights unless he could show it lacked a rational basis.

As for Gibson's 1st Amendment argument, the court gave clear instructions to the district court: It must first decide if the Texas statute is commercial speech, which has less vigorous constitutional protection. If the district court decides that Gibson's website is commercial speech, the district court must use a test set forth in Central Hudson Gas v. Pub. Serv. Comm'n, a 1980 U.S. Supreme Court ruling.

According to that ruling and prior cases, government may restrict commercial speech that is inherently or potentially false, deceptive or misleading. The state argued that Gibson's website name is inherently misleading, citing several trademark cases to make its point. The appellate court, however, said those cases aren't applicable because the state of Texas did not use "its own talent and energies" in developing the term "Texas workers' compensation."

Nevertheless, the court said the DWC may still enforce the statute if it shows that it has a substantial state interest in doing so and that the statute is the least restrictive method of accomplishing that goal. The district court found the law to be constitutional because its intent is to prevent misuse of the DWC's names and symbols, "however, Texas concedes that it has not yet compiled the record necessary to demonstrate satisfaction of the Central Hudson test as a matter of law," the appellate court said.

While Gibson may be victorious for the time being, he had not yet reactivated his website as of late Wednesday. The website contains a statement that it is "down for maintenance."

California 2nd DCA Affirms Injunction Against Angry Police Officer Applicant

The California 2nd District Court of Appeals on Friday upheld a permanent injunction that bars a former Pomona police officer with a history of angry confrontations with workers' compensation claims managers from possessing firearms and visiting City Hall.

The 2nd DCA said substantial evidence supported a Los Angeles County Superior Court judge's decision to grant the permanent injunction because former Police Officer Leonard Heiselt continues to pursue a disability retirement from the Police Department and city employees are afraid that he will show up at their workplace with a gun.

Heiselt, a former Marine, began working as a police officer for the Pomona Police Department in 2002. He injured his shoulders, left arm and left elbow on the job in March 2009 and filed a workers' compensation claim.

The city placed Heiselt on light duty until September 2010, when a sergeant informed him that the city could not reasonably accommodate his work restrictions and sent him home. Heiselt told city officials that he would pursue a disability retirement.

Although Heiselt was represented by an attorney in his workers' compensation claim, he made an angry call to the city Human Resources Department in March 2010 and visited the office in person in June 2010 to pursue reimbursement for an unpaid mileage claim. A workers' compensation claims examiner testified that Heiselt yelled profanities and stormed out of the office when she asked him to leave.

In November 2010, Heiselt visited City Hall again to ask about his disability retirement application and told a city employee that she was incompetent, according to testimony. In December 2010, he attempted to visit a Human Resources official without making an appointment and yelled at employees who intervened. In February 2011, he came to City Hall again and screamed obscenities while flailing his arms. He left the building after city officials called police.

The Los Angeles County Superior Court issued a temporary restraining order against Heiselt in February 2011 that ordered him to stay at least 100 yards away from City Hall and dispose of any guns or other firearms in his immediate possession or control. The court issued a permanent injunction against Heiselt in May 2011 with terms similar to the temporary restraining orders, except that it did not bar Heiselt from visiting the Police Department.

Heiselt appealed, arguing that the injunction was not warranted because he had not made a credible threat of violence. The appellate court disagreed, finding that Heiselt's actions "would place a reasonable person in fear for his or her safety."

The court noted that Heiselt owned 12 handguns and rifles, had been a police officer for 10 years and made it known to city officials that he was an "expert" on guns.

"Defendant demanded that one of plaintiff's employees provide him with immediate answers to his questions, and said something to him to the effect of, 'Do I have to cock my gun?' or, 'my gun is cocked,'" the court said.

Heiselt had admitted that he used acts of "getting in people's faces" and intimidating people to get what he wanted, which is sufficient evidence that city employees were reasonably placed in fear for their safety, the court said.

