# Lex and Verum

## The National Association of Workers' Compensation Judiciary

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# President's Page

By Hon. Michael Alvey*

Outstanding, phenomenal, stupendous and pretty darn good. This is how I would describe the 2015 National Association of Workers' Compensation Judiciary Judicial College. I would like to thank everyone for their efforts in making the 2015 Judicial College a rousing success. I am always awed by the quality of the presentations and the overall excellence of the conference.

We celebrated a milestone this year by having over one-hundred attendees at the college for the first time. The continued increase in attendance is a tribute to both the quality of the programming and the excitement generated and passed on by the attendees. Every year I hear very positive comments from first time attendees, and that they will urge their agencies to continue to send adjudicators to the program. This year was no exception.

I specifically want to thank the conference committee for all of their efforts in ensuring the success of the conference. The committee is chaired by Hon. Jane Williams of Kentucky. The other committee members are Hon. Neal Pitts of Florida, Hon. Bruce Moore of Kansas, Hon. John Lazzara of Florida and Hon. Wes Marshall of Virginia. I would also like to thank Hon. Bob Swisher of Kentucky who was drafted into service at the conference. I would also like to thank the Hon. David Langham, Deputy Chief Judge of Florida, whose efforts above and beyond the call, as always, ensured our success at the conference. Thank you to all.

I also thank Kathy Shelton, Shirley Kendall and Woody Douglas of RMI, not only for their assistance at the conference, but the support they provide our association throughout the year. Finally, I thank Hon. Melissa Jones, D.C. and Kent Wetherell, Florida 1st DCA for their service to our board of directors. I also welcome Hon. Frank McKay of Georgia, Hon. Ken Switzer of Tennessee, and Hon. Bruce Moore of Kansas who will begin service to our board of directors on January 1, 2016.

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*President Alvey, from page 1.*

As we have wrapped-up the 2015 College, planning is well underway for the 2016 College. If you have any thoughts or suggestions, please send those to me at michael.alvey@ky.gov, and I will forward them on. Also, I am in the process of updating our committees. Below is a list of all of our committees, chairs and members. If you wish to serve, let me know, along with your preference for service, and I will ensure you get involved.

Thanks in advance for sharing your talents. Again, thank you to all for your assistance in making the 2015 College the best ever.

| **NAWCJ Committees** | | |
|---|---|---|
| **Committee** | Chair | Members |
| **Long-range Planning**-Chaired by President-elect, with one to three members, not necessarily Board members | Jennifer Hopens, Texas | Jim Szablewicz, Virginia<br>John Lazzara, Florida<br>Bob Swisher, Kentucky<br>Elizabeth Gobeil, Georgia<br>Dave Torrey, Pennsylvania |
| **Curriculum**-Develop curriculum for the college, and assist with the recruitment of speakers, and setting agenda | John Lazzara, Florida - Dean | Bruce Moore, Kansas<br>John Lazzara, Florida<br>Ken Switzer, Tennessee<br>Sheral Kellar, Louisiana<br>Jim Szablewicz, Virginia |
| **Conference**-This committee shall provide hands-on assistance for the conference, including set-up, staffing of the table, and any other administrative assistance necessary at the conference | Jane Rice Williams, Kentucky | Neal Pitts, Florida<br>Wesley Marshall, Virginia<br>John Lazzara, Florida<br>Bruce Moore, Kansas |
| **Parliamentary**-Annually review and suggest changes to the By-laws. | Jim Szablewicz, Virginia | Scott Beck, South Carolina<br>Sheral Kellar, Louisiana<br>Elizabeth Gobeil, Georgia |
| **Scholarship**- Set deadlines for scholarship applications. Review the applications, and make recommendations to the Board | Ellen Lorenzen, Florida | Bob Cohen, Florida<br>Jennifer Hopens, Texas<br>Melodie Belcher, Georgia |
| **Recruitment**-Contact individuals from the various state agencies regarding the conference/membership | Roger Williams, Virginia | Karl Aumann, Maryland<br>Deneise Lott, Mississippi<br>Dwight T. Lovan, Kentucky<br>Frank R. McKay, Georgia |
| **Newsletter**-Serve on the editorial board to assist with the solicitation of articles, author articles, and proofread. | LuAnn Haley, Arizona | Dave Langham, Florida<br>Melissa Jones, DC<br>Dave Torrey, Pennsylvania |
| **Website**-Monitor for content and make suggestions for modification. | Dave Torrey, Pennsylvania | Dave Langham, Florida<br>Jane Williams, Kentucky |
| **Moot Court**- Coordinate the Earle Zehmer Moot Court Competition with the committee (Barbara Wagner/Tracey Hyde) | Tom Sculco, Florida | Ray Holley, Florida<br>Margaret Sojourner, Florida<br>Melody James, South Carolina |

# Report from the Floor: NAWCJ Judiciary College August 2015

By Hon. LuAnn Haley*

As one of the more than 100 lucky judges who attended the 7th Annual College in Orlando, I can provide the following recap of events while still basking in the post conference high. I would be remiss however if I did not call out an "all hail to the chief" for the fine leadership of our President Mike Alvey during this year's conference. Also, the Dean of the College Curriculum, Judge David Langham, was a constant presence during the conference and made sure each presenter felt welcomed and had the tools needed to insure success in all sessions.

The College kicked off the week on Sunday with the E. Earle Zehmer Moot Court competition and this year's event proved to be outstanding. Many jurisdictions carve out workers' compensation from the state central panel because specialized knowledge is needed to litigate and adjudicate workers' compensation cases. This year's moot court competition problem proves the wisdom of that approach. For the first time in 25 years, the problem was not authored by Richard Sickling, Esq. Judge David Langham assumed that role this year and Judge Thomas Sculco prepared the bench brief. Almost fifty NAWCJ judges volunteered and presided over the competition and the NAWCJ Board extends its thanks to all the judges that participated.

The winners of the 2015 moot court competition hailed from Florida Coastal School of Law and the team's coach is Professor Alexander Moody. Also, the NAWCJ's Professionalism Award went to a participant from Stetson School of Law, Nicole Santamaria. A hearty congratulation is extended to all of the students and coaches who participated in this year's competition.

Sunday evening's Board meeting included the report from the conference committee that for the first time the College had more than 100 registrants. The Board also confirmed the slate for the incoming board members during the meeting. The following judges were approved for two year terms on the NAWCJ Board: LuAnn Haley, Deneise Turner Lott, Frank McKay, Bruce Moore, Kenneth Switzer, and Jane Rice Williams.

On Monday morning, the College opened with an informative session on evidence lead by Professor Charles W. Ehrhardt which included video vignettes (prepared by judges from Pennsylvania, Mississippi and Kentucky) and interactive opportunities for the audience to rule on evidentiary objections. Professor Ehrhardt provided the audience valuable information regarding issues of relevance, authenticating documents, and evidence from social media and gave the attendees a chance to weigh in on the admissibility of evidence in each case.

Following the evidentiary show, Judge Switzer provided a session on medical terminology for judges that provided a fun way to learn about medical terms. Using a crossword puzzle format, Judge Switzer helped the audience to understand difficult medical terms that will be useful in the trenches.

In the afternoon, the attendees were given two opportunities to consider comparative law issues, first in a general panel of judges from the NAWCJ and secondly, at the SAWCA Regulator Roundtable. In the NAWCJ session, judges from Kansas, Tennessee, Washington, South Carolina and Maine provided information regarding how different jurisdictions address common workers' compensation issues. In the Regulator Roundtable, Judge Belcher led a three hour presentation that included comparative law discussions regarding: fee schedules, opt out provisions, medical marijuana, first responder presumptions and workplace violence. This year's Roundtable included a unique opportunity for the audience to text their questions to the panel leaders which allowed the audience easy participation.

There was also a separate track on Monday afternoon for the New Adjudicator that included sessions on guardians, dealing with difficult litigants and ethics. All of the new judges who attended came away with tips on handling their caseload no matter where they reside.

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*Report from the Floor, from page 3.*

All of the presenters in the new judge tract provided practical information for judges from every jurisdiction.

On Tuesday morning, all of the judges learned writing techniques from a master of judicial writing, Professor Timothy Terrell. Each participant came away with new insight on writing with clarity, a requirement of any adjudicator of workers' compensation claims. Professor Terrell, who teaches legal writing at Emory School of Law, showed the judges how to move from writing with logic and precision to writing quality decisions with coherence and persuasiveness. The take home message: a good judicial writer combines focus, flow and structure to create a coherent and well written decision.

The Annual Business meeting was held at lunch on Tuesday during which the audience was treated to comments from the guest speaker, Bob Wilson, regarding the trials and tribulations of workers' compensation. Mr. Wilson spoke of the future in workers' compensation which will require all involved to be innovative and adapt to changing circumstances in order to be successful.

Tuesday afternoon included a presentation from a renowned medical expert, Dr. James Talmadge, who dazzled the audience with expert medical information on impairments, causation and assessing workability. Dr. Talmadge provided detailed information to assist any adjudicator with the handling of difficult medical issues faced by all judges in workers' compensation cases.

Our group then heard from the Honorable Elizabeth Crum from Pennsylvania regarding judicial ethics and then went directly to the issue of medical marijuana, which was perhaps appropriate to include as a high to end day two of the conference. Dr. Sanford Silverman, a pain physician from Florida, provided expert information, but no samples, on how marijuana affects the human body.

After a fun gathering for dinner at Smokey Bones on Tuesday evening, the conference ended on Wednesday with two excellent and informative sessions. First the audience learned helpful tips from Commissioner Roger Williams, from Virginia, regarding dealing with the pro se litigant. The College ended with the grand finale, a session on how we can avoid a remand in our cases. Judges from DC, Kentucky, Tennessee, and Georgia shared their expertise and guided the audience on this important topic.

As the NAWCJ College closes for another year, I am confident that each judge who attended the conference is better prepared to handle the difficult issues we all face in the adjudication of workers' compensation cases in our jurisdiction. See you in 2016!

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* Judge LuAnn Haley is an ALJ for the Industrial Commission of Arizona and has worked in that position since moving to Arizona in 1998. Before moving to AZ, she worked as a defense lawyer in Pittsburgh, Pennsylvania after graduating from Dickinson School of Law in 1981. She is licensed in Arizona and Pennsylvania and has worked exclusively in the field of Workers' Compensation Law since 1981.

# Dreams do come true at Judiciary College

This young man was attending the Judiciary College in Orlando in August. Imagine his surprise when he learned that one of his idols was also in the building! It involved a significant amount of effort, as his people contacted our people, and back and forth. But we were able to make this young man's dream come true. Herschel Walker (L) lived the dream and got to meet his idol, the Honorable David Imahara (R), Chief Administrative Law Judge of Georgia! We are sure Herschel will treasure this picture forever, and we are so proud that we could facilitate his meeting Judge Imahara.

# The Workers' Compensation Judge's Complete Guide to John Fabian Witt's *The Accidental Republic*[1]

By Hon. David Torrey[*]

*The Accidental Republic: Crippled Working Men, Destitute Widows, and the Remaking of American Law* (311 pp., Harvard University Press 2004).

I.

This book, published in 2004, is a compilation of academic articles that John Fabian Witt, a law professor, now at Yale, authored over the preceding years. It is a history of the genesis of workers' compensation laws. The author declares, "This book is about the American industrial-accident crisis and the transformation it occasioned in American law."

More recently, Witt has authored another book – this one about the origins of the initial laws of warfare, which had their genesis in the Civil War.[2] *The Accidental Republic* also reflects the author's deep interest in that conflict. In this regard, a theme throughout all chapters is how Americans addressed the post-war surge in industrial accidents and deaths, given the then-current idea that autonomy ("free labor") should characterize the efforts of workers. Of course, the Civil War saw the triumph of free labor over its polar opposite, *slavery*.

In Witt's introduction, he touches on the various themes the book explores in the succeeding chapters. One key to the success of the book is that the chapters, though originally separate essays, build upon each other logically until the author's eventual theses are proven.

A. ***The work accident crisis; The problem of Priestley v. Fowler.***

In the author's introduction, he notes that in 1907, President Theodore Roosevelt made a speech in which he addressed the rising problem of industrial accidents. Roosevelt, in his speech, noted a "great increase in mechanical and manufacturing operations" which meant "a corresponding increase in the number of accidents to the wage-workers employed therein." Roosevelt recognized that at the time, "the United States was in the fifth decade of an accident crisis like none the world had ever seen and like none any western nation has witnessed since." Roosevelt recommended bold changes in the nation's laws relative to compensating work accidents and deaths, and he successfully advocated a workers' compensation program for federal workers.

Witt sets forth astounding statistics from the late 19th century: "In 1890 alone, one railroad worker in every 300 was killed on the job; among freight railroad brakemen, one out of 100 died in work accidents." It is in this introductory discussion that Witt references the dangerous work circumstances of the anthracite mines of northeastern Pennsylvania. Throughout the 1850's and 1860's, each year 6% of the workforce was killed, 6% permanently crippled, and 6% seriously but temporarily disabled. Here, too, the author references the calamitous mine-explosion disaster of December 1907 at Monongah, West Virginia, in which 362 miners perished.

How was the law to respond to this crisis?

Reflecting on the earliest days of the nation, Witt posits that 18th century lawyers and judges in England and in the American colonies "paid little attention to the problems of unintentional injury." Little about the issue, for example, is mentioned in Blackstone. Most controversies were treated as "contract cases." And, in fact, many disputes that we now think of as tort cases were conceptualized as arising out of contract.

True, we can trace payments for damages for personal injury "through a centralized institution (the state) back to ancient times." And in this context the author mentions the Code of Hammurabi, the Roman Twelve Tables, and the European wergild.

