Lex and Verum

The National Association of Workers' Compensation Judiciary

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President's Page

By Hon. Michael Alvey*

Now that the 2015 Judicial College is in the rearview mirror, it is time to look ahead to 2016. Planning is underway for the 2016 Judicial College. If you have any suggestions for topics or speakers, please, as soon as possible, send those to me, michael.alvey@ky.gov, or Judge Langham at David.Langham@doah.state.fl.us. Thanks for your assistance.

Last month I provided a list of all of our committees. If you are interested in serving on a committee, or on any one in particular, please let me know as soon as you can. Thank you in advance for your willingness to serve, and to continue to serve, our association.

On another note, occasionally a case comes before me in which the parties are particularly contentious. When this occurs, I usually append a copy of the Kentucky Bar Association Code of Professional Courtesy to the decision. I also occasionally provide a copy of this aspirational code when making a presentation. Although this is geared primarily to litigators, it is equally applicable to adjudicators. I have provided the full text of the code below:

> Attorneys are required to make the system of justice work fairly and efficiently. In carrying out that responsibility, attorneys are expected to comply with the letter and spirit of the applicable Code of Professional Responsibility adopted by the Supreme Court of Kentucky.

Continued, Page 2.

Each 2015 College attendee received an NAWCJ water bottle.

President Alvey, from page 1.

The following Code of Professional Courtesy is intended as a guideline for lawyers in their dealings with their clients, opposing parties and their counsel, the courts and the general public. This Code is *not* intended as a disciplinary code nor is it to be construed as a legal standard of care in providing professional services. Rather, it has an aspirational purpose and is intended to serve as the Kentucky Bar Association's statement of principles and goals for professionalism among lawyers.

1. A lawyer should avoid taking action adverse to the interest of a litigant known to be represented without timely notice to opposing counsel unless ex parte proceedings are allowed.
2. A lawyer should promptly return telephone calls and correspondence from other lawyers.
3. A lawyer should respect opposing counsel's schedule by seeking agreement on deposition dates and court appearances (other than routine motions) rather than merely serving notice.
4. A lawyer should avoid making ill-considered accusations of unethical conduct toward an opponent.
5. A lawyer should not engage in intentionally discourteous behavior.
6. A lawyer should not intentionally embarrass another attorney and should avoid personal criticism of opposing counsel.
7. A lawyer should not seek sanctions against or disqualification of another attorney unless necessary for the protection of a client and fully justified by the circumstances, not for the mere purpose of obtaining tactical advantage.
8. A lawyer should strive to maintain a courteous tone in correspondence, pleadings and other written communications.
9. A lawyer should not intentionally mislead or deceive an adversary and should honor promises of commitments made.
10. A lawyer should recognize that the conflicts within a legal matter are professional and not personal and should endeavor to maintain a friendly and professional relationship with other attorneys in the matter – "leave the matter in the courtroom."
11. A lawyer should express professional courtesy to the Court and has the right to expect professional courtesy from the Court.

Have a great month, and I look forward to hearing from you regarding the 2016 Judicial College, and service on a committee. Thanks for all you do.

Editor's Mantra for the Month:

GRATEFUL

By Hon. LuAnn Haley*

I recently had an opportunity to attend a workshop led by an Ayurvedic meditation expert from India and learned the value of adding a meditation practice to an already busy schedule. The teacher, a nationally recognized speaker, provided scientific support for using meditation as exercise for the brain. In the workshop, the Ayurvedic specialist led the group in a breathing exercise and then followed with a guided meditation that could be done at home. The teacher also suggested practitioners should take time each day to clear your mind, repeat a mantra out loud (in my case I chose the word "grateful") and spend a few minutes in quiet reflection.

Although I sometimes fall short of my post workshop goal of following the meditation pattern learned in the workshop each day, I have found the time to take a few minutes each day to repeat my "grateful" mantra and consider all I have to appreciate. As this month's Newsletter comes together, it seems the perfect time to express my gratitude to the many members of NAWCJ who have made *Lex and Verum* an outstanding publication each month.

At the top of my list of those who deserve a word of thanks are the members of NAWCJ. Many of you in this organization have submitted well written and scholarly articles that make our job as editors manageable each month. We recognize that writing and submitting an article requires hard work and courage and I extend my thanks to who have submitted articles, or plan do so in the future. Also, members of the Board have provided information regarding new appointments and honors for our members which we include in each issue of the Newsletter. I would encourage all NAWCJ members to provide information regarding the accomplishments of your colleagues so we can continue to recognize our members. If you have an article that you believe our readers would enjoy or an announcement regarding a member, I encourage you to contact me directly at LuAnn.Haley@azica.gov.

Sometimes gratitude can bring with it a bit of sadness and it is with this sentiment that I announce the departure of Judge Melissa Lin Jones from the Board of NAWCJ and our Newsletter committee. Judge Jones has accepted a new position as a Social Security Judge in Buffalo, New York and both the Board and our committee are grateful for her many contributions. As many of you know, Judge Jones worked hard during her tenure on the NAWCJ Board and helped both with the Moot Court Competition as well as several educational sessions at the College. With regard to the Newsletter, we have appreciated her legal writing skills as well as her keen editorial eye when finalizing this publication.

Although Judge Jones will be missed, I am pleased to report that Judge Shannon Bruno Bishop has volunteered to be a member of the Newsletter committee. I again find myself grateful that Judge Bishop has agreed to work with our committee despite her relatively recent appointment as District Judge of the Office of Workers' Compensation in Louisiana. For those who have yet to meet Judge Bishop, she is a native New Orleanian and a graduate of the University of Mississippi School of Law. Prior to becoming a District Judge, Judge Bishop served as a full time mediator where she mediated hundreds of workers' compensation cases each year. Welcome aboard to Judge Bishop and a big thank-you for so quickly stepping up to join the Newsletter committee.

When considering the many ways I am grateful, I would be remiss if I did not acknowledge with considerable appreciation the other members of the Newsletter committee, Judges Torrey and Langham. In addition to authoring quality articles, Judge Langham undertakes the monumental task of laying out the Newsletter each month and making sure it is timely distributed to our readers. Judge Torrey also can be counted on every month to have a recently completed scholarly article on hand that is ready to be published.

Continued, Page 4.

Mantra for the month, from page 3.

To both these fine Judges, I owe many thanks. Without Judges Langham and Torrey, the NAWCJ Newsletter could not have risen to its current status as "the best Newsletter in the business."

Following the now familiar words of our NAWCJ President (Could it be possible that Judge Alvey too has a meditation Mantra?) "Thanks for all you do."

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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 Arizona, 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.

Judges Belcher (GA) and Lott (MS) discuss the finer points of the intoxication defense at the 2015 Moot Court Judge's Luncheon

Judges Lewis (FL), Williams (KY), and Holley (FL) prepare for round one of the 2015 Moot Court Competition.

The Workers' Compensation Judge's Complete Guide to Fishback & Kantor's *A Prelude to the Welfare State: The Origins of Workers' Compensation* (2000)

By Hon. David Torrey*

Price V. Fishback & Shawn Everett Kantor, *A Prelude to the Welfare State: The Origins of Workers' Compensation* (316 pp., University of Chicago Press 2000).

Abstract: *The authors of this leading history first study precisely how workers obtained compensation for work-related accidents before the creation of the workers' compensation system. They then study the economic impact on various constituencies by the transition from the tort system to workers' compensation. The authors then turn to the precise timing of enactment of workers' compensation laws in the second decade of the last century, and explore the political process of their adoption. They further discuss "the fractious disputes over state insurance," a debate which the authors characterize as among the most divisive. These same constituencies also undertook battles over benefit levels in the early decades of workers' compensation systems. The authors, in discussing these two latter issues, point out that while most constituencies wanted workers' compensation, and thought they would benefit from the same, precisely how these no-fault insurance systems would be structured, and what levels of benefits they would pay, were subject to significant dispute. The authors conclude by trying to derive lessons from the experiences of the creation of the workers' compensation system.*

This essay is a non-critical summary of the Fishback & Kantor book. I will note a caveat at the outset – to wit, that the reader will detect some level of repetition in the pages that follow. I have tried to summarize each chapter comprehensively, and because those chapters originally appeared as stand-alone articles, it is natural that some information will be repeated.

I.