NCCI Report Addresses the Risks of the Aging Workforce

The National Council on Compensation Insurance, NCCI, issued an October 2012 report[1] regarding the aging workforce. The report by Tanya Restrepo and Harry Shuford, titled *Workers Compensation and the Aging Workforce: Is 35 the New "Older" Worker*? (hereafter "the Report") questions our perceptions of aging. Recent years have brought anecdotal reports of employees deferring retirement and remaining in the active workforce. Some commentators have questioned whether that results from a decaying economy and investment destruction following the 2008 financial meltdowns. Others have posited that longer working Americans are a natural consequence of longer life,and a desire to remain active in what we once considered years of retirement. Both hypotheses can be supported anecdotally, and we will perhaps never be entirely certain of the role each plays.

The NCCI Report notes that there is evidence to support that our human abilities deteriorate with age. There is a fact which anyone over the age of 40 could have filled us in on without need for a report. However, research by Ray Fair[2] is quoted in the Report in support of the conclusions that both mental and physical abilities are subject to the aging process. The good news from this research is that these aging processes, though notable throughout the life-cycle, are distinct for physical and mental abilities.

The example in the report considers physical exertion (sprinting), physical endurance (long-distance running) and mental acuity (chess). This example illustrates ability does not deteriorate consistently in these three categories, the Report concludes:

> [S]printing deteriorates more slowly than physical performance involving endurance, such as long distance running, and mental performance, such as playing chess, deteriorates at an even slower pace.

In making the numerical comparisons, the Report addresses deterioration of capacity or ability over notably long time periods. One comparison of interest addresses the thirty years between age thirty-five and sixty-five. This is of particular interest in the context of the historical significance assigned to age sixty-five as a "normal" retirement age.

Three capacities are compared in the Fair research. Two are physical capacity measures and one is a mental acuity measure. To measure physical ability, long-distance running and sprinting performance of the study participants are compared. The mental acuity performance is based upon chess.

The physical abilities were determined "based on the best-ever performance by age, so are measured for very fit people who are running races at all ages." The mental acuity age factors

> [A]re not based on a US or world record, but are based on the best rating by age among chess ratings for about 50,000 players, downloaded from the World Chess Federation website.

The Report notes that the "long distance run" capacity, or "endurance" capacity is deteriorates the most markedly in this thirty year period. The deterioration rate in this metric is twenty-seven percent (27%) over the thirty years. The deterioration rate for "sprinting" or "exertion" is more modest. Over the same thirty-year period, exertion capacity deteriorates only nineteen percent (19%). As expected, however, the most modest decline is the mental acuity (Insert text box with old age quote "youth and vigor") category. In this metric, the rate of decline over thirty years prior to age sixty-five is a mere six percent (6%).

NCCI posits the question "Are older workers now younger?" Stated another way, are the effects of aging as pervasive as previously suggested? Previous recent (2011) NCCI publications have concluded that

> [O]n average, costs for workers aged 35 and older ("older workers) tend to be quite similar; in contrast, they are higher than the average costs for workers aged 16 to 34 ("younger workers").

The Report also concludes that the distinction between younger and older workers is not limited to issues of the cost of claims. Certainly, various hypotheses are permissible regarding "older" workers. Their injuries may be slower to heal based upon the natural aging process that results in the decrease of ability noted by Fair. It is also possible that perceptions of the injured worker regarding their future are different for the "younger" worker with a lifetime before herself or himself.

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Upcoming Seminars

34th Annual Medical Seminar on Workers' Compensation, February 24-26, 2013, Francis Marion Hotel, Charleston, South Carolina. http://www.scwcea.org/

American Bar Association Workers' Compensation Committee 2013 Midwinter Seminar and Conference, Co-sponsored by Tort, Trial and Insurance Practice Section, March 14-16, 2013, The Biltmore Hotel, Coral Gables, Florida. http://apps.americanbar.org/dch/committee.cfm?com=LL122000

WCRI Annual Issues and Research Conference, February 27028, Boston Marriott Cambridge, Cambridge Massachusetts. http://www.wcrinet.org/conference.html

SEAK 33rd Annual National Workers' Compensation and Occupational Medicine Conference, The Resort and Conference Center at Hyannis, Hyannis, Cape Cod, Massachusetts July 16–18, 2013 Hyannis, Massachussets. Cost is $975.00.