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*The Accidental Republic, from page 5.*

But, of course, what happened in the late 19th century was, and is, completely different: "But if western legal systems had dealt with wrongful harms for centuries, the problem of compensation for unintentional human injuries generated on a mass scale by the regular operations of economic life was largely new to western legal systems in the mid to late 19th century."

Witt begins to address legal doctrine as he discusses *Priestley v. Fowler*, the pivotal English case from 1837. Of course, this is the case that created the Fellow Servant Rule – the ruling that was to make the law's response to the accident crisis so unsatisfactory. Of note: "The opinion's author, Lord Abinger, had long supported reform in the English Poor Law ..., on the theory that state-provided material support undermined incentives to work and led to pauperism. Accordingly, in *Priestley*, Abinger ruled that the law of industrial accidents would turn not on state mandated standards, but rather on the private contractual arrangements of the parties. In Abinger's view, "employees consented by implied contracts to take [on] the risk of injuries other than those caused by the negligence of the employer."

Later in the book, Witt details at length how the Fellow Servant Rule eventually lost some of its force with the enactment of employer liability laws, such as Pennsylvania's Casey Act. Yet, those piecemeal enactments were found unsatisfactory, yielding definitively to the movement in favor of no-fault workers' compensation.

***B. Was workers' compensation a* fait accompli*?*** Witt further ponders whether the ultimate evolution of tort liability to no-fault workers' compensation was a *fait accompli*. Here he undertakes, like many historians, a consideration of alternative outcomes – could there have been a different solution to compensating work injuries?

Witt, in this regard, posits: "in fact, the United States experimented in the late 19th and early 20th centuries with an array of policy alternatives to address industrial accidents." Labor leaders, for example, studied the "apparently more favorable liability rules in European jurisdictions," and scholars and government officials "studied German approaches to industrial-accident policy." In fact, before workers' compensation there were "four leading approaches to the accident problem .... In the nation's courts, lawyers and judges created the common law of tort, repackaging a formerly ad hoc jumble of rules and standards into a common law accident regime. Workers organized widespread but remarkably little-known cooperative insurance societies. Sophisticated employers and the first generation of scientific managers developed private employer compensation programs. And social insurance advocates proposed the compulsory accident compensation schemes that were enacted in the decade after 1910."

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*The Accidental Republic, from page 6.*

In a dramatic statement, Witt declares, "the era of accident-law reform thus stood as one of those seminal moments of possibility in American politics, one of those punctuations in the equilibria of normal politics; a critical juncture in which the future of American law and policy was open to a number of different possible lines of development."

In light of these facts, Witt hazards that, while by the 1920's workers' compensation was well established for work accidents – with tort liability, in contrast, for other accidents – it was nevertheless true that "in the preceding half-century, the proliferation of alternatives ... had occasioned a highly plastic moment in which the institutions that make up our contemporary accident law regime might have developed in any number of different ways."

C. ***Political influence of workers' compensation.*** Addressing another phenomenon, Witt notes that the industrial-accident crisis and the U.S. response to it "were among the nation's first sustained encounters with social policy for a modern industrial economy." He posits that the great leaders of the New Deal had grown up in the era of the industrial accident crisis and were influenced by the same and the introduction of workers' compensation. He notes as yet a further example that the populist Huey Long in fact began his career as a claimant's lawyer working in the Louisiana workers' compensation system. Witt posits that the population at large was greatly impacted by the introduction of workers' compensation. For example, by 1930, in New York, 200,000 new claims were filed.

Addressing another phenomenon, Witt asserts that the rise of workers' compensation in the early days of the 20th century has a great deal to do with its endurance over the decades: "political lobbies and powerful interest groups were still in the process of formation in the early years of accident-law reform. Just a few decades into the 20th century, these constituencies would come to dominate and often calcify policy making processes in areas such as accident law and health insurance reform."

D. ***"Free labor" defined; interaction with accident recovery.*** The author, in his introduction, analyzes how the "free labor" ideology both conflicted with, and in a sense was consistent with, the eventual workers' compensation innovation.

The ideology of free labor stressed the virtues of autonomy, independence, and efficiency of the American workman. This concept was in marked contrast to slavery. Witt declares, "as an ideology ..., free labor came by the middle of the 19th century to influence powerfully the politics and law of the United States." The 13th Amendment, meanwhile, was ultimately to "enshrine free labor" by outlawing slavery.

For our purposes, however, "free labor ideas exhibit a kind of systemic *disregard* for the phenomenon of risk." (Emphasis added.) In this regard, how the costs of accidents or "misfortunes" would be taken care of in a free labor environment did not seem to capture the imagination or attention of its early advocates. This was so perhaps because "self-reliance" was prized by the advocates of free labor.

This created a problem: "In the decades after the Civil War, industrial accidents made it increasingly difficult for free labor thinking to screen out the problem of risk." Indeed, by the 1930's, "the hazards of modern wage-earning had replaced free labor as the centerpiece of lawmakers' ideas about the regulation of labor." Thus, "free labor" suffered demise in the wake of the Industrial Revolution and the industrial-accident crisis.

After the Civil War, according to Witt, attempts were made to "adopt the values of free labor thinking to the problems of risk in a modern wage-earning economy." These were the reforms referred to above, which ultimately culminated in the reform of workers' compensation. "The paradigm shift from free labor to risk and insurance," he posits, "was not so much a clean break as a halting, inevitably partial, and often barely perceptible change in emphasis."

Having reflected on the free labor idea, and its demise, Witt precisely defines the purpose of his book: "This book is about this transformation in American law and politics ... from the poles of freedom and slavery to the opposites of freedom and risk."[3] It aims to account for the "processes by which ... tort 'swallowed up' contract. .... The pivot on which this remaking of American law took place was the great and horrible industrial accident crisis of the turn of the 20th century."

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*The Accidental Republic, from page 7.*

E. ***What the book doesn't address; meaning of "Accidental Republic.***" In the final part of his introduction, Witt offers (as is typical in academic writing), defenses to his omission of certain subjects. As a preliminary matter, he states that the book is a legal history, and not so much a social history. He does not discuss the law of slavery, or what happened when a slave was injured at work. Likewise, he does not address at length the development of early safety regulations. Witt does say that such efforts were largely a failure – while such early safety regulations were enacted, they went "famously under-enforced during the period that occupies this study. Factory inspectors were understaffed, overworked, frequently incompetent, and sometimes corrupt."

The author finally talks about the title of his book. He has two intentions. He states: "The first is to suggest ..., the extent to which developments in accident law contributed to the foundations of the 20th- and 21st-century American republic. Many features of our modern state, ranging from its social insurance systems to its federalism principles and beyond, cannot be understood without reference to the story I tell here." Further, "The second meaning of the phrase suggests something more abstract – namely that the developments in accident law (and thus in part the foundations of the modern republic) were themselves accidental."

II.

Chapter 1 of Witt's book is "Crippled Working Men, Destitute Widows, and the Crisis of Free Labor."

A. ***Introduction.*** One can't appreciate the theme and thesis of this chapter (or the book!) without a major reminder (or basic training) relative to the meaning of the doctrine of "free labor."

In general, free labor is an ideology which essentially sanctified the idea that Americans (chiefly men at the time), should labor free, and not in any sense as slaves. As Witt states: "The outcome of the Civil War enshrined the ideal of free labor in American politics and law." And, of course, the 13th Amendment placed it in the Constitution.

Here is yet another definition: "[The free labor ideology] is a set of beliefs and ideas that presented slavery as a threat to white male economic independence. It was central to the Republican Party's attack on slavery. It asserted that the ability of working men to achieve economic independence was the basis of northern superiority. Northern working class men were concerned about competing with other workers and maintaining economic independence. The land in the west meant safety and a place they could continue to make a living and not have to worry about competition.

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If slavery were to move west, it would destroy that option because there would be less industrialization and they wouldn't be able to compete with slave labor."

We can perceive the problem with free labor ideology and the Industrial Revolution's crisis of industrial injuries. The crisis threatened the vision of autonomy and self-sufficiency.

A critical quote: "The American accident problem was deeply bound up in a peculiar set of preoccupations borne of the American experience of slavery, Civil War and emancipation. 'Free labor' had become the rallying cry for a diverse array of views about the proper organization of American economic, political, and social life, ranging from expectations of upward mobility and views about the wisdom of state regulation of the marketplace, to beliefs about the proper organization of the firm and the appropriate structure of the family. By the late 19th century, the industrial-accident problem seemed to present a paradox for free labor thinking, for a variety of practices loosely associated with free labor appeared to contribute to American industrial accident-rates. In turn, industrial accidents both called into question basic values and free labor thinking and gave rise to a spate of experimentation in adapting free labor to a new world of risk."

B. ***A different sort of American exceptionalism: the crisis of work injuries and deaths.*** Witt, in Chapter 1, gives an account of the surge in work injuries and deaths during the period in question. He maintains that, while France, Germany, and Great Britain also experienced mechanization and problems with such casualties, the U.S. experience was exceptional. "The United States," he posits, "witnessed an industrial accident crisis of world historical proportions." "Many," Witt declares, believed that, "by the end of the first decade of the 20th century … industrial accidents were one of the most important issues in American public life."

Remarkable in this regard is the fact that the generations who lived through this surge in injuries and deaths made reference to the same by thinking of the American Civil War and its unprecedented carnage.

Also, "the Civil War even gave rise to the nation's first major experiments in public policy for disability and injury in peacetime." Here Witt talks about Civil War pensions. He states that, "in the first decades of the 20th century, the Civil War Veterans' programs would lay important groundwork for accident-compensation policies aimed at the nation's beleaguered industrial army."[4]

Many concerns beyond work accidents existed with regard to life in the industrial era. Still, by the turn of the 20th century, "the industrial accident emerged in the United States as among the most visible of social ills." A major reason for such visibility was that work accidents seemed to pose "an especially acute problem in some of the leading occupations of the new industrial economy": railroad work, mining, logging, timbering, bricklaying and masonry. Industrial accidents "also disproportionately affected wage earning men supporting dependent wives and children."

"Accidents," meanwhile, "stood out from other social ills as startling to bystanders, observers, and victims alike. As the important 20th-century photographer Lewis Hine documented in one of his earliest photographic essays ..., the violence of encounters between flesh and machine was readily apparent in the form of missing limbs, the scarred bodies of victims, and the vacant stares of destitute family members."

Witt agrees with the familiar understanding that "industrialization generated heightened accident rates." Importantly, this phenomenon was perceived even at the time – contemporary analysts and press accounts attributed the situation to factory mechanization. Railroads, heavy machinery, mechanized workplaces, streetcars, and mines were all areas of modern economic life that gave rise to unprecedented numbers of injuries and deaths.

Witt rejects, meanwhile, the assertions of some historians that there was no real growth in injuries and deaths. To the contrary, "from the available evidence, it appears that accident rates were growing sharply in the mid-19th century in most western nations." This was the case in England, Witt states, and so too in the U.S. This analysis is assisted by the fact that starting in 1850 the U.S. Census started to count deaths from accidents. In 1860, the Census specifically added railroad accidents, and then in 1870, mining accidents, injuries from machinery, and deaths sustained from falls.

Witt reiterates that industrial accident rates in the U.S. were worse than in Europe: They were "exceptionally acute," particularly in the coal mining industry. Workplace injuries, he states, "were far and away the leading category of accidental injury and death in turn of the century of America ...."

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*The Accidental Republic, from page 9.*

The crisis of injuries and deaths was new: "If age-old sources of injury, illness, and premature death had been more or less integrated into the fabric of everyday life, new industrial causes of accident and death stood out in bold relief against the background of traditional and familiar sources of human suffering." In the railroad industry, in particular, no end of hazards existed.

As noted above, this phenomenon was perceived as such even at the time. Contemporaries sought to figure out the cause of the increase. Some maintained that many of the workers in the industrial workforce were recent immigrants who lacked basic safety know-how. Some could not even read rudimentary safety warnings.

The author reviews at length the idea that the inability of workers to sue their employers for workplace injury or death, with any ease, gave rise to lax employer attention to safety. Witt seems persuaded: "Thanks to a law of employers' liability that made it difficult for employees to sue their employers for work injuries, occupational hazards were relatively inexpensive. From the railroads to the mines to the factories, firms responded to these conditions by minimizing their investments in expensive capital and labor while maximizing their use of power-hungry, labor-saving devices, often at the expense of safety."

C. ***The work injury crisis, free labor – and two ironies.*** "The law of employers' liability," Witt declares, "seemed to many commentators to have developed a body of doctrines that minimized employers' responsibility for work accidents in the name of free labor. Under the law of slavery ..., slave owners had been able to recover for injuries to a slave caused by the negligence of those to whom the slave had been hired out to work. In contrast to the slave law approach ..., 'the American principle' in employers' 'liability is ... briefly this': If the workingman objects to some dangerous task, 'he has the privilege of throwing up his job. He is not a slave – he cannot be compelled to work under hazardous conditions.'" Thus, Witt concludes, "the ostensible virtues of free labor ..., lay at the foundation of the law of employers' liability, where they contributed to the accident problem itself."

A second problem with free labor and autonomy: "Perhaps most of all, it seemed to many that the independence and the discretionary authority insisted on by many American workingmen exacerbated accident risks." Notably, Francis H. Bohlen, a leading authority on American tort law, insisted that the "American workman probably takes greater risks than any other." For example, miners allegedly over-relied on explosives and, in general, miners' "strong independent streak ... exacerbated safety hazards in the mines." Meanwhile, "on the railroads, risk-taking by workingmen was often part of an ethic of manly bravado." Even Crystal Eastman stated, "extreme caution is as unprofessional among the men in dangerous trades as fear would be in a soldier."[5]

Of course, a tension in thinking exists here: Eastman, for one, did not believe that most injuries were caused by employee carelessness. Witt seems to be persuaded of this as well: "The notion that accidents in the workplace were caused by negligence of the employees was the favorite refuge of scoundrel employers ...." Labor leaders would become furious at employers who blamed worker carelessness for accidents.