Although workers' compensation is a legal system, it is primarily a system of social insurance. In addition, it is a system with broad economic implications. A phenomenon of this reality is that much of the study of workers' compensation over the decades has not been by lawyers or legal historians but, instead, by those engaged in economic study.

A comprehensive modern history of workers' compensation, the Fishback and Kantor book, *A Prelude to the Welfare State: The Origins of Workers' Compensation*, is an example of this phenomenon.

In this regard, in 2000, these two academic economists published a book in which they analyze, using both econometric analysis (and good old-fashioned quantitative political science techniques), the origins of workers' compensation in the first and second decades of the 20th century. The authors, throughout this analysis, evaluate how "economic interests [were] filtered through the political process."

Like many academic texts, the eight chapters of the book first appeared separately throughout the 1990's in various academic journals. (Examples are the *Journal of Economic History* and the *Journal of Law and Economics*.)

Continued, Page 6.

A Prelude to the Welfare State, from page 5.

A goal of the authors is to determine *why* virtually all states adopted workers' compensation laws in the second decade of the last century. Was it really because the progressive movement was strong during this period, and because social reformers commanded influence in state legislatures? This might be the common understanding among many in the workers' compensation community, but the authors test this hypothesis and do not find it to be accurate. Instead, they believe that all of the key constituencies were interested in the work accident problem and recovery for the same, had a corresponding interest in the reform via workers' compensation, and thought they would *benefit* from it. This is the book's prevailing theme, and one that the authors reiterate in every chapter.

Like most analysts of the origins of the system, the authors first treat how, before workers' compensation, injured workers would have to sue in tort for their injuries. There, workers would be met with the powerful employer defenses of the fellow servant rule, assumption of the risk, and contributory negligence. They assert that workers' compensation, which would completely overthrow this system, and pay benefits on a no-fault basis, was a *revolution* at the time.

In this latter regard, the authors remind us that before the introduction of workers' compensation, the majority belief was that too much aid to the poor and disadvantaged was *unwise*. The authors explain, "there was a general feeling that the vast majority of the poor bore the lion's share of the responsibility for their fate. They should receive only a brief helping hand to get them back on their feet. Policymakers feared that generous benefits to the destitute would keep them from assuming responsibility for their own well-being, which in turn would lead to continued reliance on the benefits."

Attitudes began to change during the Progressive Era, and reformers proposed many types of social reforms. The authors note, however, an irony. In this regard, at the beginning of the century, only *workers' compensation* received truly widespread support. Of course, that it was widespread is evidenced by the fact that all but five states adopted this tort reform between 1910 and 1921.

Why did workers' compensation lead the way, and become a "prelude" to the welfare state – even if its influence proved to be delayed for another couple of decades? The authors identify five reasons.

The authors first point out that before workers' compensation, employers were *already required* under the common law to compensate the injured – when the former were at fault – while they bore no such responsibility to the unemployed or the retired. Thus, it was less of a stretch for employers to "swallow the requirement that they compensate their workers for all accidents regardless of fault than it would have been for them to pay unemployment compensation."

Second, from the public's point of view, the new program did not impose a "general tax burden outside the employment relationship."

Third, "compensation for workplace accidents was also less troubling for those who worried about personal responsibility and the impact of payments on the poor's acceptance of responsibility."

Fourth, the continued mechanization of the industrial workplace raised questions about the assignment of fault. As the authors explained, "many accidents seemed to come from the inherent dangers of work and fault could not easily be assigned to either the worker or employer."

Fifth, workers' compensation paid to industrial accident victims "also seemed less likely to cause behavior that led to more accidents, a phenomenon known as 'moral hazard,' than would payments, say, to workers who were unemployed. Injuries were painful, raising the cost of the accident to the worker well beyond lost earnings and medical expenses." And, of course, workers' compensation was not complete wage replacement in the first place, typically limiting payments to two-thirds – and often much less – of lost earnings.

While delay in further progress occurred, once workers' compensation was on the books, it was arguably easier to enact *other* social welfare programs: "workers' compensation was a key early link in the chain establishing the American welfare state. The programs were truly a prelude to the modern welfare state."

In addition, workers' compensation, with its operative principle of no fault, has also had an impact on other liability systems.

Continued, Page 7.

A Prelude to the Welfare State, from page 6.

According to the authors, "this shift in liability helped set precedents for the shifts in liability from fault-based to no-fault systems that we see in many areas today. The courts have implicitly moved away from negligence liability to strict liability for consumer products, while numerous states have adopted various forms of no-fault policies."

The authors make quite clear that it is a mistake to think that the enactment of workers' compensation was a singular victory for labor. To the contrary, scholarship has long existed that documents "that many employers actively supported workers' compensation when it was introduced." The authors, in their book, assert, "we show that workers, employers, and insurance companies all tended to support the general notion of workers' compensation, although they fought bitterly over the details of the law." The authors posit that it is *error* to engage in "the general view that workers' compensation was a victory for workers over employers."

II.

In the authors' first chapter, entitled "Framing the Issues," they announce two goals of their research and writing. The first is to determine how various interest groups believed they might *gain* by adoption of workers' compensation. The second is to identify the process that led so many legislatures to enact workers' compensation laws at virtually the same time.

They also seek to determine how workers and employers "made out" under the old system of tort liability and the replacement of workers' compensation. Indeed, this is a special theme of one chapter, but it runs throughout the book.

The authors point out that the Walter F. Dodd and Somers & Somers studies, published in the 1930's and 1950's, respectively,[1] set forth "thumbnail sketches" of the reasons for the enactment of workers' compensation laws. These authors stressed the "social insurance" motive and the desire of reformers to "reduce unnecessarily large transaction and administrative costs."

A thesis of the Fishback & Kantor book, however, is that workers' compensation, "like most legislation, was not passed simply because it was 'in the public interest.'" And, as foreshadowed above, the authors conclude that many employers "joined workers in favoring" the enactment of workers' compensation law:

> Workers' compensation was not class-based legislation implemented from the bottom up or from the top down. Workers did not obtain large gains at the expense of employers, nor were recalcitrant workers coerced into accepting the terms of this 'uncertain experiment' by their employers. Each group supported workers' compensation in the political negotiations willingly because they anticipated gains from the switch to the new regime. Employers gained a reduction in the uncertainty surrounding their accident costs and saw reduced frictions with their workers, as other scholars have noted.
>
> [O]n the surface, it appears that they paid too much for these gains because the switch to workers' compensation led to a substantial increase in the amount they paid for accidents.... [Still], employers were able to pass onto workers a large portion of the higher costs of post accident payment to reductions in real wages. Thus, employers gained greater certainty and reduced friction without having to pay for most of the increase in then set levels. Risk-averse workers, despite 'buying' the higher benefits through a drop in their wages, gained because under negligence liability they had problems purchasing their desired level of accident insurance. The switch to workers' compensation left them better insured against workplace accident risk. Finally, insurance companies willingly supported the legislation, as long as it did not allow the state to write workers' compensation [insurance] because they could expand their coverage of workplace accident risk.

Continued, Page 8.

A Prelude to the Welfare State, from page 7.

III.

The second chapter of the book is "Compensation for Accidents before Workers' Compensation." The goal of this chapter is to examine how the negligence system operated in the work injury context in both theory and in practice. The authors insist that it is important to consider the experience.

After all, in trying to compare tort and workers' compensation, one must remember that significant "transaction costs" were involved when a worker tried to achieve a settlement or verdict. The actual operation of both systems may well be different from what theorists presume.

The authors accept the assertion of the legal historian, Lawrence Friedman, that common law courts in the late 19th and early 20th centuries were starting to produce instability in the law of torts in the realm of work injuries, and juries started to award significant damages as a result. These developments, generated out of the enactment of partial-reform "employer liability" laws, were highly unattractive to employers.[2]

Still, the authors seek, from analyzing contemporary studies, the *actual levels* of post-accident compensation received in fatal accident cases. Here, the authors take account of the renowned Pittsburgh study by Crystal Eastman. Eastman, of course, studied the 546 work deaths in Allegheny County in the fiscal year 1906-1907, and tried to determine the level of survivors' recovery – if any.[3]

Here the authors point out a well-known phenomenon: it has always been difficult to measure the true number and costs of non-fatal injuries on the job. With non-fatal injuries, incentives may exist against reporting. Workers, for example, may be afraid that if they report an injury, they could be fired. Employers, meanwhile, may withhold information about *known* non-fatal injuries and not report all of them to insurers and government agencies. In death cases, on the other hand, casualties are much harder to hide.