Florida Workers' Compensation Claims Handling 2013. February 5, 2013, Emerald Coast Convention Center, Ft. Walton Beach, Florida. http://www.mcconnaughhay.com/seminars/1367/

Boardwalk Seminar 2013, Bally's Atlantic City, Atlantic City, New Jersey, April 17-19, 2013. http://www.nj-justice.org/nj/index.cfm?event=showPage&pg=ExhibitMain

These programs are listed here for information only. The NAWCJ does not endorse these programs or participate in their production.

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However, the distinction raised by the Report regarding the costs of such claims is based more in the inverse relationship that age may influence in terms of premium dollars charged for coverage. The Report notes:

> [F]rom a workers compensation perspective, the higher costs are largely offset by the higher premium due to higher wages of older workers.

This conclusion is likely more persuasive with "older" workers who remain in a workforce, and the natural expectations thereof such as seniority, promotion, etc., than for "older" workers who are returned to the workforce later in life with the potential for lower earnings because of a restarted or different career path in which they are perceived as more akin to entry-level employees. This phenomenon could result from a degradation of transferable skills resulting from a workforce absence, or a lack of ongoing "new skill" accretion which is expected in the day-to-day participation in employment.

NCCI concludes that the findings regarding "older workers" is "reassuring." The Report notes that "an aging workforce appears to have a far less negative impact on workers compensation claim costs than might have been thought." The Report issued in October 2012 is a return to the foundation assembled in the 2011 NCCI report regarding the aging workforce.[3]

In expressing their conclusions, the NCCI refers to age groups as "age cohorts," and the focus is to compare the results from the "younger cohort" (ages 16-34) to the "older cohort" (ages 35-65). In order to compare apples to apples in this study, the NCCI has separated accidents into various categories of severity, which are a mixed bag of medical and indemnity descriptors. Injuries are categorized as "medical only" claims, indicative of minor severity and no "lost-time," to claims which required time from work for recovery, which are characterized as "temporary total" claims, and the most severe, which justified indemnity for "permanent partial" disability benefits.

Among their significant findings:

> For a range of specific diagnoses, the shares by type of workplace injury (i.e., temporary total, permanent partial, and medical only) are remarkably comparable across age cohorts. For example, the shares of claims due to "sprain of neck" that were temporary total injuries are virtually identical for both younger and older workers.
>
> The factors accounting for increases in severity (referred to as mix, quantity, and price5) over two time periods (1996/97 to 2000/01 and 2001/02 to 2007/086) are relatively similar across age cohorts.

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> For all age cohorts, changes in the mix of leading diagnoses account for a marginal share of the increase in severity for both periods, but the impact is slightly larger in the late 1990s than in the 2000s.
>
> Injuries due to high severity diagnoses have historically been more common for older workers, but those high severity diagnoses are now becoming common in younger-age cohorts as well.
>
> Quantity is more important for all age cohorts in the late 1990s when both duration (number of days with indemnity payments) and number of treatments per claim were increasing.
>
> Employers are implementing safety and loss control programs to address the aging of the workforce.

Intuitively some leap to the conclusion that there will be a greater severity in injuries the older the patient. The NCCI study considered "the 15 most common diagnosis codes, based on the total of permanent partial, temporary total, and medical-only claim counts across Accident Years 1996–2008." From this population of data, samples were selected in both the "older" and "younger" categories. Adjustments were made in an effort to make the comparison more valid. The Report notes that some "fatal and permanent total claims" were excluded to this end.