But here, Witt posits, "lay a crisis for free labor thinking." In this regard, "criticisms of employer accusations of employee carelessness themselves rested on ideas about the managerial authority that employers were exercising and could have exercised." Such labor leaders seemed to be acquiescing in the idea that workplaces should be "rationally managed," that is, "engineered from the top down." This was a crisis for free labor thinking: "Workers' relative autonomy and the legal standards that had been developed around it had become exacerbating factors in the American industrial accident epidemic. Yet workers' relative autonomy was also one of the organizing principles in the mid- and late-19th century American body of thought that has come to be known as the ideology of free labor."

D. ***The work injury crisis, free labor, and the end of upward mobility.*** Another conception of free labor – a bit more abstract – goes to the worker's "domestic sphere." Free labor "marked off the domestic sphere as a separate domain protected from the dangers of the marketplace." Social insurance experts of the time, Witt says, posited that "the legitimacy of free labor rested on the sharp distinction that [it] promised to preserve between markets in labor, on the one hand, and tranquility and virtue in the domestic sphere, on the other."

Witt discusses the great move away from workers laboring in skilled crafts, often by themselves or in smaller enterprises, and into "wage labor."

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All of this changed the work relationship: "The ... dream of the wage laborer's upwardly mobile rise to economic independence, it seemed, was increasingly out of step with the social structure of a free labor economy in which wage-earning was not a temporary phase but a permanent condition…. If industrial accidents were epidemic, the modern wage labor economy hardly seemed consistent with triumphs for either individual autonomy or workingmen's independence. Free labor's efficiency was called into question by the enormous waste of labor power associated with employee injuries. And free labor's capacities to sustain the family wage – a central test of free labor's success – seemed in serious doubt."

It is here that free labor encountered a major problem, as the entire idea of "personnel management" developed: "Sophisticated employers and efficiency engineers began to develop personnel management departments that sought to replace labor markets with hierarchically organized structures of employment. Frederick Winslow Taylor's scientific management movement, for example ..., replaced markets with hierarchies, substituting managerial command-and-control regimes for incentive based systems of labor management."

Work accidents, Witt continues in this vein, "seemed to challenge Lincolnian optimism about hard work and upward mobility, for they often had disastrous consequences for precisely those wage earners who otherwise seemed to be hard-working and morally upstanding members of their communities."

Notably, labor started supporting workers' compensation in the wake of this realization.

E. ***Alternative conceptualizations of the injury crisis.*** Labor and social reformers saw a special evil in the crisis of uncompensated work accidents. In this regard, some "saw in the commodification of the injured worker's body a kind of latter-day slave auction, in which ostensibly free laborers sold their bodies and their lives for cash in the form of settlements and tort liability damages, to the extent such damages could be obtained."

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

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

**NAME:** _____

**DATE:** ____/____/____

**FIRM OR BUSINESS:**

_____

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**PROFESSIONAL ADDRESS:**

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*The Accidental Republic, from page 11.*

Others, however, didn't really adopt this conceptualization. Witt quotes one commentator as follows: "The real problem in the law of employers' liability was not commodification of ostensibly free laborers' bodies. The real problem was insufficient valuations" of injury and death. (Emphasis added.) Accordingly, different interest groups conceived of the crisis – and how to respond – in different ways: "These competing views of the accident crisis ... produced competing prescriptions for resolving it."[6]

Witt maintains that by the end of the 19th century, "four leading models for dealing with the fallout from the industrial-accident crisis had emerged." He maintains that these corresponded to the "leading strands of free labor thought." These four models were:

1. common law personal injury litigation;
2. the cooperative model of self-insurance through insurance societies;
3. the managerial model of private employer relief funds; and
4. the social insurance model of compulsory state compensation plans.

Of course, it is the latter, workers' compensation, which prevailed.

III.

The second chapter of Witt's book is "The Dilemmas of Classical Tort Law." Of course, in the first chapter, Witt establishes that the ideology of free labor did not mesh well with the socioeconomic challenges of the industrial age, and certainly not when it came to industrial injuries and the losses incurred by workers. In the same sense, classical tort law did not provide the type of analytical framework for liability, and remedies, presented by the same industrial era crises. This is the story of Chapter 2.

A. ***Genesis of the "fellow-servant rule" and enshrinement of assumption of risk.*** A key precept of 19th century tort law was that no recovery was available for victims of behaviors that were not attended by negligence. This precept is critical in the first issue that Witt addresses, that is, the famous decision by Massachusetts Chief Justice Lemuel Shaw. He wrote the famous 1842 decision *Farwell v. Boston and Worcester Railroad*. *Farwell* followed *Priestley v. Fowler* and held that employees assumed the ordinary risks of their employment, including the risk of a fellow servant's negligence.

Witt points out that Farwell was actually not the first U.S. articulation of this standard, particularly the idea that "defendants were liable only for those damages caused by their fault or negligence." Witt also points out, in this regard, that courts in New York and Pennsylvania in the early 1820's had begun to move towards "the idea that defendants were liable for injury only where they failed to exercise reasonable care."

A key precept, set forth by Shaw, is crucial in Witt's analysis. The author notes that this precept is even in the Bible: "Damage lies where it falls."[7] In our context, the phrase means that when neither party is at fault, the damage lies where it falls. The Latin phrase for defining the idea that non-negligent victims of non-negligent harm had no rights is, as we learn in law school, *damnum absque injuria*.

A *political philosophy* corresponded with this precept: "Tort law marked the bounds of individuals' liberty … separat[ing] the private sphere of individual action from the public sphere of state coercion." To refine: the idea prevailed that individual freedom was best served by making one party liable to another only when negligence was shown.

B. ***Assumption of risk and the industrial accident crisis.*** Still, a dilemma surrounding this philosophy unfolded in the wake of the industrial accident crisis. Witt states, "a negligence standard that held individuals liable for damages only when they failed to exercise reasonable care would allow individuals to act freely within their rights, without compromising those rights by charging them with the costs of harms that they could not reasonably avoid. But such a negligence standard would also leave remediless the faultless victim of harm caused by someone else's free exercise of rights." On the other hand, "A strict-liability standard that held individuals liable for damages they caused even when they exercised reasonable care, by contrast, would rectify such harms but would also impose charges on the free exercise of the non-negligent injurer's rights."

The author asks rhetorically, "what principle could allow one person to cause injury to another without compensating the victim?" In answer: the principle that the power of the state should not be set in motion merely to shift costs among equally undeserving individuals.

*Continued, Page 14.*

# Judiciary College 2015

## Marriott World Center, Orlando, Florida


Commissioner Roger Williams led a spirited discussion regarding how to handle cases in which a party or parties may be pro se.

Judges from across the country donated items of interest as door prizes. The Hon. Bruce Moore of Kansas won the drawing for a gator head and found a good use for it when he returned home!


An all-star panel discussed comparative legal systems at judiciary College 2015, from left to right, Hon. Brian Watkins (WA), Hon. Kenneth Switzer (TN), Hon. Glen Goodnough (ME), Hon. Scott Beck (SC), and our 2015 moderator Hon. Bruce Moore (KS).

Others, meanwhile, "saw in strict liability a standard that would threaten to bring all economic action to a halt." Yet another idea was that "the negligence standard rested on an imagined social contract: Individuals gave up their 'natural rights' to the inviolability of person and property in return for the like abandonment of rights by their neighbors." Finally, "at the core of these defenses of the negligence standard in classical legal thought was the fear that a strict-liability standard threatened to collapse the distinction between public and private."

Witt conceptualizes the 19th century development of tort law – and its exceptions – as follows: "Much of the doctrinal edifice of the law of torts during this period can … be understood as a series of attempts to deal with the persistent problems of the faultless victim of non-negligent harm." It is in this context that the author necessarily addresses the issue of how contributory negligence was once a complete bar to a tort claim.

Tort law also "justified the absence of a remedy by the consent of the victim to bear the risk of accident." This, of course, was the doctrine of assumption of risk.

An inconsistency existed in American courts' application of the assumption of risk defense. Although this defense existed, most courts at the same time, perhaps inconsistently, would not approve pre-injury waivers of liability: "Conventional wisdom in late-19th century tort law held that for reasons of public policy persons could not contract out of liability for their own negligence. Certain entitlements were simply not alienable. Such waivers of liability were suspect for arising out of coercion. Moreover, such waivers appeared to give rise to the risk of harm to third parties who might be injured by carelessness that had been licensed by a person's belief that he could be held harmless against costs arising out of his negligence."[8]

Witt explains that many of these conceptual ideas about responsibility came under great pressure by the rise of personal injury litigation, much of which was driven by industrial injuries: "The avalanche of novel claims was overwhelming the delicate structures of the law of tort."

C. ***Challenges to the injured worker's tort lawsuit.*** Witt, having introduced the reader to the prevailing doctrine of the time, discusses the difficulties surrounding an injured worker's lawsuit, particularly in the early 19th century. Employees often worked in employer households, making lawsuits uncomfortable. Also, "the 'family system' of mill hiring meant that very often multiple employers of a single family worked under the roof of a single mill; litigating work accidents in such circumstances might have meant losing not one but several jobs." Witt remarks, "in such situations, injured workers usually appealed to their employers for assistance rather than risk suing them."

Witt refers, in this regard, to the litigation challenges of "the twin forces of deference and local power." The mining industry is the prime example here. For example, he notes, "company towns amid bituminous coal fields of western Pennsylvania [among other places] were dominated by mining companies that owned the local real estate, housing stock, roads, and stores. Even when no single mining company was dominant, as in the famed anthracite fields of northeastern Pennsylvania, personal injury litigation was often futile. In a region in which the average duration of any one mining enterprise was less than one year, employers were effectively judgment proof; most mines would have closed down long before the resolution of any legal action."

If this was one challenge for personal injury litigation, evidence law was another. For example, significant muscle during these decades was incorporated into the hearsay doctrine. The law surrounding admissions, for one, was quite restrictive. In this regard, not everything an agent of the employer stated would constitute an admission and hence a hearsay exception. For example, "the declarations of a conductor as to the poor condition of a railroad track made a 'moment before the accident' were 'inadmissible' as not part of the res gestae."

Despite all of these challenges, "the outpouring of new tort litigation in the 1860's and 1870's" could not be stopped. The statistics on this point are remarkable. In 1870, "tort cases constituted 4.2% of New York City trial courts' contested caseload. By 1910, the percentage was almost 41%."

Perhaps a growth in the number of lawyers led to more lawsuits. "It is difficult to tell," Witt posits, "from any of this evidence whether growth in the number of injury claims resulted from the increase in the number of lawyers or vice versa. It may not matter, however, whether lawyers or claims came first in time. The two trends at once responded to, interacted with, and accelerated one another."

*Continued, Page 15.*

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Torrey-Greenberg Pennsylvania Workers' Compensation treatise, as published by Thomson-Reuters.

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*The Accidental Republic, from page 14.*

Witt reviews at length how contingent fee personal injury lawyers were thought to be of low status in the late 19th century. He reviews, among other things, the practice of lawyers employing "runners" to connect with victims in the immediate aftermath of accidents.

D. ***The rise of sympathy for no-fault.*** The challenge of the industrial accident crisis to classical tort law concept was plain (see above), but a growing realization existed "that an increasing number of the victims of personal injuries, especially victims of injuries suffered in the workplace, were themselves faultless. Injuries, it seemed, were the inevitable result of modern methods of industrial production." This change in thinking was significant, as throughout most of the 19th century, "students of American industrial accidents believed that accidents were almost always the result of someone's fault." However, this idea began to change, and Crystal Eastman, in her book about Pittsburgh, *Work Accidents and the Law* (1910), stressed the same. She asserted that in a majority of work-deaths, "no one is to be blamed."

A tort system that linked liability to fault gave rise to a crisis. The tort system simply did not respond well: "Tort law almost certainly served as a poor compensation mechanism for accident victims. For one thing, work-accident cases, which involved injuries to wage earners, tended to create an urgent need for compensation." Classical tort theory, meanwhile, failed: "The negligence standard – which courts had crafted as a guarantor of the boundaries of individual autonomy – had come to license the mass infliction of remediless injury on thousands of Americans each year."

One pre-workers' compensation response was the rise of strict liability and quasistrict-liability in certain situations. For example, in some areas rebuttable presumptions of negligence arose. This development was reflective of the theory, *res ipsa loquitur*. Such a strict liability standard can be perceived relative to potential defendants who undertook hazardous activities such as the storage of dangerous substances. Still, even strict liability was no answer for the great rise in accidents of the Industrial Revolution. Even strict liability involved questions about the parties' relative fault.

Another pre-workers' compensation response was the creation of "employer liability" statutes. Witt traces the first to Georgia statutes from 1856. These laws still required the injured worker to prove negligence, but removed or truncated the employer's defenses of assumption of the risk, the Fellow Servant Rule, and contributory negligence.

*Continued, Page 16.*

*The Accidental Republic, from page 15*

A free labor problem existed with these seemingly pro-worker reforms: "The difficulty with employer's liability reform was that it seemed to require that workers become complicit in employers' attempts to strip them of discretion and autonomy in the production process. Arguments for expanded liability rules paradoxically required that workingmen's organizations challenge the assumption articulated in the common law of employer's liability (often an erroneous assumption, to be sure) that workers controlled the details of the production process."