The authors, in discussing the factors influencing accident compensation, try to determine whether the famous trinity of defenses, found in the common law,[4] were really that important in employer decisions whether to pay a particular tort claim. The authors conclude that the common law defenses were important in the decision to pay in fatal cases, but not so much in injury cases.

The authors remark, in this context, "Analyzing how accident victims or their heirs were compensated around the turn of the century suggests that the impact of the common law defenses on accident payments was filtered through a settlement bargaining process that was influenced by legal costs and private information. There is evidence that the common law doctrines guided the defective system of accident compensation, but other factors clearly influenced who received compensation."

Continued, Page 9.

A Prelude to the Welfare State, from page 8.

Another dynamic, meanwhile, was at work: "Workers could enhance the amounts and probability of payment by hiring a lawyer, who effectively served as their advocate in working through the legal system. But hiring a lawyer meant enticing him with a portion of any award that was won or by paying him an upfront fee, which was something most injured workers probably could not easily afford."

Under the negligence liability system, "compensation for fatal accidents was relatively meager." The authors submit that very few [heirs] of fatal accident victims received much compensation: "Similarly, substantial numbers of non-fatal accident victims received no benefits." The authors conclude, along with Crystal Eastman, that employers paid out more in workers' compensation than under the tort system.

On a miscellaneous note, the authors seem to be persuaded that a "risk premium in wages" existed. That is, at least some evidence suggests that employees earned more because of the known risks of extra hazardous work. (As an editorial note, other analysts have found little patience with this argument.[5])

IV.

The next chapter, "The Economic Impact of the Switch to Workers' Compensation," features a discussion of how the introduction of workers' compensation changed the nature of benefits paid in the early 20th century. Another focus of the chapter is "the impact of workers' compensation on wages, household saving and accident insurance purchases," as well as fatal accident rates.

A. ***Does mandated workers' compensation reduce employee wages?*** The authors summarize a major finding of the book: "Numerous studies of the economic impact of government-mandated benefits find that employers are able to pass at least part of the costs back to workers through reduced wages...." The authors seem persuaded by this finding in the workers' compensation context – particularly with regard to non-union workers. In this regard, studies persuasively show that "changes in workers' compensation benefits over the past 20 years [demonstrate] that increases in benefits are associated with reductions in wage rates."[6]

Continued, Page 10.

The authors assert that even though workers may have "bought" these higher benefits (via wage reductions), they were, at least originally, still "better off" as a result of the introduction of workers' compensation.

One measure of this phenomenon is trying to determine whether workers, before workers' compensation, were really able, as sometimes is suggested, to buy their own insurance. The authors insist that workers were not. This was so "in part because insurance companies faced significant informational problems in selling workplace accident insurance to individual workers." Workers instead often had to rely on savings – "a relatively expensive means of insuring against accident risk."

B***. Does mandated workers' compensation leverage employers to top-down safety?*** A century-old controversy exists over whether imposition of mandatory no-fault liability, undergirded by experience-rated insurance, leverages employers to greater safety practices.

The authors, having reviewed this issue, point out an irony. They declare, "we cite the results of studies that show that workers' compensation was associated with a decline in fatal accident rates in manufacturing industries, but an increase in fatal accident rates in the coal industry. We speculate that differences in the employer's costs of preventing accidents across these industries produce this dissimilar effect on fatal accident rates." They explain, in this regard:

> Although many reformers and even employers predicted that the introduction of workers' compensation would lead to a decline in accident rates, the new legal institution gave workers and employers conflicting incentives for accident prevention. Increased accident benefits gave employers an increased interest in preventing accidents, but some workers were able to relax their attentiveness to accident prevention because the social insurance guaranteed their expected incomes. As a result, in settings where employers could prevent accidents at relatively low cost, accident rates fell. Where the additional accidents from the workers' relaxed prevention were costly for employers to prevent, such as in coal mining, accident rates rose.

V.

The next chapter, "The Timing of Workers' Compensation's Enactment in the United States," is the authors' attempt to document, based on an empirical analysis, "why, if so many parties anticipated benefits from the legislation, state legislators waited as long as they did to adopt workers' compensation." The authors note that "the activities in each individual state, where legislatures made the actual decision," are part of the analysis.

In any event, "analysis of the timing of adoption across the United States supports our contention that the greater uncertainty arising from the changes in the negligence system played an important role in the introduction of workers' compensation. The relative strength of major interest groups also played a role, as unions, the manufacturing lobby, and larger and more productive manufacturers helped speed the adoption of workers' compensation. Finally, social reformers played a smaller role in the overall adoption of workers' compensation laws than they did in determining the particular features – such as benefit levels or state insurance of workers' compensation risk – of the legislation in a particular state."

Of note to the lawyers: "One group that might have opposed the introduction of workers' compensation comprised attorneys involved in the practice of workplace accident law. In Missouri, for example, these damage-suit attorneys used the political process to slow the adoption" of the program. It is notable as well that the bar in Tennessee encouraged the legislature to have workers' compensation litigation conducted in *civil court.* This phenomenon was documented by National Commission researchers.

A subsection of this chapter is "Why Workers' Compensation?" The *alternative* could have been continued reform of the tort liability system through employer liability laws. On the other hand, another device could have unfolded, one simple, yet unfamiliar to most of us – that is, one "where workers and employers negotiated private contracts that establish workers' compensation-like arrangements at the firm level. Under such a private scheme workers would have signed contracts with their employers in which the worker, before any accident occurred, waived his right to a negligence suit in return for a guaranteed set of accident benefits, regardless of fault. Why was a governmental solution [instead] chosen?"

Continued, Page 11.

A Prelude to the Welfare State, from page 10.

One answer to this query is that many states, including Pennsylvania, had a common law rule that such pre-injury contracts were unenforceable. The Pennsylvania case is *Johnson v. Philadelphia Railway Co.*, 20 A. 854 (Pa. 1894).[7]

In any event, the authors characterize the eventual workers' compensation reform as contractual, allowing employers "to eliminate the uncertainties of large court awards in return for providing his workers with a set of benefits that on average were higher than those under negligence liability."

In terms of timing, the authors discuss at length how employer liability laws started making it easier for workers to win. As to the *lobby* for such changes, "organized labor pressured legislatures for limitations on employers' common law defenses, anticipating that more injured workers would be compensated and the amount they received would be higher as a result of the laws."

As noted at the outset, employers in the late 19th century asserted that results in court were extremely uneven and unpredictable in the wake of these laws. In this vein, the authors note, "by September 1902 lumber employers [in Washington state] were denouncing the courts with their extravagance in negligence cases." There was "a great deal of uncertainty about the extent of employer's liability," in states like Washington. This uncertainty "caused a large increase in the liability insurance premiums that employers paid." "[W]eakening of employer's common law defenses encouraged employers to pay more attention to accident compensation issues than before." The authors summarize the situation as "an unfavorable legal climate" which was unfolding "during a time when industrial accidents were coming to the fore of public attention."

This worsening climate, in the early 1900's "encouraged employer-supported lobbying groups to explore the possibility of a switch to a no-fault compensation system." These groups included the National Civic Federation, the National Association of Manufacturers, and the American Association of Labor Legislation. The latter, which was formed in 1907, "became one of the leading advocates for workers' compensation...." The federal government, meanwhile, under President Theodore Roosevelt, enacted a workers' compensation law for federal workers in 1908.

According to the authors, labor unions also changed their attitude towards workers' compensation. Whereas at the turn of the century, the AFL believed in major tort reform by stripping employers of their three defenses, within a short time major labor organizations began to embrace workers' compensation instead. The authors note that organized labor's initial reluctance to embrace the new system was part of a "more general opposition to governmental regulation of the workplace."

Why did labor change its position? Labor, the authors explain, thought that insurance companies and lawyers were "parasites" on the system. In 1909, the AFL switched its position and starting passing resolutions supporting compensation.

The authors, in a subsection entitled, "Interest Group Influence," note that agricultural lobbies tended to be against the introduction of workers' compensation, at least to their employment sector. "Farm interests," they note, "focused on eliminating farm workers from coverage." Consistent with this fact, "states with more workers employed in manufacturing tended to adopt the law earlier." "The insurance lobby," meanwhile, "favored workers' compensation as a means of expanding their coverage of workplace accidents, as long as the state did not try to establish a state fund to write workers' compensation insurance."