The Report concludes that there are increased likelihoods of particular injuries in certain age groups. For example, it notes that "older workers are more likely to have higher-cost rotator cuff and knee injuries while younger workers are more likely to have lower-cost back sprains." The analysis also supports that some of the more costly diagnoses are suffered more often by "older workers." The Report cautions that some of those specific injuries are now trending to becoming more prevalent in younger workers.

Ultimately, the Report illustrates that there has been some shift in the types of injuries which are predominant within each age group, and concedes that some diagnoses codes indicate more costly claims than others. However, the data presented by the Report generally supports that the effect of age is less pernicious than one might think.

What the Report does not address, however, is the further question of how age plays a role in the "older" than "older" worker population. With greater longevity and the availability of medical treatments, more employees may elect to remain in the work environment beyond age 65. Whether that is genuinely a significant factor in work places, and whether this "older" than "older" population presents significantly different results and concerns will perhaps be addressed in future reports.

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[1] Workers Compensation and the Aging Workforce: Is 35 the New "Older" Worker? https://www.ncci.com/NCCIMAIN/INDUSTRYINFORMATION/RESEARCHOUTLOOK/PAGES/WORKERSCOMP-AGINGWORKFORCE.ASPX

[2] Fair, Ray C., "Estimated Age Effects in Athletic Events and Chess," Experimental Aging Research, 33: 37–57, 2007.

[3] NCCI Research on the Aging Workforce and Workers Comp, https://www.ncci.com/nccimain/IndustryInformation/ResearchOutlook/Pages/NCCIResearch-AgingWorkforce-WC.aspx

Interesting Quotes

"The law isn't justice. It's a very imperfect mechanism. If you press exactly the right buttons and are also lucky, justice may show up in the answer. A mechanism is all the law was ever intended to be."

Raymond Chandler

"Laws and institutions, like clocks, must occasionally be cleaned, wound up, and set to true time."

Henry Ward Beecher

"Laws too gentle, are seldom obeyed; too severe, seldom executed."

Benjamin Franklin

"Where the law is uncertain there is no law."

Proverb

"The lawyer's truth is not Truth, but consistency or a consistent expediency."

Henry David Thoreau

"The court is like a palace of marble; it's composed of people very hard and very polished."

Jean de la Bruyère

"A judge is a law student who grades his own papers."

Henry Louis Mencken

"The legal system is often a mystery, and we, its priests, preside over rituals baffling to everyday citizens."

Henry Miller

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR MEMBERSHIP

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

NAME: _____ **DATE:** ____/____/____

OFFICIAL TITLE: _____

Organization: _____

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_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

YEAR FIRST APPOINTED OR ELECTED? _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ? _____

_____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

_____

_____

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

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Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
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Email: kathy@wci360.com

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
APPLICATION FOR ASSOCIATE MEMBERSHIP

THE NAWCJ ASSOCIATE MEMBERSHIP YEAR IS A FOR 12 MONTHS FROM YOUR APPLICATION MONTH. ASSOCIATE MEMBERSHIP DUES ARE $250 PER YEAR.

NAME: _____ **DATE:** ____/____/____

Firm or Business: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____Fax:_____

HOW DID YOU LEARN ABOUT NAWCJ? _____

Mail your application and check to:

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@wci360.com

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

There are opportunities for sponsorship of the 2013 NAWCJ Judicial College August 19 through 21, 2013, in Orlando, Florida. If you are interested in sponsoring any of the following:

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Please Contact

Kathy Shelton
P.O. Box 200
Tallahassee, FL 32302
850.425.8156
Email: kathy@wci360.com

We Will See You There!

The National Association of Workers' Compensation Judiciary, August 19-23, 2012

Marriott World Center, Orlando

Confirmed Topics for Next August Include

Evidence for Judges, Professor Mathhew Steffey, Mississippi College School of Law.

Judicial Writing, Hon. Gerry Lebovits, New York.

Thanks to our Judiciary College Curriculum Committee 2013

Hon. Karl Aumann, Maryland

Hon. Stephen Farrow, Georgia

Hon. Sheral Kellar, Louisiana

Hon. James Szlablewicz, Virginia