E. ***Summing up.*** In conclusion, the author portrays the universal resort to workers' compensation as the result of the utter inability of doctrine and the courts – in practice – to adequately deal with the industrial accident crisis: "Ultimately, as in the law's oscillation between negligence and strict liability, conflict between the waiver cases and the assumption of risk rule produced doctrinal paralysis." This paralysis ultimately led to replacement of the whole mess with workers' compensation: "Workmen's compensation statutes undid the resolution of *damnum absque injuria* ..., replacing it with a scheme that aimed to shift to employers, at least in part, the costs of precisely those nonfaulty injuries which ... were [traditionally held] to lie where they fell."

IV.

Chapter 3 of Witt's book is "The Cooperative Insurance Movement." Here we learn that, well before the enactment of workers' compensation laws, workers themselves decided that they needed insurance not only for work injuries, but for casualties from the general perils of life, and for burial expenses.

Witt establishes that "cooperative insurance," as it was called, was thriving in the years after the Civil War.

A phenomenon existed, however. Cooperative insurance had a relatively rapid rise and fall. In 1860, it "was a bit player" on the insurance scene, but by the 1890's, "cooperative insurance was the leading form of insurance in a life insurance market that 83 had increased in size thirty times over." At one point, in urban and industrial areas, nearly one in three, or even more, American workers belonged to a cooperative insurance association. Yet, by the turn of the century, these insurance programs were experiencing a *marked decline*.

Cooperative insurance leaders thought that they could band together and form a broad social insurance program in the U.S. According to Witt, this type of metamorphosis unfolded in Europe, but it did not in our country.

A. ***Genesis and growth of cooperative insurance.*** "Post-Civil War workingmen's insurance societies," Witt explains, "developed out of a long tradition of mutual insurance. English friendly societies, which became important institutions of working-class self-help in 18th century, claimed to have their origins in antiquity.[9] During the first half of the 19th century, mutual insurance pools sprang up across the United States and western Europe among a wide array of groups to protect against a variety of hazards such as fire and maritime losses. ...Yet as late as the close of the Civil War, American workers had few sources of insurance...." Witt notes that it was only in 1864 that Travelers' Insurance of Hartford, Connecticut was born.

All of this, Witt explained, changed over the next 40 years. An immense boom occurred with regard to both cooperative insurance and, to a lesser extent, commercial accident insurance. However, commercial insurance was really not marketed to industrial workers "who faced the greatest risk of accidents[,] but rather to the business and professional classes to protect against accidents in travel." Commercial accident insurance, in short, was not really an answer to the working class.

The products that commercial insurance did provide were small policies "purchased by working families not so much to replace earnings or to sustain a family after the death of a wage earner as to pay for the cost of burial." These tiny life insurance policies were paid for by weekly premiums of as little as five cents "collected by insurance agents who went door to door on payday."[10]

It was because of this shortcoming, presumably, in commercial insurance that cooperative "workingmen's insurance associations" developed and flourished in the late 19th century. Importantly, these cooperatives developed methods to address the moral hazard and adverse selection problems of general disability insurance markets. "Moral hazard" describes the reduced incentives for prevention and for rapid recovery created (for insurers and the injured, respectively), by the existence of insurance.

*Continued, Page 17.*

*The Accidental Republic, from page 16.*

"Adverse selection," meanwhile, "is the tendency for high-risk individuals to seek out insurance pools, and for low-risk individuals to flee insurance pools, at least when those pools are insufficiently subcategorized such that low-risk insureds pay more than their share of the total risk ...." Witt explains that "cooperatives were organized in ways that helped to minimize these difficulties."

Workingmen's associations actually had more success than unions in marketing insurance products. Mandatory deductions from worker wages for union-based insurance raised the cost of trade union membership and, as a result, deterred many workers from joining. Indeed, Eugene Debs "eventually quit the Locomotive Firemen because of their continued focus on insurance functions rather than organizing." Still, railroad brotherhoods were the leaders in the field.

Outside of the railroad brotherhood context, workers in other trades needed cooperative insurance that was "institutionally distinct from trade unions so as not to create tensions between organizing and insuring." Witt declares, "cooperative insurance societies provided just such a system of insurance." It is difficult to count exactly how many cooperative insurance associations existed, as many were very tiny. The "associations were nominally divided into two kinds of organizations: sick and disability societies on the model of the English friendly societies, and life insurance associations." Each type, however, "often offered both cash disability and death benefits."

The railroad brotherhoods were organized around industrial accidents, as were many other such cooperative insurance associations. Various specialties, and also ethnic, race, and religious "lines" gave rise to such associations. Here, the author discusses at length African-American and Catholic associations – the latter including the Knights of Columbus and the Catholic Orders of Foresters. Importantly, members paid equal rates regardless of their age or risk profile. Given the importance of norms of mutuality and reciprocity in the cooperative insurance associations, "perhaps it is not surprising that the fraternal ethic generally did not extend across racial or religious lines."

B. ***Cooperative insurance, the dignity of labor, and struggle against moral hazard.*** On the philosophical side, a desire for workingmen's insurance associations was driven by the idea that workers should be deemed to be independent and in control of their work associations: "The problem of upholding the independence of the workingman in the face of the onslaught of industrial injuries led prominent labor union leaders to establish cooperative accident-insurance associations." "The problem of work accidents," Witt declares, "required the creation of collective worker institutions that could help maintain the independence of workingmen and their families during times of disability."

*Continued, Page 18.*

# National Health Expenditure Projections, 2014–24: Spending Growth Faster Than Recent Trends

According to Health Affairs, "health spending growth in the United States is projected to average 5.8 percent for 2014–24, reflecting the Affordable Care Act's coverage expansions, faster economic growth, and population aging. Recent historically low growth rates in the use of medical goods and services, as well as medical prices, are expected to gradually increase. However, in part because of the impact of continued cost-sharing increases that are anticipated among health plans, the acceleration of these growth rates is expected to be modest. The health share of US gross domestic product is projected to rise from 17.4 percent in 2013 to 19.6 percent in 2024."

*Health Affairs* is a peer-reviewed journal founded in 1981, which explores health policy issues of current concern in domestic and international spheres. Its mission is to serve as a high-level, nonpartisan forum to promote analysis and discussion on improving health and health care, and such issues as cost, quality, and access.

*The Accidental Republic, from page 17.*

Witt states, "the cooperative insurance system … represented one among a number of attempts by late-19th-century American workingmen to adapt the Civil War idea of masculine free labor citizenship to a newly industrializing republic…. The cooperative insurance associations ..., adopted an approach to disability benefits that drew heavily on free labor ideology and its ideals of independence." One philosophy supporting cooperative insurance was that "cooperation was a process by which rational, self-interested individuals could assume new levels of self-control and responsibility."

The other idea, highly idealistic, was that "the cooperative insurance movement was not merely a process for the pursuit of individual interest, but rather one strand of the late-19th-century movement that sought to transform the competitive wage labor system into a 'cooperative commonwealth.'"

It is here that Witt details the insurance challenges of moral hazard and adverse selection: "Cooperative insurance societies adopted disciplinary rules and regulations that were especially well suited to dealing with the moral hazard and adverse selection problems endemic to disability insurance." Claimants, he explains, were surveilled and their claims were adjusted in such a manner to ensure against malingering. Meanwhile, cooperative insurance societies "designed their insurance pools to foster group loyalty and mutuality." Insuring wasn't just the process of remitting an insurance payment. To the contrary, such things as "secret handshakes and gestures" were part of the cooperative insurance scene, to generate in members a sense of belonging. This effort, presumably, would also prevent members from jumping ship to avoid insurance costs during times when they were healthy.

It is notable that, even in the 1880's, "labor unions ... rarely made workplace safety or employer compensation of injured workers central issues in collective bargaining with employers." Workingmen's insurance, at least as delivered through union plans, played into this dynamic. After all, the dignity of labor required such organizations to "defend workers' discretion and independence in the processes of production"; a purpose of labor organizations was maintaining employee discretion and independence "from managerial domination."

Still, by the end of the 19th century, employers prevailed with their "more systematic mechanisms of managerial control."

C. ***Decline of cooperative insurance.*** The cooperative insurance movement unraveled in the late 1880's and 1890's, and many of the associations became bankrupt. One problem was that low-risk members left the plans. Meanwhile, courts, in disputed cases, construed insurance contracts against the cooperative insurance movement, and such plans often lost in court (unlike commercial insurers, which hired crafty lawyers). In addition, Ponzi-scheme operations formed "in the guise of fraternal insurance associations." This misfortune gave rise to cynicism and vigilance on the part of insurance regulators.

Witt raises again the idea of alternative outcomes. Was it really destiny that the cooperative insurance movement was going to fail? After all, "such programs have had a profound influence on the structure of accident compensation law throughout western Europe, Australia and New Zealand." And, in England, the English friendly societies, all the way to the end of World War II, contributed to English social insurance. They formed, as well, "the foundation of Britain's national health insurance system."

Witt tries to answer the question, specifically, "why ... didn't the U.S. cooperatives go the way of their English and continental counterparts?" Witt answers that they did, in fact, try, with the formation of a "National Fraternal Congress."

Yet, another, more compelling factor was at work that defeated the evolution of the cooperative insurance movement. Witt believes that the uniquely extreme crisis of industrial accidents in the U.S. is the answer.

*Continued, Page 19.*

*The Accidental Republic, from page 18.*

"The critical distinction," he states, "between the Western European experience and the American experience is that in Europe, leading social insurance advocates, thinkers, and politicians turned to the cooperative as a way of grappling with a wide range of problems in the politics and structure of social provisions." In the U.S., "political and intellectual leaders in social insurance reform in the years leading up to 1910 were singularly preoccupied with the industrial-accident problem."

This great crisis of work accidents in the U.S. "limited the appeal of the cooperative insurance associations as useful building blocks. For at just the time that social insurance discourse was coming onto the scene in the United States, two developments – exceptionally forceful in America – deeply undermined the two institutional capacities of cooperative insurance associations to grapple with the problem of industrial accidents." The first was the "massive influx of over a million new immigrants each year ...." While immigrant groups formed societies, many "were never able to provide substantial benefits to working men or their families." Second, "a dramatic reconceptualization and reorganization of work in America in the decade after 1900 made cooperative, first-party approaches to work-accident policy and law seem increasingly out of step with industrial conditions." For example, cooperative insurance did not particularly encourage safety nor deter accidents.

In any event, "by 1908 and 1909 the momentum in workingmen's insurance against accidents had shifted decisively away from the cooperative insurance associations." This decline, however, was accompanied by the growth of company sponsored plans and, shortly thereafter, state compensation schemes.

V.

Chapter 4, "From Markets to Managers," addresses the rise, and then fall, of the movement of large companies to provide in-house accident benefit programs. Witt also recounts the parallel rise of the workplace safety movement. Both of these developments had their genesis in the conviction of "a new generation of managerial engineers" to bring rational labor management theory to the industrial workplace: "In the early 1880's, a new generation of managerial engineers began to rationalize labor management theory, advocating administered, hierarchical, and rationalized modes of labor management."

A. ***Rise and fall: Employer-based work-accident insurance programs.*** One aspect of this surging field of managerial engineering was the conviction that the workers themselves were a critical aspect of the firm. Indeed, labor "accounted for a substantial portion of most firms' variable costs." This type of thinking led to the idea that management needed to control the actual operations of the workplace, thus reducing the role of foremen and other skilled workers.

Witt identifies the renowned Philadelphia figure, Frederick Winslow Taylor, as being in the "forefront of the movement to rationalize the American workplace." "Scientific reorganization of the processes of work would allow management to 'substitute ... science for the individual judgment of the workmen.' ...Through time and motion studies, managers could determine by ostensibly scientific methods the 'one best way' to carry out even the simplest of tasks, and then require minute compliance with prescribed methods by workers."

The author notes that full implementation of these techniques "was relatively limited. Nonetheless, Taylorism and its accompanying varieties of management engineering worked a thorough transformation in the ways in which Americans conceived of work."

Pertinent to the subject of the book, Taylor believed in managerial responsibility, and part of such responsibility was "employer-provided accident insurance benefits."

Witt explains that by 1900, Taylor's Philadelphia company, Midvale Steel, "had set up precisely such an accident insurance plan. Employees contributed five cents per week to the insurance fund in return for injury and death benefits. ...And therein lay the seeds of a transformation in the ways in which American firms handled industrial injuries."

One reason that managerial engineers favored these types of plans, and increased safety, was a fixation on efficiency. Managerial engineers were appalled, particularly, at the number injuries and deaths in railroading and manufacturing: "As early as the 1880's, American engineers began to focus on the prevention of accidents in industry as central to their project of rationalizing labor management, and by 1890, engineering trade journals devoted substantial coverage to railroad and other industrial accidents."

*Continued, Page 21.*

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*The Accidental Republic, from page 19.*

So many railroad workers died, indeed, that the mortality rate "threatened to undermine and even destroy the efficiency of the American railroad system." It was agreed that the American railroad system was the most dangerous in the world. Engineers thought that deaths in the United States from railway accidents were a national disgrace. The waste of life in American coal mining was a grave concern as well.

Early court opinions (like *Priestly v. Fowler* and *Farwell*), reasoned that workers in effect charged a premium in wages for laboring in dangerous work places. However, this notion was disdained by managerial engineers. Also, "many engineers believed that employee injuries were exceedingly inexpensive under the common law of employer's liability. ...Inattention to costly work-safety measures thus offered firms in competitive industries the opportunity for substantial savings."

With regard to coal mining, managerial engineers thought that the injury and mortality rate was "evidence of the ways in which primitive management practices produced wastefully high accident rates." Witt, here, compares the U.S. and British approaches to coal mining. The latter was undertaken more safely.