State labor departments, meanwhile, became advocates for the introduction of the system.

In the end, "Workers' compensation represented the leading edge of labor legislation during the period…. The support from major employers' groups and organized labor led to the widespread adoption of workers' compensation...."

Workers' compensation, the authors again conclude, "was legislation that united a broad-based coalition of workers, manufacturing employers, and insurance interests attempting to reform the negligence liability system that all agreed was ill suited for the modern industrial economy." In trying to weigh *the most* important consideration, the authors remark: "it appears that greater public awareness of accident risk was not nearly as important as changes in the employer's liability climate."

Continued, Page 13.

THE NATIONAL ASSOCIATION

OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR MEMBERSHIP

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

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

OFFICIAL TITLE: _____

ORGANIZATION: _____

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PROFESSIONAL E-MAIL: _____

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PROFESSIONAL TELEPHONE: _____ **FAX:**_____

YEAR FIRST APPOINTED OR ELECTED: _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ: _____

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DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

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

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Mail your application and check to: Kathy Shelton, P.O. Box 200, Tallahassee, FL 32302
850.425.8156; Email: kathy@wci360.com

A Prelude to the Welfare State, from page 11.

Postscript. The authors provide, in this chapter, a 50-state table showing the enactment dates of compensation laws. The authors divide the states into three groups, based upon when they enacted compensation. The first are those states that passed laws before 1913; the second group features states that undertook enactment between 1913 and 1916; and the third those which passed laws after 1916.

VI.

In next chapter, "The Political Process of Adopting Workers' Compensation," the authors' review is less quantitative and more in the nature of traditional political science analysis. The authors address this issue by way of case studies, specifically, the experiences of Ohio, Illinois, Massachusetts, New York, Minnesota, and Missouri. The authors discuss how, in each state, various lobby groups argued for or against workers' compensation laws.

The authors believe that these five case studies again show that employers, workers, and the insurance industry all supported a workers' compensation law, but that the same lobbies disputed the *details* of the program: "Harsh debates developed over specific features of the law."

Ohio. In Ohio, a key issue was whether a worker, even with workers' compensation being adopted, "would [still] have the right to choose between the guaranteed workers' compensation benefits or suing his employer under negligence liability." While some workers favored the continued viability of a tort lawsuit, "employers strongly opposed giving workers this option because it would confront them with the same legal and financial uncertainty from which they were trying to escape. If workers could choose their means of compensation, then employers would be forced to pay damages to all of their injured workers, plus they would still face the possibility of paying very large awards to those workers with strong negligence claims." Of course, in the end, the employer lobby prevailed on this issue.

The authors discuss at length the genesis of the Ohio fund, which exists to this day. Insurers, notably, opposed a state fund because adopting insurance on this basis would purportedly "encourage negligent behavior and increase the level of accidents...."

Illinois. In discussing the Illinois experience, the authors point out that as early as 1907 the Illinois legislature "flirted" with workers' compensation laws before abandoning the same at the behest of organized labor. Within three years, however, both employers and organized labor began pressing for the system.

The discussions of the Ohio and Minnesota laws show that it was common for legislatures to characterize workers' compensation laws as "elective" – but making *unpalatable* the choice of electing out because the employer, in a tort case, would not have the advantage of the three traditional common law defenses.

Minnesota. The discussion of the Minnesota statute is remarkable because it shows that many approaches to the details of compensation were proposed. For example, one employer lobby expressed a concern about a proposal which would have featured generous medical coverage. That proposal was to pay "full medical coverage for the first two weeks of injury, up to $100.00." The concern was that no matter how *minor* the accident, hospitals and doctors would prescribe treatment in order to extract the full $100.00.[8] This same lobby unsuccessfully sought a cap of an employer's liability for a single accident, "like a mine explosion, at $50,000.00."[9] And, this employer lobby recommended that employees contribute 20 percent of the cost of the insurance, not exceeding one percent of the workers' wages. A lobby in Minnesota would also allow a worker the option of suing or accepting workers' compensation. This was a proposal that likewise did not unfold. The disputes over the details of the program were apparently so fractious in the year 1911 that no law could be passed.

Some lawyers in Minnesota opposed workers' compensation because they would lose the ability to sue employers in tort actions. In this spirit, one Minnesota critic charged that workers' compensation was really something enacted for employers: "Isn't it a travesty on justice to ask you to pass this measure ostensibly for the benefit of the working men but urged by the big employers of the state?"

Continued, Page 14.

A Prelude to the Welfare State, from page 13.

Missouri. The discussion of Missouri reveals a state that had a significantly delayed workers' compensation law because, in part, damage-suit attorneys opposed the reform. It took 16 years of debate in Missouri before the workers' compensation law was finally passed in 1925.

VII.

The next chapter, "The Fractious Disputes Over State Insurance," addresses the little-understood history of how some state systems came to be underwritten by private insurance, while a minority (like Ohio, discussed above), opted for a state-run system similar to modern-day unemployment compensation. Jurisdictions that maintain state-run programs are called "fund" or "monopoly" states.

Today, only two large states, Ohio and Washington, are fund states. North Dakota and Wyoming also have this structure. Within the last couple of decades, Nevada and West Virginia are jurisdictions that changed from being fund states and which now allow private insurance like most jurisdictions, including Pennsylvania.

At the outset of workers' compensation reforms, a debate existed over whether states should pass laws with insurance that was state run, as in Ohio and Washington, or privately underwritten, as in Pennsylvania. The dispute over state insurance "was particularly bitter." Unions were in favor of state funds, while insurers, of course, favored their ability to underwrite the system. Employers, the authors posit, "split over the issue of state insurance."

The authors explain, meanwhile, that union leaders "pushed strongly for state insurance on the grounds that private insurers were profiting from denying benefits to many deserving injured workers. Insurers fought to save their business and charged that state insurance was a sign of creeping socialism."

Crystal Eastman held such a prejudice against private insurance. Eastman thought that liability insurance in the tort context "lowered the chances of an injured worker receiving compensation, and the insurance industry was profiting at the expense of workers' suffering." Eastman also thought "since the insurance company was 'equipped with system, money, skill, and experience,' the chances of successfully suing an insured employer for damages were 'formidable.'" The authors, however, posit that reformers like Eastman "were in fact mistaken ... in assuming that workers always fared poorly at the hands of liability insurers." The authors examine various early data sets in support of this assertion.

Continued, Page 15.

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

A Prelude to the Welfare State, from page 14.

According to the authors, "proponents of state insurance presented little evidence to suggest that the state could save dramatic sums of money by reducing the overhead associated with writing workers' compensation insurance." One critic, E.H. Downey, charged to the contrary that "the monopolistic state fund does [not] have the inducement of competition to keep itself up on its toes."

Importantly, opponents of state insurance pointed to the inevitable "politicization of not only the bureaucracy administering the law but also the financial aspects of the state fund." The authors posit that "such fears ring true today" as many funds have money problems.

And a vital quote: "At the core of the state insurance debate in the early 20th century was simple private enterprise philosophy. State insurance supporters like Minnesota representative Thomas J. McGrath 'recognized no legitimate function that the private insurance carriers perform under a workmen's compensation scheme that cannot be adequately and properly performed by a state department.' The opponents of state insurance [on the other hand,] questioned why the government should step in to provide a service that could just as easily and cost effectively be provided by private parties. They worried that government intervention into insurance would lead to expansions in the state role: 'If insurance is a proper field for the State to enter, why is not manufacturing or merchandising ...?'"

One answer was found by several states. In this regard, many states "chose a compromise solution by establishing a state fund while allowing private insurers to compete with the state." Of course, this was the Pennsylvania approach in 1915.

The authors, of note, posit: "In the final analysis there is no well-established notion of whether the state or private firms were the optimal agents to insure workers' compensation risk."

In discussing the alignment of interest groups on this issue, the authors point out the important fact that "state insurance was considered radical by early 20th century standards and opponents consistently invoked images of creeping socialism." In this area, the authors do indicate that their findings show that progressive reformers were influential: "The empirical analysis ... shows that progressive reform movements were important to the adoption of state insurance."

The inquiry into the decision of legislatures over which system to adopt defies quantitative analysis: "Because the decision to implement a state insurance fund involved complex coalitions across economic and political groups, an econometric analysis only begins to capture the richness of the battles over monopoly state funds."