It was all these concerns that led to management engineers' interest in providing in-house employee accident-compensation funds. These were also called "establishment funds." Some of these enterprises were established shortly after the Civil War to assuage striking railroad workers. This was a phenomenon in Pennsylvania. "Undermining worker allegiance to the brotherhood," Witt explains, therefore became a "central goal of railroad management, and railroad relief funds were frequently employed toward this end."

An example is the early Pennsylvania manufacturer Cambria Iron Works, of Johnstown, which established, shortly after the Civil War, an accident fund financed through employee fines. It was in the early 1880's that such funds began to flourish. Among the companies participating was Westinghouse Air Brake (Pittsburgh), which first started its plan in 1903. The approach of yet another company was to take monies budgeted for liability insurance to create a fund. Crystal Eastman determined that in Pittsburgh, by 1908, 23% of all injured workers were enrolled in employer establishment funds.

Witt explains that establishment funds "generally paid one-half or two-thirds of an employee's weekly wages for durations ranging from 39 weeks to two years during the course of a work-related disability." Virtually all required, before any injury, the members "sign waivers of the right to sue as a condition of enrollment"; "where such waivers were unenforceable, funds required injured members to elect between collecting fund benefits and bringing a risky tort claim."

Witt also discusses at length the 1910 U.S. Steel "voluntary accident relief plan" for its employees. This arrangement had been preceded by the 1901 Carnegie Steel Company plan, one which Carnegie himself had endowed. Of note is that it quickly was short on money: "[T]he great volume of claims ..., soon forced the Carnegie fund to suspend all aid in cases of temporary disability lasting less than one year."

Witt posits that the 1910 U.S. Steel initiative was "a signal moment in the history of American welfare capitalism." The program was of an immense size, with accident relief payments amounting to two million dollars per year. Also, the U.S. Steel plan was financed entirely through employer contributions. The underlying theory sounds like that of workers' compensation – the idea was to provide "compensation to injured workmen as a legitimate charge against the cost of manufacture … [T]he victim of an industrial accident or his dependents should receive compensation not as an act of grace on the part of the employer but as a right."

Witt posits that the U.S. Steel plan endorsed the "principle of managerial responsibility," although it went one step further than Taylor had "by shifting from employee-financed funds to employer-financed funds."[11]

A parallel movement of managerial engineers existed, endorsing safety in the industrial workplace. Engineers became convinced that "sophisticated firms, not incorrigibly careless workers, were best situated to create engineering solutions to work accident problems. ... Employers ... could bring systemic planning to bear on work safety." This was "the beginning of a movement for industrial safety." Here again, this movement was focused on the managerial engineer's idea of top-down control. Managers felt "the best way to prevent accidents and catastrophes in the modern industrial workplace was to remove discretionary authority from the hands of the worker."

*Continued, Page 22.*

U.S. Steel was a leader in this area: "In 1906 and 1907 managers consolidated the company's decentralized, plant by plant safety departments into a single Central Committee on Safety." The two movements – work safety and compensation – went hand in hand for a simple reason: "Firms that took on extra accident costs through accident benefit plans had increased reason to make their workplaces safe." Still, despite the U.S. Steel example, "implementation of new engineering ideas about work safety and accident relief in actual workplaces was a slow process."

B. ***Challenges to company plans: prohibition of pre-injury tort waivers and "competitive disadvantages."*** Witt explains that a major disadvantage of the company plans, in the U.S., was the common law rule forbidding pre-injury waivers:

> First, courts regularly refused to enforce employment contract provisions barring injured employees from suing their employers in tort. A few early decisions flirted with enforcing employee waivers but the strong trend in virtually all American jurisdictions soon moved decisively in favor of unenforceability, and a number of legislatures confirmed the trend by enacting legislation expressing barring the enforcement of such employment contract waivers....
>
> [M]any employers responded by adjusting their accident-benefit systems so as to condition receipt of benefits after an accident on waiver of the right to sue. In such schemes, the acceptance of benefits operated as a kind of post-injury settlement of the tort action that courts enforced as a matter of course. Yet even here, employers experienced difficulty preventing employees from bringing tort actions after receipt of their benefits; though many courts enforced such election of remedy-schemes, others refused to do so. ... And in a number of states, legislatures enacted statutes barring the use of an employee's acceptance of accident compensation benefits as a bar to tort suits. ...

The second obstacle to such schemes "was the competitive disadvantage placed on firms adopting accident-benefit schemes." It was costly for firms like U.S. Steel to set up such plans. Indeed, U.S. Steel estimated that its private accident programs cost substantially more than it had paid under the law of employer's liability.

Advocates of workers' compensation, like John R. Commons, in Wisconsin, believed the solution was to have all employers provide insurance, in an effort to "equalize competition" and "prevent the worst employers from dragging down the others." Witt concludes, "the solution that would burst on the scene beginning in 1909 and 1910 was workmen's compensation."

Witt states, "By replacing tort actions with compensation claims, the statutes themselves would insure that employers would no longer need courts to enforce employment contract provisions waiving employees' rights to sue." Many companies, the author stresses, including "the nation's most sophisticated firms," were hence in favor of workers' compensation legislation.

VI.

Chapter 5 of Witt's book, "Widows, Actuaries, and the Logics of Social Insurance," is one of the book's most important chapters. It is also the chapter that is the most Pennsylvania and Pittsburgh-centric.

Witt first summarizes and critiques the renowned Pittsburgh Survey study, *Work Accidents and the Law* (1910). That book, by lawyer and social reformer Crystal Eastman, meticulously surveyed work deaths in Allegheny County (Pittsburgh) in the first decade of the last century (there were over 500 in fiscal year 1906-1907, alone), and ascertained the level of compensation that was achieved by the widows and families of the fatally injured employees.[12] Second, Witt analyzes the "politics" of workers' compensation and the precise factors that prompted enactment.

A. ***"The genius of Crystal Eastman."*** Perhaps Witt is the first to try to synthesize theories with regard to how workers' compensation came about and was so quickly accepted in most circles – despite its fairly novel aspects and its break from tort law. This synthesis goes to the "widows" of the title. Crystal Eastman (who is the star of this chapter), was seemingly the first to identify the work injury and death crisis as threatening widows and children.

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*The Accidental Republic, from page 22.*

To so imperil the disempowered is bad enough, but, of course, a free labor idea was that an American worker was supposed to be able to support his wife and family. If he could not do so because work was dangerous, and if injured or killed the family could not be supported through other means, then the concept of the self-sufficient worker would be utterly defeated. Eastman's study vividly portrayed the fate of widows and children and hence challenged the ideology of free labor.

Eastman was, however, also a student of statistics. She counted precisely the work deaths of Pittsburgh mines, mills, and railroads for the fiscal year 1906-1907 and reported to the dollar how much (if any), was received by the widows. And, at about the same time, the same managerial science reviewed above started conceiving of work injuries and deaths as basically inevitable, predictable, and something that should be built into the costs of products.

Witt asserts that part of Eastman's "genius" was to marry these two concepts, with the logical result a recommendation for workers' compensation. That program at once (1) compensated widows and children; and (2) was informed by actuarial calculations. Eastman was of the view that this preexisting European model could, and should, be applied to U.S. conditions.

Witt declares, "Crystal Eastman's genius was to marry the symbolism of the family wage to the emergence of this new actuarial mode of thinking." Here again is the tension Witt identifies in the free labor thinking: "What good for individual autonomy and independence ..., if individual efforts seem to have no effect on the yearly accumulation of industrial catastrophes?"

B. ***A broader analysis.*** Witt asserts that, as of 1910, it was not "clear ... what the politics of workmen's compensation statutes would be." Ultimately, virtually everyone agreed that workers' compensation was the answer to the great crisis of the day, but what was the political thinking that made the statute so agreeable to the majority of people?

Witt argues that no one theory can explain why workers' compensation was so popular and enacted so quickly. Still, he identifies a number of such theories.

One is the familiar "social justice theory," that is, the desire to provide leveraged injured workers, their widows, and children with a prompt remedy without the need to go to court. Witt states that this was the theme of the "first generation of compensation historians."[13]

Another, the "corporate-liberal school," advanced by University of Pittsburgh academic Roy Lubove, characterized the "enactment of compensation statutes as a novel gambit by employers to reduce and standardize the mounting costs of jury awards under the common law of employer's liability, a gambit that presages the capture of the emerging regulatory state by the very industries it purported to regulate."[14]

A third account is the "bargain theory": "under this interpretation ..., workmen's compensation was simply a variation on the employer-accident plans in which employees waive their right to sue for work accidents in return for limited but certain compensation." "The difficulty was that courts refused to enforce employment contract terms waiving the right to sue. As the theory goes, employers and employees turned to state legislatures to create a public regime mimicking the benefits of the private accident plans that they would have entered into in the labor market, but for the courts' refusal to enforce the contractual waivers."

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# Interesting Workers' Compensation Blogs

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

Workers' Compensation Institute
http://www.wci360.com/

Florida Workers' Compensation Adjudication
http://flojcc.blogspot.com/

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

Tennessee Court of Compensation Claims
http://tennesseecourtofwcclaims.blogspot.com/

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

From Bob's Cluttered Desk
http://www.workerscompensation.com/compnewsnetwork/from-bobs-cluttered-desk/

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

Maryland Workers' Compensation Blog
http://www.coseklaw.com/blog/

*The Accidental Republic, from page 23.*

Witt seems to suggest that none of these are perfect theories. "No single interpretation need explain everything about workmen's compensation, and the one offered here surely will not. The point is that notwithstanding generations of writing on the subject, there is still much that is unexplained about the compensation statutes."

For his part, Witt asserts that American workers accepted workers' compensation laws because replacing lost wages with the insurance of workers' compensation was not inconsistent with the idea of free labor, and its emphasis on the dignity of the American worker being able to support his wife and family.

Witt remarks that workers' compensation, in any event, is "the most important work-accident legislation in American history." He marvels that "interpretations have swung wildly between descriptions of the statutes as pro-employee and then pro-employer, as backward-looking and then forward-looking." In Witt's view, the system is "all of these things at once."

C. ***Workers' compensation and constitutionality.*** A major issue surrounding workers' compensation statutes was constitutionality. In this regard, state regulation of the employment environment, and imposing mandatory laws on employers, was inconsistent with a critical constitutional premise of the day. That idea was expressed in the renowned *Lochner* decision. Courts, including the *Lochner* court, had struck down laws that regulated business, such as those that limited the hours of bakery workers, [15] and other laws that regulated the hours of female workers.

A critical question therefore existed in the early part of the 20th century, to wit, "whether workmen's compensation (which rested on compulsory participation in an insurance scheme for employers and employees) was consistent with these constitutional limitations." A major issue was whether a no-fault law could be compulsory. According to Witt, "workmen's compensation statutes seemed perilously close to the line separating permissible and impermissible accident-cost allocations." And, indeed, the first New York statute was compulsory, and the law was held unconstitutional. Other questions existed as well, such as whether legislatures could shift "accident cases to administrative tribunals ...."

In the early days, some workers' compensation statutes were declared unconstitutional. This was of great concern among those who favored enactment of the laws. To get around constitutional concerns, some legislatures chose to enact weak, elective statutes. One commentator stated that early workers' compensation laws were "maimed and twisted so that [they] might commend [themselves] to the judges." Early legislatures, by limiting the scope of compensation statutes, were so limited "to satisfy the constitutional requirements of due process." Pennsylvania constitutes a major exhibit in this advocacy. In Pennsylvania, the constitution was amended to allow for a compulsory law, but in the end the legislature still enacted only an elective statute.

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*The Accidental Republic, from page 24.*

D. ***Workers' compensation as attractive to the managerial engineering community.*** Early workers' compensation laws were animated by the new managerial engineering idea of relying on statistics: "The novelty of the statutes lay in their statistical approach to thinking about accidents, an approach that had already begun to shape the law of a number of western European nations."

It is important to note, in this regard, that thinkers in the late 19th century began to realize that accidents, fatal and non-fatal, were inevitable in the workplace. The Illinois Commission, for example, stated, "the Moloch of industrial activity demands a sacrifice of life and limb, constant, as the actuary tables show, and inevitable so long as human contrivances and human understanding are fallible."

Meanwhile, with the growth of statistical thinking, "To think in terms of probabilities was to make possible new approaches to the problem of risk." "If," Witt posits, "we can estimate how many injuries or deaths can occur in the workplace, and assume that they are inevitable, one concludes that individuals should not be blamed for such events, as it was inevitable that they would occur. Social insurance, however, could provide individuals guaranteed protections against the inexorable risks of industrial life. Moreover, social insurance could spread across an entire society the costs of accidents that were bound to happen to an unlucky few."

E. ***Workers' compensation, safety, and reconceptualizing the law.*** As to the link between workers' compensation and safety: "Workmen's compensation supporters described 'scientific accident prevention' as closely linked to workmen's compensation. Accident prevention efforts ... could not be 'left to the haphazard initiative of a number of individuals ....'" This safety thinking naturally favored workers' compensation, as it was compulsory and hence would "force all the firms in an industry to take on the increased costs associated with the private work accident funds."

"In its mix of managerial and actuarial thinking," Witt says, "workmen's compensation precipitated a halfway transformation from free labor to risk. Where classical tort law dealt in individualized inquiries into the boundaries of individuals' freedom of action, workmen's compensation statutes aggregated accident costs and averaged the outcomes."

F. ***The limited political influence of workers' compensation.*** Witt stresses that progressives liked the new workers' compensation laws, as they conceived of the program "as a kind of entering wedge in the establishment of a whole panoply of social insurance schemes, schemes that by the middle of the 20th century would become the modern welfare state."

Witt states, "workmen's compensation represented at once the triumph of new actuarial technologies and the reliability of old family wage categories, victory for scientific managers and the promise of a new collective solidarity. The statutes were thus rich in diverse possibility for subsequent development in accident law and social policy more generally...." He then notes, "today, of course, we have the decided advantage of hindsight."

That hindsight is that social insurance schemes did not unfold robustly in the U.S. – even to the present day. (For example, even with the reform of Obamacare, no guaranteed medical care exists for all.) He asks, "why was it that the solidarity principle of social insurance had such an uneven and halting career outside the work-accident case?" Here is Witt's conclusion, with which he ends the chapter:

> One answer lies in the authority of American courts to arbitrate among the competing values that workmen's compensation statutes sought to embrace. The actuarial categories of workmen's compensation deemphasized important values in free labor cultures – autonomy, independence, personal responsibility – in the name of another free labor value, the family wage. But as the supporters of compensation were painfully aware, all of these free labor values had been written into the nation's constitutional law. ...

VII.

Chapter 6 of Witt's book is "The Passion of William Werner." Werner was the New York Court of Appeals Judge who authored the famous "test" case *Ives v. South Buffalo Railway*. *Ives* held that the 1910 New York workmen's compensation statute, a compulsory law, was unconstitutional.

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*The Accidental Republic, from page 25.*

Werner reasoned that a violation of substantive due process would be committed if the state passed a law directing that employers, on a no-fault basis, were to be liable for the injuries of their workers. Werner identified workers' compensation statutes "as a radical innovation in American law." He thought that the New York compensation statute "was an impermissible redistributive reallocation of property from employers to employees."

Witt treats Werner's life with an eye towards synthesizing his subject's life experiences with the changing times and economic/industrial conditions that rendered his Civil War era/free labor ideology type thinking outdated.

The "passion," at least under most dictionary definitions, is usually reserved to the suffering and martyrdom of Jesus Christ. However, here Witt is indeed using the phrase in this sense, as the Ives case was so negatively received that it led to the end of Werner's career. And, in fact, he died a few years later.

As Witt points out, just a few years after *Ives*, the U.S. Supreme Court, in a series of three cases written by a conservative justice, approved the constitutionality of workers' compensation laws. The idea that substantive due process would be violated by no-fault laws was dismissed in the famous *White* case.[16]

Still, the irony is that *Ives* made reformers in many states very gun-shy, and they enacted their laws for the most part to be elective, so as to avoid constitutionality problems. Also, because the laws were elective, a force existed to leverage down benefit levels, as employers would never, at least in theory, "elect in" if benefits and consequent costs were too high. According to historians writing even as early as the 1930's, this caused workers' compensation to have a "stunted genesis," with one commentator even referring to workers' compensation as having a "mushroom" development. The *Ives* case was very disruptive to the reform: "Workmen's compensation programs had 'grown up in mushroom forms' in a kind of wild, unplanned pattern ...."

In any event, after the *Ives* case, "the American compensation movement shifted decisively to a *quid pro quo* theory of the compensation statutes." Only three states allowed post-injury election, and these have since all been abolished.

It is in this chapter (like the introduction) that we see that Theodore Roosevelt was a proponent of workers' compensation reform. A New Yorker, he had always been an ally of Werner, but broke with him in the wake of the *Ives* decision. Roosevelt, meanwhile, used the case as a centerpiece to his argument that Congress should have the power to repeal unpopular court decisions. (This fairly extreme position may have cost Roosevelt another chance at being elected President.)

Importantly, the original New York law, like that of England, allowed a worker, after an accident, to elect between workers' compensation and a tort suit.

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# Judge Van Norman re-elected as Nebraska Workers' Compensation Court Presiding Judge

Judge Van Notman

Judge Laureen Van Norman has been re-elected as Nebraska Workers' Compensation Court Presiding Judge for a two-year term beginning July 1, 2015 and ending June 30, 2017. The Nebraska Workers' Compensation Court is composed of seven judges who are initially appointed by the governor and who then remain on the bench for successive six-year terms upon retention election. Every two years one of the judges is elected as presiding judge by the judges of the court, subject to approval of the Nebraska Supreme Court.

Judge Van Norman joined the court in 1993. She was retained in 2014 for a term that expires in 2020. Judge Van Norman earned her B.A. from the University of Nebraska-Lincoln and her Juris Doctor from the University of Nebraska College of Law. Prior to joining the court, she was legal counsel to the Nebraska Department of Labor.

# *Thanks to our Outstanding 2015 Judicial College Faculty!*

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Honorable Diane Beck (FL)

Honorable Scott Beck (SC)

Honorable Elizabeth Crum (PA)

Alex Cuello, Esq.

Honorable Marshall Davidson (TN)

Professor Charles W. Ehrhardt

Honorable Glen Goodnough (ME)

Honorable Melissa Lin Jones (DC)

Honorable Sheral Kellar (LA)

Honorable John J. Lazzara (FL)

Honorable Frank McKay (GA)

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Honorable Bruce Moore (KS)

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Honorable Kenneth Switzer (TN)

James B. Talmadge, M.D.

Professor Timothy Terrell

Honorable Brian Watkins (WA)

Honorable Jane Williams (KY)

Honorable Roger Williams (VA)

Robert H. Wilson

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Werner was not particularly concerned about this issue, Witt says, and the issue was not even mentioned in the *Ives* decision. Yet, this issue became important in the wake of the further reform movement. After *Ives*, the constitutional thinking was that for employers to have no-fault imposed upon them, they had to have the protection of the exclusive remedy, and be free from tort damages. Witt seems to find this ironic, because it was not a big deal in the *Ives* decision in the first place.

Witt insists that *Ives* was borne out of free labor ideology. Those who came of age during the Civil War held this idea close to their hearts but, Witt insists, the new managerial and actuarial thinking was quickly displacing it. Indeed, such thinking was fully adopted by the three Supreme Court decisions.

Witt has discussed the "managerial class" and its reformulation of the work accident solution before. Here is another explanation:

> The managerial theory of compensation statutes led to a kind of presumption of employer responsibility, moderated by a damages rule that kept employer's damages at one-half or two-thirds of employee's lost wages. The additional step of the actuary was to convert the presumption of the scientific manager into an unrebuttable presumption: a statistically derived general rule to be applied prophylactically to virtually all cases. Causation would, in a sense, be determined by legislative fiat for compensation cases as a whole on the theory that employers were best described as the cause of the injury in the majority of cases; the individualized causation inquiry or tort law would be replaced by an inquiry into the status of the parties accompanied by an unrebuttable presumption of employer causation based on statistical tendencies.

Werner did not believe that this type of "aggregating" was consistent with constitutional precepts which protected the property rights of individual employers. (It's notable that yet another critic complained that workers' compensation "ignores, abrogates and treats as worn out, the fundamental notion of personal responsibility.")

The *Ives* decision led to Werner's downfall in part given its unpopularity with many leaders of the day. While the prevailing lawyer in the appeal described the ruling as "a substantial dike against the tide of socialism," most critics harshly criticized the opinion. Critics included Roscoe Pound and influential former New York Labor Commissioner P. Tecumseh Sherman. Meanwhile, the day after *Ives* was handed down, a terrible fire occurred at the Triangle Shirtwaist Company, in Manhattan, taking the lives of many young women workers. The thought that the unfortunate victims would likely receive nothing in compensation was unsatisfactory to much of the public.

In November 1913, after *Ives*, New York voters approved "by an overwhelming margin a constitutional amendment which authorized the state legislature to enact a workmen's compensation law." In 1915, the same court (with Werner not taking part), approved the constitutionality of the revised New York law. That case was *Jensen v. Southern Pacific Company*. [17] Unlike the *Ives* court, the judges of the Jensen court embraced the "categories of analysis" noted above, to wit, "those of the actuary and the statistician." *Ives* was wholly discredited.

The U.S. Supreme Court, meanwhile, was soon to ratify the constitutionality of the nascent workers' compensation laws. A conservative Justice, Mahlon Pitney, wrote all three decisions referenced above. It is remarkable that he had been an enemy of labor, yet found no problem with workers' compensation statutes: "With Pitney's three 1917 workmen's compensation opinions, the basic premises of the workmen's compensation statutes had come to be accepted across virtually the entire political spectrum of American legal culture, from Crystal Eastman and John Mitchell on the left to Pitney [and his conservative colleagues] on the right."

VIII.

Chapter 7 of Witt's book is "The Accidental Republic." In this chapter, Witt takes what he has reviewed before and then reflects on how all of this history affected the growth of social insurance and related fields over the succeeding decades. The chapter thus has a number of different themes.

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A. ***Workers' compensation, workplace safety, and "human resources."*** The initial issue Witt discusses is the phenomenon that, after the introduction of workers' compensation, the number of industrial accidents began to decline. Witt states, "economic historians disagree as to whether employers' costs under the new statutes caused the decline." In any event, whether because of increased costs or widespread public attention to work accidents, the new system "brought in its wake the first widespread safety movement in the American workplace." Injury and death rates fell in all areas, including manufacturing and railroads, though not in mining. (Only after World War II did fatal accident rates go down in that industry.)

On this same theme, Witt observes that in the wake of the enactment of workers' compensation, "employers founded safety departments run by engineers, hired industrial hygiene experts, and established new offices of human resources." Indeed, workers' compensation popularized the term "human resources."

B. ***Development of administrative dispute resolution.*** On a different theme, Witt points out that workers' compensation was the first mass administrative law judging system: "The first mass systems of administrative adjudication in the United States arose out of workmen's compensation programs, which replaced judges and juries with specialist administrators." The use of workers' compensation "claims boards" was a significant development in the growth of the administrative state. He states, "in terms of the sheer number of people involved, few of these new administrative programs [outside workers' compensation] could compete with the workmen's compensation system enacted around the nation in the 1910's."

C. ***Development of workers' compensation interest groups.*** Another item that the success of workers' compensation brought, however, was "an end to the early eclecticism of the American law of accidents. Employers, insurers, plaintiff's lawyers, and unions began to organize around workmen's compensation, forming powerful interest groups to lobby state and federal governments ...." Still, certain structural aspects of U.S. law and the organization of our government "insured that compensation statutes would not sweep across the American law of work accidents." Instead, there would be no single system, only "a proliferation" or a "patchwork of different legal regimes."

The beneficent progression of the workers' compensation idea was hampered by jurisdictional lines, but also because of the growth of interest group lobbies. For example, railroad lawyers on both sides bitterly opposed the proposal for a federal workers' compensation statute for railroad workers. These lobbies "hindered enactment of a workmen's compensation regime [in the railroad context] even as compensation statutes swept the field virtually everywhere else."

Attempts at bringing no-fault to motor vehicle accident legislation were also stalled by lobbies. Here, Witt refers to the Columbia Plan of 1932, which was inspired by the example of workers' compensation. Such proposals were opposed by personal injury claimant's lawyers, and others as well. Vested interests sought to protect the status quo, which involved, among other things, the endurance of tort and the various riches that the same might bring to lawyers.

Witt ventures, "the arrival of organized interests brought an end to the period of relative openness and contingency that had characterized the early decades of industrial accident policy experimentation." There would be no more "open policy frontier." In general, Witt concludes, "virtually no one in the early years of American accident law anticipated or advocated [the present] patchwork of regimes...."

At the conclusion of his book, Witt remarks that he has, with his book, "described a lost tradition of experimentation in the American law of accidents."

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D. ***Effect of workers' compensation on other social insurance programs.*** Witt is in full historian mode in shifting gears and considering how the workers' compensation founding experience affected the development of law, particularly social insurance, over the next few decades. He states, "the jurisdictional boundaries of American federalism helped push social provision policies for unemployment and poverty onto a state-by-state, rather than federal, basis where they were shaped by competitive races among the states to reduce the tax burdens on local employers. And as in the case of accident law, organized interest groups formed to stymie change in controversial fields such as health insurance."

The author also remarks, at length, that many of the architects of the New Deal had significant experience in the workers' compensation field. Witt states, "ideas drawn from accident-law reform powerfully influenced New Deal policymaking."

For example, workers' compensation theory postulated that if employers felt the brunt of no-fault liability in higher premiums, they would be more prone to adopt safe workplace practices. The correlative idea in unemployment compensation would be that if employers laid off their workers with impunity, they would feel the effect of the same through higher assessments for unemployment compensation. Witt states that, "by 1935, the analogy between industrial accidents, on one hand, and such problems as unemployment and superannuation, on the other hand, had become commonplace."

IX.

In his brief conclusion, the author reflects on issues of the present day through the prism of what has come before in his historical analysis. Witt ponders the fact that industrial accidents were the big problem a century ago, but in the present day, "problems in the law of personal injury have raised dilemmas on the order of those that caused wrenching paradigm changes in our law a century ago." For example, how is compensation to be paid in the wake of mass casualties like the September 11 attacks on the World Trade Center? Mass disaster risks give rise to new challenges that are not easily handled by traditional insurance mechanisms.

Witt again takes on the historian's contemplation of whether workers' compensation laws would necessarily have been created and prevailed the way they did. Many factors, he explains, went into making the law evolve as it has. Here the author uses the word "determinism." Did the Industrial Revolution and American legal principles necessarily determine that workers' compensation would prevail? "The historian's contribution to such issues ... is to evaluate whether different paths might reasonably have been taken. The historian asks, in other words, whether there were plausible alternatives."

"In the case of American accident law," Witt concludes, "the answer seems to be yes. There were alternative institutional directions in which our legal system might have gone, in which other legal systems did go, and with which we seriously experimented a century ago."