After making these general observations, the authors discuss in detail the adoption of state insurance in Washington and Ohio. They also discuss the *failure* of Minnesota to follow suit. In the end, the authors note that "the extreme position of establishing a monopoly state fund occurred in only seven states." Thus, "the adoption of state insurance of workers' compensation risk contrasted sharply with the enactment of workers' compensation legislation generally."

VIII.

The next chapter is "The Battle Over Benefit Levels, 1910-1930." The authors here repeat their theme. Virtually all parties favored workers' compensation because they thought they would, overall, benefit from the same. Still, with regard to the *specifics*, significant controversy existed. These specifics included, as noted above, how employers were to insure for no-fault liability.

Disputes also existed, however, over benefit levels. And, as might be suspected, "whether the employer's proposed benefit levels or the proposals of labor leaders carried the day was determined by the relative political strength of employers and organized labor, by the nature of industry in the state, and by the extent of political reform movements." Employers, as might be anticipated, sought to limit benefits, whereas organized labor sought higher percentages of lost earnings, even arguing for "no ceilings on weekly benefits and short waiting periods." Overall, both economic and political factors influenced how compensation benefit levels were determined in the political process.

Continued, Page 16.

A Prelude to the Welfare State, from page 15.

The authors note that from the very beginning a wide variation in benefit levels existed across states. This is a well-known phenomenon in the present day, but it existed in the early period of the program as well.

As one might sense, employers were in favor of an upper limit on benefit levels in part to avoid the "moral hazard problems that might undermine their basic reason for shifting to workers' compensation – to reduce accident cost uncertainty."

In their analysis, the authors note that "once agencies were established to administer workers' compensation, organized labor succeeded in enlisting the efforts of state administrators to help raise benefit levels in the years after workers' compensation was adopted."

IX.

Chapter Eight, the final chapter, is entitled "Lessons From the Origins of Workers' Compensation." Here the authors remind us again that workers' compensation was the first of the social insurance programs to be widely enacted in the United States. A peculiar phenomenon, however, surrounds this fact.

In this regard, the enactment of workers' compensation was thought by many to herald a number of other social insurance innovations in American law. However, the movement towards such reforms was (and continues to be) stalled. Over the next decade or so, a number of states considered introducing unemployment insurance, health insurance, and old age protections. However, it was not until the 1930's that the federal government established unemployment and Social Security Retirement. Many other enactments such as Medicare, Medicaid, and SSD did not unfold until after World War II. Universal health care, despite Obamacare, has *never* been achieved.

Another lesson that the authors derive is that the "free market approach" to preventing injuries and encouraging "self insurance" by workers did not really work: "According to some reformers, not only did market competition fail to protect workers, but individual workers failed to protect themselves." Those convinced of this assertion reasoned further that "if the market supposedly could not help workers or if they could not help themselves, then government could."

This was a crucial tenet of progressive thinking that, for the *many* reasons discussed above, ultimately *prevailed*.

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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.

Endnotes on page 35.

Governor Rauner Appoints Hemenway as Arbitrator

Governor Bruce Rauner has appointed Christina Hemenway to the Illinois Workers' Compensation Commission as an arbitrator. She has been an attorney specializing in workers' compensation claims for more than 20 years

Currently, Hemenway worked for COUNTRY Financial as a workers' compensation claims attorney where she managed catastrophic claims and employer liability and coverage lawsuits. In addition, she was a subject matter expert for the company. Previously, she was the supervisor for the department.

Hemenway is a member of the Illinois Chamber of Commerce's Workers' Compensation Committee, the Property & Casualty Insurers' Workers' Compensation and Medicare Committees, and is a member of the Illinois Advisory Committee for the Workers' Compensation Research Institute.

Hemenway is a graduate of Missouri State University and earned her law degree from the University of Missouri.

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Criticism: Noise Induced Hearing Loss as an Industrial Accident in Louisiana

By Hon. Sheral Kellar*

I.

A recent decision by the Louisiana Supreme Court, *Arrant, et al. v. Graphic International, Inc., et al.*, 2013-2878 (La. 05/05/15); 169 So.3d 296, underscores the difficulty courts have expanding workers' compensation coverage to work-related disabilities, illnesses and injuries not caused by an "accident." In Louisiana, as well as most states, the event giving rise to the employer's obligation to pay benefits is an accident arising out of and in the course of employment. Although an injury may arise out of and in the course of employment, it still may not be compensable if it was not caused by an "accident," which in most states is narrowly defined.[1]

In *Arrant, supra*, the Louisiana Supreme Court (LASC) expanded workers' compensation coverage to noise induced hearing loss (NIHL) when it was not caused by an "accident" as defined by Louisiana statutes.

In 1914 when Louisiana first enacted a workers' compensation statute, accident was defined as "an unexpected or unforeseen event happening suddenly or violently, with or without human fault and producing at the time objective symptoms of an injury." These terms remained constant until 1989 amendments when the legislature changed the definition of "accident." Cf. 1989 La. Acts 454. The statutory definition of accident has remained unchanged since 1989 and now reads:

> "Accident" means an unexpected or unforeseen actual, identifiable, precipitous event happening suddenly or violently, with or without human fault, and directly producing at the time objective findings of an injury which is more than simply a gradual deterioration or progressive degeneration.[2]

Between 1914 and the 1989 legislative amendments, the courts established jurisprudential rules for determining whether a particular event constitutes an accident.[3] The 1989 amendment was clearly added to exclude illnesses or diseases caused by "gradual deterioration or progressive degeneration." In the Louisiana Civil Law Treatise, *Workers' Compensation Law and Practice* (5th Ed), Malone and Johnson, at Section 216, the authors said that the 1989 language was also intended to reverse the jurisprudential trend to permit coverage for a disability which appears to be work-related but does not fit the statutory definition of accident. In the *Arrant* case, the Louisiana Supreme Court did just this. It expanded coverage for a disability which appears to be work-related but does not fit the statutory definition of an accident.

II.

Arrant, supra, are consolidated tort cases where plaintiffs[4] alleged hearing losses that were sustained as a result of being "occupationally exposed to hazardous levels of industrial noise" during their employment. Specifically, plaintiffs asserted negligence on the part of the defendants for failing to provide a safe place to work, which in turn caused plaintiffs to suffer hearing loss by gradual, but persistent, noise exposure occurring over a substantial period of time while employed by defendants. Plaintiffs worked at a facility which includes a paper mill, box plant and carton plant. Their work environment involved machinery and processes producing high levels of industrial noise. The defendants filed exceptions of prescription and a motion for summary judgment citing immunity from tort under the Louisiana Workers' Compensation Act (LWCA). The exceptions of prescription and the motion for summary judgment were denied by the district court.

Continued, Page 19.

Noise Induced Hearing Loss, from page 18.

After a trial on the merits, the district court found in favor of the plaintiffs and awarded damages. The court of appeal reversed the judgment of the district court finding that plaintiffs' sole remedy was in workers' compensation. The appellate court held that NIHL is an occupational disease[5] and that defendants were entitled to the tort immunity provided to employers under the LWCA.

Both parties sought writs with the Louisiana Supreme Court (LASC). Plaintiffs asserted that the appellate court erred in finding that NIHL is an occupational disease. Defendants, meanwhile, asserted that the appellate court erred in not finding that NIHL is an accident by personal injury and in failing to sustain its peremptory exceptions of prescription.[6] Both writ applications were granted.

The LASC decided this issue:

> "Is gradual NIHL caused by occupational exposure to hazardous noise levels a personal injury by accident or an occupational disease, or both, under the LWCA, thereby entitling the defendant employer to immunity from suits in tort under the exclusivity provisions of the LWCA?"

After giving a fairly exhaustive history of the LWCA the court affirmed the dismissal, and held that NIHL falls within the parameters of the LWCA as both an occupational disease and as a personal injury by accident, entitling the defendants to the immunity afforded by the LWCA. The court recognized that throughout the years the definition of accident and occupational disease has been expanded to recognize "the advancement of the industrial revolution and growing number and types of diseases arising from work-related activities."[7]

III.