In an additional conclusion, Witt posits, "Our ways of dealing with accidents have been shaped only loosely by policy successes. They constitute not so much rationally planned systems as an historically assembled hodge podge of programs. Their contours, moreover, are a contingent outcome of contests among a diverse array of competing groups at the turn of the twentieth century – groups that helped to shape the foundations of American accident law from within the institutional structures of late-nineteenth century American law."

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* Judge David Torrey is the Immediate Past-President of the National Association of Workers' Compensation Judiciary. He is a Workers' Compensation Judge in Pittsburgh, PA and an Adjunct Professor of Law, University of Pittsburgh School of Law.

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# New Drug Shows Promise as Opioid Alternative

By: Ben Miller (Reporter)

Researchers at Memorial Sloan Kettering Cancer Center in New York City think they've found an opioid-like substance that could provide the same pain relief as opioids without the side effects that lead to addiction and overdose.

The substance is called iodobenzoylnaltrexamide, or IBNtxA for short. A team of researchers including doctors Gavril Pasternak and Ying-Xian Pan first derived the substance from the opioid dependence-treating drug naltrexone in 2011 and have been working to understand more about it ever since. In mice, the research has shown that IBNtxA reduces pain without depressing the rodents' breathing, creating physical dependence or activating the "reward pathway" in the brain associated with addiction. In last month's (July) issue of the Journal of Clinical Investigation, the researchers added further understanding to the mechanism by which IBNtxA operates — basically, by targeting different receptors in the brain than opioids normally do.

The drug's avoidance of the brain's "reward pathway" suggests that it wouldn't create the sensation of being high in humans, while the absence of respiratory depression implies that it would not contribute to overdoses. The main cause of death in opioid overdoses is respiratory depression. In short, the researchers think IBNtxA is an opioid painkiller without the side effects. Those side effects, including addiction, abuse and overdoses, have spurred employers and insurers to reduce opioid prescriptions to workers' compensation claimants. Those efforts include the creation of drug formularies in Texas and Ohio and the controversial independent medical review system in California.

There's some evidence that workers' comp is beginning to gain some control over opioids. The workers' compensation pharmacy benefit manager Helios reported a 2.9% drop in opioid utilization and a 7.4% decrease in morphine equivalency dose per claim in 2014. Still, efforts to reduce opioid prescriptions continue. In Massachusetts in June, a working group convened by the governor released recommendations to curb opioid abuse. Last month, the American Medical Association urged more physicians to begin checking state prescription drug-monitoring systems to catch patients "shopping" from doctor to doctor for pills.

Advocates for the reduction of opioid use often point to the Centers for Disease Control, which has called opioid overdose an "epidemic." According to the CDC, more than 16,000 people died from opioid overdose in the U.S. in 2013. Dr. Donald Teater, a family physician and medical advisor to the National Safety Council, said the possibility of a potent painkiller without the side effects of opioids is welcome news. "What they're talking about is that it might be stronger than the opioids that are out there right now — if it's that good and it doesn't have the side effects, then that's great," he said.

However, he said, there is no telling exactly how the drug will work in humans since it's still in the animal testing phase. And it might not work exactly like opioids — after all, part of what makes opioids addictive is that they calm the patient and work against depression. Those same qualities help reduce pain. "Essentially all pain organizations that have created a definition for pain say there is both a physical and an emotional aspect of it," he said.

If a drug based on IBNtxA isn't addictive, it might not have those same effects on mental health. On the plus side, Teater said, the introduction of a painkiller that doesn't affect mental health could help more physicians understand exactly what the opioids they're prescribing do. "The doctor thinks they're just treating pain with (opioids); they don't understand the mental health aspect of it," Teater said.

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*New Drug Shows Promise, from page 31.*

Michael Gavin, president of the medical cost-containment firm Prium, was similarly hesitant to embrace IBNtxA as a solution for the problems of opioids just yet. "It's still in animal testing, which means it's probably somewhere between five and 10 years away from commercial availability," Gavin said. "So nobody should be sighing in relief that we've discovered a new nonaddictive opioid." He also said that every analgesic discovered in the past century has turned out to have some kind of side effect in humans. "Early indications are that this would be a significant positive development for pain that needed to be treated through medication," he said. "But keep in mind — I would say that the same excitement arose around acetaminophen at one time, until we realized that despite the (lack of) respiratory depression ... it does cause liver damage."

Further, Gavin said, opioid painkillers have always been more appropriate for cancer patients than for the typical workers' compensation injuries, such as lower back pain and torn ligaments. For the more common workers' compensation injuries, Gavin said the industry needs to try shifting away from a pharmacological approach altogether and put more emphasis on treatments like cognitive behavioral therapy and functional restoration programs. "The focus on medication therapy for musculoskeletal injuries is where we went off the rails in the last 10 years," he said. "So while I think this is an exciting development, I would hate to see the workers' compensation industry get distracted by a medication that is 10 years away."

# Work Comp Likes Yoga for Back Pain

By: Ben Miller (Reporter)

More and more Americans are doing yoga, and the workers' compensation system is paying for it as a treatment for chronic pain — but in a field as unstructured and nebulous as yoga, it's tough to tell how often is necessary.

The percentage of U.S. adults who practice the ancient Indian exercising techniques collectively known as yoga nearly doubled from 2002 to 2012, according to a survey the Centers for Disease Control and Prevention released earlier this year. During that time, several studies were published suggesting that yoga can help reduce pain and increase function in patients with chronic lower back pain.

The Official Disability Guidelines, a common standard for states to turn to when guiding the treatment of injured workers, recommends yoga for "highly motivated patients."

Three studies examining the efficacy of yoga are:

http://www.ncbi.nlm.nih.gov/pubmed/22041945
http://www.ncbi.nlm.nih.gov/pubmed/19701112
http://www.ncbi.nlm.nih.gov/pubmed/22025101

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# IAIABC-NAWCJ Mediation Program

The International Association of Accident Boards and Commissions and National Association of Workers' Compensation Judiciary partnered for a third year to provide an extensive IAIABC/NAWCJ Mediation Program. This year, attendees had the choice to participate in introductory or intermediate tracks on mediation strategies and tactics for judges or mediators in workers' compensation.

The venue was the historic Drake Hotel in Chicago in early September. Attendees from a variety of jurisdictions brought their mediation perspectives and experiences to the table and discussed their similarities and differences.

Mediation is nothing new. American courts began using the alternative of mediation in the 1970s to alleviate crowded dockets and congestion. In the late 1980s a handful suggested that mediation might have a place in workers' compensation. In 1991 Florida statutorily recognized mediation, making it mandatory in 1993.

Now, Workers' compensation mediation is an accepted part of workers' claims in a variety of states including Georgia, North Carolina, Pennsylvania, Virginia, and Washington. The obvious benefits of mediation are inspiring its acceptance and use.

*Work Comp Likes Yoga, from page 32.*

And yet, most workers' compensation case managers and payers probably can't even tell if they're paying for it. There are no current procedural terminology billing codes for yoga and very little standardization of the practice. Yogis can offer exercise in a cornucopia of styles — Hatha, Viniyoga, Iyengar — and it can be done as part of a group, one-on-one, through a gym membership, in a hospital or in a person's own home.

Dr. Teresa Bartlett, senior vice president and corporate medical director for Sedgwick Claims Management, said she's a "big supporter" of yoga. "I think anything we can do to help people help themselves in the long run is a huge benefit," she said. Bartlett said the company has seen bills come in for yoga, but it's rare. Sedgwick would embrace yoga as a treatment and reimburse for it, except that much of the time, she said, patients are likely doing yoga themselves — perhaps by their doctor's recommendation. So it wouldn't necessarily show up in Sedgwick's case files. "There's a lot of this that goes on in workers' comp and it's sort of undocumented so to speak," she said. "But it's not that it's not embraced."

Bills for yoga do show up in the mail for workers' compensation carriers, however. The California State Compensation Insurance Fund, one of the largest residual workers' compensation carriers in the U.S., has approved yoga for some claims, according to Medical Director Dinesh Govindarao. "Treating chronic pain is a complex endeavor and in some cases involves utilizing alternative treatment options such as yoga," Govindarao wrote in a statement to WorkCompCentral on Friday. "The biopsychosocial treatment model is an effective way to approach chronic pain patients. State Fund supports the use of alternative treatment options on a case-by-case basis with utilization review oversight."

Dea Jacobson, a yoga therapist at Blue Heron Yoga in western Colorado, has spent nearly 20 years perfecting methods for getting workers' comp carriers to pay for her services. With more people practicing yoga across the U.S. and more representation of yoga in national media, Jacobson said, it's getting easier to get workers' compensation payers to approve it as a treatment. "I would say the last four or five years I've had a lot less explaining to do with case managers," she said.

Jacobson said that for a patient with back pain, she will usually ask for 10 to 12 one-hour sessions. The style of yoga she uses and the pacing will change from patient to patient — if she's working with somebody addicted to morphine, for instance, she might start off a bit more slowly and work up to more vigorous exercises.

Though she gets many patients referred to her through a local doctor, she said the physician's prescription is often not enough. While "alternative" medicines such as acupuncture are widely recognized and have billing codes, Jacobson said getting yoga approved takes extra work. "When we get a prescription from (the physician), we always double back and make sure that the insurance company knows who we are, what we do and how we do it," she said.

She said her bills can show up in several different ways, depending on what company she's working with. Pinnacol Assurance, Colorado's insurer of last resort, has a dedicated billing code for yoga, Jacobson said. For others, she might use physical therapy codes. "It can be rolled into a package (of codes) and done that way," she said. "And in that case there are these codes that are sort of catch-all codes that a practitioner can use, sort of like 'physical activities — other.'"

*Continued, Page 34.*

*Work Comp Likes Yoga, from page 33.*

Part of the reason yoga isn't as embedded in the repertoire of insurers, she said, is the lack of standardization. "There are training programs, but there are no national standards," she said. In fact, she said, yogis are often actively opposed to standardization. One organization in Colorado pushed a bill through the state Legislature this year — Senate Bill 186 — that protects yoga-training groups from standardization and regulation under state laws. If the group had embraced regulation, she said, yogis would have had an easy way to prove their credentials and insurers might have become less hesitant to pay for their services.

But there are others working to standardize yoga. The International Association of Yoga Therapists, Jacobson said, is working to create a standardized program for therapists to earn designations. The association already keeps a list of approved training programs that meet its criteria.

However, yoga doesn't always have to be done as an individualized treatment. Steven Feinberg, past president of the American Chronic Pain Association and a contributor to the Official Disability Guidelines, runs a clinic in the San Francisco Bay Area that offers functional restoration programs. One part of the program available to patients is yoga. Really, Feinberg said, it's common sense that yoga would help patients with chronic pain. "It's exercise. If you look up exercise, it's totally accepted in (the American College of Occupational and Environmental Medicine) and the ODG," he said. The reason guidelines call for yoga only for highly motivated patients, he said, is that patients with chronic pain who want to get better and "take charge" of their own recoveries are more likely to have good outcomes. "Everyone would benefit from yoga, but if the patient's not really motivated to get better, nothing's really going to help them," he said.

## Congratulations Newly Elected and Reelected NAWCJ Board Members!

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# Interim Chief Judge Appointed by Rhode Island Supreme Court

The workers' compensation adjudication process in Rhode Island is conducted by a branch of the state court system specifically established for that jurisdiction.

The Supreme Court in July appointed Workers' Compensation Court Judge Debra L. Olsson to serve as the interim chief judge. At the end of July, Chief Judge George E. Healy Jr. will retire, creating the vacancy.

Judge Olsson will lead the workers' compensation court until a successor, nominated by the Governor, is confirmed by the Senate. It is expected that the nomination process will begin soon.

Judge Olsson is the senior workers' compensation judge in Rhode Island, and has served since 1991. She has served in the appellate division since 2001. She earned her undergraduate degree at Wellesley College and her law degree from Suffolk University Law School.

Judge Healy also began with the Court in 1991. In announcing the interim assignment, the Court noted significant modernization of the workers' compensation practice over Judge Healy's tenure.

# Celebrating the Centennial Anniversary of Vermont Workers' Compensation Act

By Keith Kasper, Esq.*

The 100th anniversary of the enactment of the Vermont Workers' Compensation Act is being commemorated this year with a series of initiatives and events including outreach to local schools, recognition by the Vermont Legislature, and culminating with a special Centennial conference in Montpelier on September 15, 2015.

A grand compromise between labor and management, the Act grew out of concerns from both workers and employers about the impact of work-related injuries. The no-fault insurance program adopted helped ensure that workers had access to medical attention and compensation for lost wages while employers gained insurance against litigation and costs that could jeopardize their businesses. Since enactment, the Act has enabled many thousands of Vermonters to access treatment and return to work.

In recognizing this important milestone, Governor Peter Shumlin has stated that "Vermont has a long history of protecting our workforce while promoting a growing economy. The nature of many jobs has changed in the 100 years since the Vermont Workers' Compensation Act was passed. However, it is still vitally important that Vermonters know that if they are injured while on the job, the financial safety net and health care they need is ready and available to get them back healthy and working." Commissioner of Labor Annie Noonan has added that "the core mission of the Act – to treat employees fairly following a workplace injury and protect employers from costly litigation – is still relevant and worth celebrating in today's world." Earlier this year, the Vermont Legislature passed a resolution (HCR 90) recognizing the Act's value to Vermonters.

As part of the celebration, the summer issue of the *Vermont Bar Journal* will focus on workers' compensation in Vermont, featuring articles by Paul Gillies, Keith Kasper, and an interview with the Hon. Brian Burgess, former Supreme Court Justice and former Commissioner of the Department of Labor and Industry. In addition, the planning group is compiling curriculum materials on the history of workers' compensation for use by teachers in Vermont schools.

The Act will be celebrated with a Centennial Conference on September 15, 2015 in Montpelier, Vermont. This conference will feature sessions on the history of workers' compensation nationally and in Vermont, best practices and lessons for employers and workers in return to work and workplace safety, reviews of major reforms around the country, and proposals for what can improve workers' compensation in Vermont going forward. The conference will also highlight and support **Kids' Chance of Vermont**, the recently established local branch of the national Kids' Chance program, which offers college tuition scholarships to the children of injured workers.

The conference agenda and registration information are available under "Events" at www.aivt.org or at www.labor.vermont.gov.

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Keith Kasper is a partner with McCormick, Fitzpatrick, Kasper and Burchard in Burlington, Vermont. He defends workers' compensation insurance carriers, TPA's and employers in contested workers' compensation matters from initial filing through Vermont Supreme Court appeals. He also assists other parties to mediate compromise resolution of contested workers' compensation matters.

# Critics Question Fairness of Kansas' Workers' Compensation Judge Appointments

By Tim Carpenter
August 1, 2015

Topeka attorney Frank Taff set aside time from his workday to watch a state committee interview four applicants and nominate a person to serve as administrative law judge in Topeka to handle labor disputes. He was seeking insight into how the seven-member panel established in 2013 by Gov. Sam Brownback and the Kansas Legislature approached hiring one of 10 judges handling workers' compensation and unemployment cases. He was surprised the meeting was hosted by the Kansas Chamber of Commerce, an organization acknowledged for its lobbying acumen on behalf of business interests. After settling into a seat in the Chamber of Commerce's office near the Capitol, Taff learned he would soon be leaving.

Interviews with all finalists would be conducted in executive session. Such privacy contrasts with the Kansas Supreme Court nominating commission, which interviews applicants in open meetings. The vacancy resulted from the committee's 6-1 vote in April against reappointment of Judge Brad Avery, the son of a former Kansas governor. Eric Stafford, chairman of the Workers' Compensation and Employment Security Boards Nominating Committee and a top lobbyist for the Chamber of Commerce, said guidance from the state attorney general empowered the committee to interview and evaluate candidates behind closed doors. The panel complies with state law by executing binding votes in public view, Stafford said.

"This comes from the attorney general's office of the state of Kansas. So, as stated earlier, that's why we are handling these in executive session," Stafford said. Taff said the Kansas Open Meetings Act didn't reflect that position. "I see nothing in there that permits these interviews to be conducted in executive session," he said. "I think the public has pretty much been kept in the dark." "We're not doing anything in secret here," Stafford said. "We're not trying to cover anything up."

**Fair or not?**

Taff said he was frustrated with the committee's decision to make Avery, whom he called highly competent, their first ouster victim. It also claimed the selection system was purposefully distorted to favor Kansas employers and disenfranchise injured workers. Previously, these administrative judges were chosen with equal input from employer and employee groups. The new law designated five slots on the committee for representation of employers and two seats to serve employee interests.

Committee member Harvey Sorensen, a Wichita attorney who often takes a lead during committee consideration of applicants, said critics of the process were mistaken. "I think it's working fine," Sorensen said. "We don't have a set of standards that every one of us are required to adopt."

Each selection is forwarded for final approval by Kansas Department of Labor Secretary Lana Gordon, a former Topeka member of the Kansas House. In 2013, the Legislature and Brownback agreed to abandon the administrative judge selection process that pitted representatives of the state Chamber of Commerce against the AFL-CIO. It was an approach typically resulting in selection of middle-of-the-road judges.

The new structure allows the state Department of Labor, Chamber of Commerce, National Federation of Independent Businesses, Society for Human Resource Management and the Kansas Self-Insurers Association to each select a committee member. The labor secretary also designates a person to act on behalf of public employee groups. The final member is from AFL-CIO.

**Foxes on guard**

John Ostrowski, a Topeka lawyer and Kansas AFL-CIO lobbyist, said a tenet of any judicial system was avoidance of even appearance of impropriety. "I don't think anybody can look at this committee and say this is a balanced selection process," Ostrowski said.

*Continued, Page 37.*

*Critics Question Kansas, from page 36.*

"In representing injured workers, it certainly destroys their confidence in the system when they learn that the judge deciding the case is hired and fired by a coalition controlled by the chamber, insurance carriers and employers. The foxes are clearly guarding the hen house."

He said the committee's rejection of Avery was "clearly based on the perception that his rulings too often favored injured workers. It was not based on his job performance or any objective standard."

Jeff Cooper, a plaintiffs' attorney for injured workers also affiliated with the group Kansas Association for Justice, said lawyers were developing a lawsuit to challenge constitutionality of Kansas' system. He said reforms adopted in 2011 during the Brownback administration weakened access to benefits for the injured and legislation in 2013 undermined integrity of administrative judges selections. "If you control the judges, you control the results," Cooper said.

**Decisions**

Stafford said confidentiality of interviews and committee deliberations had to be kept private. However, he chose to disclose in open session a problem with the committee's decision in April to appoint Robert Matthews to the Employment Security Board of Review. "Some things have come up in the KBI background check that are concerning and would question judgment going forward," Stafford said.

After conclusion of a two-hour executive session Thursday to discuss a replacement for Avery, Sorensen offered a motion to select Britt Nichols, a contributor to Brownback's re-election campaign. Sorensen said his justification for favoring Nichols reflected comments he made during the closed portion of the meeting, but didn't repeat in public. The vote was 2-4 against Nichols.

That prompted nomination of Julie Sample, who has been in the workers' compensation field since 1997. She served as a workers' compensation administrative law judge until 2003, authored 700 opinions as a member of the workers' compensation appeals board and handled workers' compensation cases in private practice since 2011. She was approved 5-2.

Committee member Bruce Tunnell, executive director of the Kansas AFL-CIO, said Nichols would have prevailed had reporters with The Topeka Capital-Journal and The Wichita Eagle not been present. Tunnell cast the lone vote in favor of retaining Avery. He opposed Nichols, but backed Sample. He said most committee members focused in closed session on whether potential judges would be "business friendly." Political ideology drives the process, he said. "They claim it doesn't," said Tunnell, gesturing toward other committee members. "They want someone who's going to represent their best interests."

# Lana Gordon, Kansas Labor Secretary, Rejects Workers' Compensation Judge Nominee

By Tim Carpenter
August 17, 2015

The secretary of the Kansas Department of Labor rejected without explanation the nomination of a Johnson County attorney to serve as an administrative law judge with jurisdiction over workers' compensation disputes. Secretary Lana Gordon's decision drew attention because nominee Julie Sample, who has nearly 20 years of experience in the workers' compensation field, became the first nominee to be derailed by a labor secretary under the modified selection system put into place by Gov. Sam Brownback.

Sample was endorsed by the Kansas Workers Compensation and Employment Security Board to take the slot to be vacated by Judge Brad Avery, who was the first incumbent judge not retained by the board since it was created in 2013.

*Continued, Page 38.*

*Lana Gordon Rejects, from page 37.*

Gordon said she wouldn't discuss what troubled her about Sample's candidacy. The 10 administrative judges are employees of the state Department of Labor and personnel decisions regarding those appointments can be held in confidence, she said. Urged to explain what general qualities she would like to see in judges, Gordon said the objective was to identify "someone who's going to be fair."

The Kansas workers' compensation system serves as a legal alternative to typical jury trials for damages linked to injuries occurring in the workplace.

Eric Stafford, chairman of the Workers Compensation and Employment Security Boards Nominating Committee, said state law didn't provide the seven-member committee clear direction on the next step. A meeting is scheduled Wednesday to decide whether to pick an alternative from among the three other finalists - Steven Roth, Britt Nichols and Michael Streit - or to request a fresh set of applicants. "It hasn't happened before," Stafford said. "The statute is vague on how to proceed."

In April, the committee voted 6-1 against reappointing Avery, the son of a former Kansas governor. The board ended a two-hour executive session in July by nominating Nichols to replace Avery.

Nichols, who works for the state Department of Labor in the asset recovery division and donated to Brownback's re-election campaign, is a former Kansas legislator. He filed a lawsuit after losing re-election to the House in a 1996 race against candidate Sue Storm. He sued individuals, associations and a corporation alleging a conspiracy to donate to Storm and violate state campaign finance law. Nichols pushed his case to the Kansas Supreme Court, which rejected his "various theories" in a decision published in 2000.

Roth is a magistrate judge in northeast Kansas, while Streit is a partner in the Wallace Saunders law firm.

In July, the nominating committee voted 2-4 against forwarding Nichols' name to the labor secretary. That was followed by a 5-2 vote to advance Sample's nomination to Gordon. Sample has worked in the workers' compensation field since 1997. She was an administrative judge until 2003, wrote 700 opinions as a member of an appeals board and handled cases in private practice since 2011.

Jeff Cooper, an attorney affiliated with Kansas Association for Justice, said the labor secretary's decision to block the appointment of Sample didn't make sense. "There's no real logic as to why they'd do that other than politics," Cooper said. "By far, she's the most qualified candidate."

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The foregoing articles, *Critics question fairness of Kansas' workers' compensation judge appointments* and *Lana Gordon, Kansas labor secretary, rejects workers' compensation judge nominee* originally appeared in the Topeka Capital-Journal, cjonline.com, on August 1, 2015 and August 17, 2015. They are reprinted here with permission.

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*Endnotes from The Accidental Republic, from pages 4-28.*

[1] This essay is constructed from the editor's notes taken upon multiple readings of this excellent book – the most current, comprehensive account of the origins of workers' compensation laws. Thanks to Daniel R. Schuckers, Esq., and Lawrence D. McIntyre, J.D., for reviewing an early version of this essay. This essay was originally published, in slightly different form, in the July 2015 issue of the Pennsylvania Bar Association Workers' Compensation Law Section Newsletter (Vol. VII, No. 122), and is reproduced here with permission.

[2] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (Free Press 2012).

[3] **Editor's Note:** On the relation of risk to freedom, see Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Harvard University Press 2012).

[4] **Editor's Note:** The leading authority on this particular issue is Theda Skocpol's *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Harvard/Belknap Press 1992).

[5] See Section IV of this paper. The Pittsburgh Survey study, *Work Accidents and the Law* (1910), by lawyer and social reformer Crystal Eastman, counted work deaths in Allegheny County (Pittsburgh) in the first decade of the last century (there were over 500 in fiscal year 1906-1907, alone), and ascertained how much compensation was achieved by the widows and families of the fatally injured employees.

[6] As early as the 1840's, for example, "the Pennsylvania mining trade press discussed accident compensation funds financed by a tax on coal sales[.]"

[7] Still, Shaw is usually portrayed as the individual who generated this idea in American jurisprudence.

[8] Witt lists three reasons why consensual waivers were disapproved. According to Witt, "each rationale, in its own way, pointed towards the impracticability of the elegant conceptual structure of classical tort law."

[9] **Editor's Note**: "A friendly society (sometimes called a mutual society, benevolent society, fraternal organization or ROSCA) is a mutual association for the purposes of insurance, pensions, savings or cooperative banking. It is a mutual organization or benefit society composed of a body of people who join together for a common financial or social purpose. Before modern insurance, and the welfare state, friendly societies provided financial and social services to individuals, often according to their religious, political, or trade affiliations." See https://en.wikipedia.org/wiki/Friendly_society

[10] **Editor's Note:** In the Pittsburgh-based novel, *Out of this Furnace* (1941), by Thomas Bell, the protagonists, struggling to meet the cost of living, worry over how they are to pay the weekly insurance bill. Soon, a fatal accident occurs at the mill, and the widow and children collect on the policy.

[11] **Editor's Note**: In the Pittsburgh Survey book by researcher Margaret Byington, *Homestead: The Households of a Mill Town*, the author attached as an appendix the full text of the U.S. Steel Plan. [Thanks to Judge Steve Minnich, Pittsburgh, for bringing this to my attention.]

[12] One commentator quoted by Witt asserted that the Eastman book was "perhaps the strongest single force in attracting public opinion" to the problem of industrial hazards. It is notable that in *Work Accidents and of the Law* (1910), Eastman not only argued for no-fault liability to hasten recovery – but was hoping that "costly lawyers would be eliminated." (Witt throughout the book notes that the early thinking was that "lawyers would be eliminated from work-accident disputes....")

[13] An example can be found in E.H. DOWNEY, WORKMEN'S COMPENSATION (MacMillan 1924). For a summary, see DAVID B. TORREY, ED., THE CENTENNIAL OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT: A NARRATIVE AND PICTORIAL CELEBRATION (Pennsylvania Bar Association 2015). Downey, throughout his book, referred to the new workers' compensation system as being an act of "social justice." Indeed, he declared, "the principle that each industry should bear its own compensation cost has passed into a canon of social justice, and is accepted by employers and underwriters alike as an article of faith."

[14] *See* Roy Lubove, *Workmen's Compensation and the Prerogatives of Voluntarism*, 8 LABOR HISTORY 254 (1967). For a summary, see DAVID B. TORREY, ED., THE CENTENNIAL OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT: A NARRATIVE AND PICTORIAL CELEBRATION (Pennsylvania Bar Association 2015).

[15] *Lochner v. United States*, 198 U.S. 45 (1905).

[16] *White v. New York Central R.R. Co.*, 243 U.S. 188 (1917). The other cases were *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (U.S. 1917); and *Hawkins v. Bleakley*, 243 U.S. 210 (U.S. 1917).

[17] *Jensen v. Southern Pacific Company*, 109 N.E. 600 (N.Y. 1915).