While it is true that courts have extended coverage to work-related disabilities, illnesses and injuries that did not exist when workers' compensation was first enacted, a court cannot ignore the definitions the legislature provides in the statute. "The law is the solemn expression of legislative will" and courts are to "merely interpret such expression."[8] If the statute requires personal injury by accident, "… some identifiable event or incident during employment where the employee could demonstrate a palpable injury" is required.[9] Even a liberal interpretation of the statute does not permit the result reached by the majority. The minority opinion stated:

> "… the plaintiffs' hearing loss did not lead to a sudden breakdown or force the employees to cease working; instead, the loss was not discovered for decades. Moreover, given its gradual and insidious nature, gradual hearing loss is neither palpable nor 'sudden,' 'acute,' nor 'identifiable.' As the experts opined herein, it is a cumulative permanent loss of hearing that develops gradually over many years of exposure to hazardous noise. ... [A]lthough the injury in question does arise out of and in the course of employment, neither its cause nor its onset is sudden or violent, and therefore, NIHL is not a personal injury by accident under any version of L.S.A.-R.S. 23:1021 or 23:1031."(sp 23:1031.1)

Additionally, the minority stated:

> "As our jurisprudence has long held, if a certain type of injury is not compensable under the LWCA, even though clearly work-related, then it is not subject to the exclusivity provision, and there is no tort immunity."[10]

Cases like *Arrant*, *supra*, are usually remedied by amendment to the workers' compensation act, which is fully expected in Louisiana's 2016 substantive legislative session. Employers do not want to pay for more disabilities, illnesses and injuries. Including more disabilities, illnesses and injuries can be costly. For example, the Ohio Senate is currently considering allowing workers' compensation for posttraumatic stress disorder (PTSD) of first responders where there are no physical injuries. An Ohio workers' compensation administrator testified that the bill would cost local governments $182 million a year, nearly double the local government's total current workers' compensation costs for that coverage.[11] No one would argue that first responders should not be entitled to receive workers' compensation benefits for the PTSD caused by their work. The question is how to pay for it.

Continued, Page 20.

Noise Induced Hearing Loss, from page 19.

Including more disabilities, illnesses and injuries can also be risky. Generally, there are more than six million work-related injuries and illnesses in the United States each year. The most rapidly growing category of workplace injuries is caused by repetitive motions of the body. In 1914, when Louisiana's workers' compensation system began, repetitive motion injuries were not only non-compensable, they were unheard of. Carpal tunnel syndrome was specifically carved out as an occupational disease in 1990.

Other parts of our bodies are susceptible to repetitive motion injury, as well, but those injuries that can result from such movements have been specifically excluded from the Louisiana Workers' Compensation Act. L.S.A.-R.S. 23:1031.1, supra, specifically excludes degenerative disc disease,[12] spinal stenosis and arthritis of any type.

In many states, the workers' compensation act had been liberally construed in favor of finding coverage.

> "While most repetitive motion disorders affect the arms and hands, they can occur in the spine as well. The majority of back injuries (particularly those that occur in the workplace) are the result of long-term, repetitive wear and tear on the muscles, ligaments, tendons, and disc in the spine. Repetitive movements such as pulling, straining, reaching, twisting, and bending can weaken and stress the structures of the spine and increase the risk of injury."[13]

This liberal construction effectuates the beneficent purpose of relieving workmen of the economic burden of work-connected injuries by diffusing the costs in channels of commerce.[14] But, this is changing as employers seek to level the playing field by statutorily precluding courts from liberally construing workers' compensation statutes in favor of the injured worker.[15] But, it's hard to ignore decades of jurisprudence. The court in *Arrant, supra*, apparently did not. The majority said: "… we must liberally construe the coverage provisions of the workers' compensation act …" and in doing so found that NIHL is a covered injury.

No Louisiana court has ever awarded compensation for gradual hearing loss under the LWCA.[16] That is probably because the injured workers could not sustain the requisite burden of proving that the gradual hearing loss was caused by "accident." By expanding the definition of accident and by liberally construing the LWCA in favor of coverage, the majority retreated to the pre-1989 jurisprudential rules regarding what constitutes an accident.

IV.

As industrial and technological advances continue to shape the workplace and change our view of occupational disabilities, diseases and injuries the definitions we give to salient features of our workers' compensation acts like "accident" and "injury" must change as well. The accidents that cause workplace injuries are not always sudden, precipitous, actual, and identifiable and do not always immediately produce objective signs or symptoms of an injury. In today's workplace, an accidental injury is a repetitive motion injury that occurs over time. It is the PTSD suffered by first responders. It is the respiratory and other ailments suffered by emergency workers who helped at the World Trade Center on 9/11. Neither of these would fit with Louisiana's definition of accident. And, no one would argue that these are not disabilities, illnesses and injuries that result from work consequences. But, it is not the court's prerogative to determine what constitutes an accident. This is the exclusive province of the legislature. Some occupations in the 21st century workplace were unheard of in the 20th century. Therefore, the definition of accident should be revisited to keep pace with disabilities, illnesses and injuries that are clearly work-related but were not occasioned by the current definition.

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* Judge Sheral Kellar is the Workers' Compensation Chief Judge of the Louisiana Workforce Commission. She has been Chief Judge since 1999 and has been a Workers' Compensation Judge since 1991. She is a Board member of the NAWCJ. Judge Kellar served as co-chair of the Louisiana State Bar Association Access to Justice Committee 2004 - 2008, and received its President's Award for her many contributions to the Bar Association and her exceptional service as Co-Chair of the Access to Justice Committee.

Endnotes on page 36-38.

Bear Selfies and New Mexico's Medical Marijuana Judge

By: Robert Wilson*

Ed. Note: the post below was originally published August 31, 2015 on WorkersCompensation.com.

Last week, I wrote about, among other things, the problem with people intent on proving the theory of Darwinism by taking "Selfies" with wild animals. As I indicated in that article, I possessed another #BearSelfie; one taken with a judge from the New Mexico Workers' Compensation system.

Now, this isn't just any workers' compensation judge. This judge is, for better or worse, likely tied to history for a landmark decision he issued a couple years back in that state. He was the first, and so far only, judge in the nation to order that employers are responsible for providing medical marijuana for their injured workers who require it. A higher court overruled him on that matter, but earlier this year the New Mexico Court of Appeals reversed that decision, and reinstated his order, resulting in the state now establishing rules facilitating the use of medical marijuana in New Mexico.

More on that in a moment. First we need to discuss that #BearSelfie.

Terry Kramer, it turns out, isn't just a judge with 15 years experience on the bench. He was also a man in search of a hobby. How else would you explain the fact that he boarded a plane for Washington State a couple years ago for no other reason than he heard about a guy giving lessons on how to carve bears with a chain saw? That is apparently where people go when they have an overwhelming desire to do that. I did not know there was demand for such a thing.

Now, before the animal rights whack jobs go all ape gaga on me, please understand we are not actually talking about live bears. No, these are bears carved out of tree logs, using, of course, the aforementioned chainsaw. So, animal rights people are safe from being offended here. Tree huggers, it would seem, are out of luck.

So, as promised, here is Judge Kramer with his very own chainsaw crafted bear:
He calls that his "Bearliff," by the way.

So, you may be asking yourself, how did I get a picture of a judge, whose medical marijuana decision I roundly criticized, sitting with his wooden Bearliff? The answer might surprise you. He gave it to me. More accurately, he had his wife text it from her phone.

Continued, Page 22.

Bear Selfies, from page 21.

Last week (August) I spoke at several sessions at the 70th Annual Workers Compensation Educational Conference in Orlando, FL. One of those sessions was a lunch for the Judicial College, put on by the National Association of Workers' Compensation Judiciary. I was invited that evening to join both the judges and the regulators from SAWCA for a dinner near the conference hotel. At that dinner Terry Kramer introduced himself to me. During my introduction earlier in the day, it was mentioned where I went to college. It turns out Judge Kramer has built a retirement home in a community near that area, and we struck up a conversation.

Now, it might be considered manna from heaven for a bombastic, sarcastic, opinionated blogger such as myself to run across the judge who created such a controversy across the nation. After all, we had been talking about his very decision at the bloggers' panel earlier that day. Kramer was not shy about it, either. In fact, it was during the introductions where he told me "I'm the judge that ordered employers pay for medical marijuana." I tell you, it was a blog that was practically going to write itself.

Except for one problem. I really liked the guy.

He wasn't a whack job radical, a hippie dippie jurist, or a blithering idiot. He was a rational, personable individual who is pretty comfortable in his own skin. And he made a fairly good point; judges can only make decisions based on the facts entered into evidence. If a case is poorly defended or not presented properly, it is not the responsibility of the judge to do the attorneys work.

I thought about a few details of the case while we were talking (Kramer did not really talk about specifics of that case). There was a doctor who prescribed medical marijuana because the patient was already using it, and said he needed it. The doctor indicated in testimony that he did not advocate the use of medical marijuana, but would prescribe it if asked to do so, as "they would use it anyway." Kramer himself seemed more sympathetic (my interpretation, not his words) for the judge who overturned his decision than for the Appeals Court decision that ultimately let it stand. I was definitely left with the impression that, while I wholeheartedly disagree with the premise, the judge in this case was not an idiot. The doctor was.

Ultimately Kramer indicated his belief that the decision won't really have significance, as recreational marijuana will eventually be legal across the country, and then it "won't matter." It was a point on which I strongly disagreed. While I do agree the tide for recreational marijuana seems to be rolling towards legalization, I think that requiring employers to pay for "medicinal" needs will only result in rampant cost shifting in that area. Recreationally legal or not, getting someone else to pay for your drug will be preferable to some. Queue the back strains and other invisible injuries….

We talked about a variety of things that evening. Kramer and his wife routinely drive much of the same route between Albuquerque and their home in Southwest Colorado that I do when visiting family there. We talked about the commute, and the region in general. It is a remote area with few towns and fewer facilities, and for me that provided the second biggest lesson of the night.

First, the judge whose decision I disagreed with and roundly criticized was a sound and rational person, and second, there apparently is a clean and well maintained restroom in Cuba, NM. Terry and his wife told me exactly where I could find it the next time I am on that road to Farmington.

Before that dinner I never would have believed either if you had told me.

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* Bob Wilson is President and CEO of WorkersCompensation.com. He was a presenter at Judicial College 2015. The foregoing was originally published on his blog, *From Bob's Cluttered Desk* and is reprinted here with his permission.

From the Pages of workcompcentral

‘Most Recent’ AMA Guidelines Mandate Unconstitutional

By: Sherri Okamoto (Legal Editor)
Monday, September 21, 2015

A narrowly divided Commonwealth Court last week declared that the state Legislature abrogated its duties under the state constitution by blindly adopting whatever standards the American Medical Association chooses on how to rate claimants’ disabilities. The four-judge majority said that Section 306(a.2) of the Workers’ Compensation Act, which provides that impairment ratings must be established using the most recent edition of the *AMA Guides to the Evaluation of Permanent Impairment*, puts “unchecked discretion completely in the hands of a private entity.”

This, the majority said in *Protz v. WCAB (Derry Area School District)*, No. 1024 C.D. 2014, 2015 WL 5474071, is an unconstitutional delegation of power. When the General Assembly added Section 306(a.2) to the Workers’ Compensation Act in 1996, the 4th Edition of the *Guides* was in effect. The AMA is now on its 6th edition. Each edition can change the impairment rating for the same injury, so a worker who would have been considered more than 50% impaired under the 4th Edition might be less than 50% impaired under the 6th Edition.

The 50% impairment is an important threshold in Pennsylvania for workers who have collected 104 weeks of total disability benefits. At the 104-week mark, the worker’s employer can petition to modify the worker’s status from totally disabled to partially disabled. The worker then must undergo an impairment rating evaluation, and the worker needs to receive an impairment rating of more than 50% to avoid being reclassified as partially disabled. An employer’s liability for partial disability benefits is capped at 500 weeks, so an employer guarantees an end to its liability by securing an IRE report assigning a worker an impairment rating below 50%.

The IRE doctor who examined Derry Area School District employee Mary Ann Protz in 2011 assigned Protz an impairment rating of only 10% using the 6th Edition of the *AMA Guides*. Workers’ Compensation Judge Ada Guyton accordingly granted the school district’s petition to modify Protz’s status from totally disabled to partially disabled. After the Workers’ Compensation Appeal Board upheld Guyton’s ruling, Protz sought review by the Commonwealth Court, challenging the constitutionality of Section 306(a.2).

Judges Dan Pellegrini, Bernard McGinley, Mary Leavitt and Patricia McCullough were persuaded by her arguments. Writing for the majority, Pellegrini noted that the Pennsylvania Constitution vests legislative power in the General Assembly, and it prohibits the General Assembly from delegating that power to any other branch of government or to any other body or authority. Although the General Assembly may adopt standards established by specialized groups as its own policy, Pellegrini said the General Assembly must still make the basic policy choices underlying those standards and ensure the regulations developed carry out its legislative intent.

Pellegrini said Section 306(a.2) failed to prescribe any intelligible standards to guide the AMA’s decision-making pertaining to the grading of impairments, and the statute was also “wholly devoid of any articulations of public policy.” Thus, he reasoned, the statute lacked “adequate standards to guide and restrain the AMA’s exercise of this delegated determination by which physicians and WCJs are bound.”

Continued, Page 24.

Pennsylvania Unconstitutional, from page 23.

Pellegrini said the General Assembly "adopted as its own the methodology enumerated by the AMA at the time it enacted Section 306(a.2) -- that is, the methodology contained in the 4th Edition of the *Guides*" but since the General Assembly has not reviewed and re-adopted the methodology contained in subsequent editions of the *Guides*, Section 306(a.2) operates to give the AMA "carte blanche authority to implement its own policies and standards" by "proactively adopting those standards, sight unseen." "Accordingly, we declare Section 306(a.2) of the Act, 77 P.S. § 511.2, an unconstitutional delegation of legislative authority insofar as it proactively approved versions of the *AMA Guides* beyond the 4th Edition without review," Pellegrini said.

The court ordered the case remanded for the WCJ to apply the 4th Edition of the *Guides* to determine Protz's level of impairment.

Judges Bonnie Leadbetter, Robert Simpson and Anne Covey dissented.

In his dissent, Simpson opined that the majority "misse(d) the mark" in analyzing whether the General Assembly had provided guidance to the AMA for developing an impairment rating methodology since the General Assembly has delegated the authority to make impairment ratings to the IRE physicians themselves. "The General Assembly provided numerous standards to guide impairment rating decisions made by physicians, of which use of the most recent edition of the *AMA Guides* is but a part," Simpson contended.

Judges Covey and Leadbetter joined Simpson's dissent, but Covey also wrote separately. Covey said she thought the majority opinion establishes that the involvement of a private party in the General Assembly's rule making is always unconstitutional. Such a conclusion directly conflicts with Commonwealth Court precedent which upheld the constitutionality of the delegation of rule-making authority to nongovernmental bodies for the development of safety standards for the storage and firing of explosives, Covey said.

In *Pennsylvania Builders Association v. Department of Labor and Industry*, Covey said, the court recognized that the General Assembly could not possibly stay abreast of every advance of science and invention in explosives, and so it ruled that the state could adopt the International Code Council's 2009 codes as Pennsylvania's 2009 Uniform Construction Code. Covey also argued that it similarly would be "unreasonable to impose upon the General Assembly the burden of frequently revisiting legislation to reflect evolving, broadly-accepted changes in the medical field that are beyond the expertise of the legislative body," and so the state ought to be able to rely on the AMA to establish impairment rating standards for the state.

Thomas Baumann of Abes Baumann represented Protz before the Commonwealth Court. He said Friday that he "fully expects" the defendants in the case to seek review by the Pennsylvania Supreme Court, and that he would be "very surprised' if the court didn't take the case. Baumann said the fight "isn't about the *Guides* per se," but about whether the way the Legislature has chosen to adopt the *Guides* for use was a proper delegation of authority to the AMA.

Until the Supreme Court weighs in, Baumann said, "there's obviously no final answer to this issue."

The Commonwealth Court actually had an opportunity to rule on whether Section 306(a.2) passed constitutional muster last year, in a case called *Wingrove v. WCAB (Allegheny Energy)*. Baumann's firm had represented the claimant in that case as well. The court declined to delve into the merits of the constitutional arguments that were raised though, deeming them too "conclusory" to be addressed.

Continued, Page 25.

Pennsylvania Unconstitutional, from page 24.

Claimants' attorney Larry Chaban, a former chairman of the Workers' Compensation Section of the Pennsylvania Bar Association, said Friday that the court's declaration that Section 306(a.2) is unconstitutional is the outcome he had been hoping to see, but he thought the court needed to stop there. "Their choices were to declare it unconstitutional or not," Chaban said, "and after they said it was unconstitutional, they aren't supposed to rewrite the statute."

If there was an unconstitutional delegation of legislative authority to the AMA, as the court found, then Chaban said he thought "to say you can still use the 4th Edition of the *Guides* is not appropriate in my mind."

Bradley R. Andreen, a defense attorney with O'Brien, Rulis & Bochicchio, said that he thought the best practice for employers and carriers in light of Friday's decision would be to get IRE decisions from doctors using both the 4th Edition and 6th Edition of the *AMA Guides*.

However, he said he doubted there would be many cases where there would be much of a difference, if any, in the ratings a worker got under each version of the *Guides*. Even if a worker such as Protz who got a 10% rating under the 6th Edition could double her rating under the 4th Edition to 20%, Andreen said, "that is not really going to change anything" since Protz would still be well short of the 50% threshold to avoid reclassification as partially disabled.

So for her, Andreen said, Friday's ruling may be a bit of a "hollow victory."

Claimants' attorney Glenn Neimann of Brilliant & Neiman agreed that the practical impact of Friday's ruling will likely be limited, but that's because "50% is such a ridiculously high standard" to meet. He said each edition of the *AMA Guides* since the 4th has made it harder and harder for a worker to get a 50% rating, so Friday's ruling "will make a difference" for some people.

The *AMA Guides* were first published as a series of articles in the *Journal of American Medical Association* in 1958. The *Guides* then were published in book form, as a compilation of these articles, in 1971.

This book was updated and republished in 1984. A 3rd Edition was published in 1998, and a revised 3rd Edition followed two years later. The 4th Edition came out in 1993, and a 5th in 2001. The 6th Edition was issued in December 2007.

More than 40 states make use of the *AMA Guides* in their comp systems. Alaska, Arizona, Idaho, Illinois, Kansas, Louisiana, Mississippi, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Rhode Island, Tennessee and Wyoming all join Pennsylvania in using the 6th Edition. The U.S. Department of Labor also uses the *AMA Guides* for determining disability for purposes of the Federal Employees' Compensation Act.

Continued, Page 26.

Two Appointed by Minnesota Office of Administrative Hearings

Workers' Compensation Judges in Minnesota are appointed by the Minnesota Office of Administrative Hearings. In September, Chief Judge Tammy L. Prust announced the appointment of two Judges, Keith Maurer and Stephen Daly.

Stephen Daly was appointed August 12, 2015. Daly has practiced since 1984 in the fields of workers' compensation, personal injury, premises liability and wrongful death. He graduated from the University of Minnesota Law School in 1984.

Keith Maurer was appointed September 9, 2015. He previously served as a mediator and arbitrator at the Department of Labor & Industry. He graduated from Saint John's University and the William Mitchell College of Law.

Pennsylvania Unconstitutional, from page 25.

Some states have specified by statute or regulation which edition of the *AMA Guides* is to be applied for certain, but others, like Pennsylvania, simply say the "newest" or "current" edition must be used.

The Workers' Injury Law & Advocacy Group opposes use of the 6th Edition, in part, because of the low impairment ratings it produces. Several states also have not embraced the 6th Edition.

Commission Proposes Rule to Mandate Electronic Filing

Friday, September 18, 2015

The North Carolina Industrial Commission is proposing to adopt rules that will mandate electronic filing and clean up other regulations to improve the consistency and efficiency of the filing process.

The proposed change to Chapter 4 of the North Carolina Administrative Code Section 10A.0108 will require claims administrators to submit documents, such as appeals of awards, applications, responses and compromise settlement agreements to the commission electronically. Claimants and employers without legal representation would be exempt from the mandate.

The rule would become effective on Feb. 1, but it contains a provision that requires the commission to grant a one-year waiver to self-insured employers, carriers, third-party administrators and law firms that notify the commission that they are unable to comply with the electronic filing requirements because of a lack of Internet technology resources. That notification would require the payer to outline a plan for coming into compliance, however.

The commission also proposes to amend NCAC 10A.0404, regarding the service of the Form 24 Application and the Form 24 Application decision that are intended to make the process more efficient and reduce costs. Also, proposed changes to NCAC 10A.0609, .0609A and .0617 would require that proposed orders be submitted in Microsoft Word format to allow the Industrial Commission staff to edit the orders prior to filing them.

The commission is also proposing housekeeping changes to NCAC 10A.0405, .0502, .0609, .0610, .0613, and .0617. Many of the changes simply contain references to the proposed rule .0108.

A minor proposed change to NCAC 10A.0101 deletes the use of the term "offices" to describe the Industrial Commission headquarters and inserts the word "main office." That change would take effect Jan. 1.

The commission has scheduled a public hearing on the proposed rule amendments for 2 p.m. Oct. 20 in Room 2173 of the Dobbs Building, 430 N. Salisbury St., Raleigh. The commission is accepting written comments until Nov. 16. The proposed changes must be approved by the state Legislature's Rules Review Commission if 10 or more persons lodge formal objections.

The foregoing stories *'Most Recent' AMA Guideline Mandate Unconstitutional* and ***Commission Proposes Rule to Mandate Electronic Filing*** were originally published by WorkCompCentral.com and are reprinted here with its gracious permission. The NAWCJ thanks WorkCompCentral for its support of the organization and this publication.

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Karen C. Yotis

The Adversaries and Frenemies of Workers' Compensation

Coming down on the side of a system that endures

By Karen C. Yotis, Esq. and Robin E. Kobayashi, J.D.***


Robin E. Kobayashi

"You have enemies? Good, that means you stood up for something." – Eminem

When it comes to workers' compensation, some folks are just gonna hate. And others, well, they're not happy either, but at least they talk about different ideas instead of sitting around complaining all the time. It's a big, complicated system out there, and in spite of the naysayers, something about it just continues to work. That's the fresh message of positivity that Judge David B Torrey conveys in his paper "The Durability of Workers' Compensation Law Against Its Adversaries," originally published in an IAIABC publication and reprinted in *The Centennial of the Pennsylvania Workers' Compensation Act* (© 2015 The Pennsylvania Bar Association). Torrey weaves historical highlights of the grand bargain together with its political realities and ends up with a thought-provoking primer about the way workers' compensation developed in this country and the direction it's likely to take going forward.

Torrey, who serves as a Workers' Compensation Judge in Pittsburgh, PA, points out that with workers' compensation there are cynics, and then there are true adversaries to the system. He defines a cynic as one who is more likely to seek reform within the system. An adversary, on the other hand, views the system as a complete failure and often wants to abolish it.

"[T]he [workers' compensation] program has endured for a number of good reasons," says Torrey. He calls out and identifies all of the entrenched interests that support the status quo—including insurance companies, state boards, doctors and lawyers—and acknowledges the difficulties inherent in overthrowing the combined strength of these special interests.

Torrey identifies a host of groups that he classifies as adversaries or "enemies" to the system. Beginning with a historical perspective, he first describes the earliest adversaries who challenged the constitutionality of the workers' compensation system over 100 years ago. They lost . . . all the way up to the U.S. Supreme Court.

Torrey also recounts the various types of federalization adversaries who have pushed for a national takeover of the workers' compensation system or at least uniform federal standards for state workers' compensation laws. The federalization adversary decries a patently unjust lack of systemic uniformity, particularly in benefit levels among the various states. These "parity adversaries" also view the "race to the bottom"—in which states cut worker benefits to attract big business—as patently "unacceptable."

Torrey also mentions the workplace safety adversaries, who criticize financial incentives for safety (such as the experience rating in which increased premiums are assessed against an employer as a penalty for rising injured worker claim costs) as ineffective. A segment of this adversarial contingent calls for improvement of workplace safety by replacing a completely dismantled workers' compensation system with a restored framework of employer tort liability.

Torrey also describes the characteristics of "Illness Culture" adversaries who tend to be mainly medical experts that blast workers' compensation as an "illness-inducing maze that masquerades as social insurance." Illness Culture proponents go so far as to qualify injured workers—especially in the back injury context—as basket cases who use their pain as a "surrogate" to mask the stress in their lives that they are unable to handle.

Continued, Page 28.

Adversaries and Frenemies, from page 27.

The illness culture believes that workers' compensation generates a benefits-dependent ecosystem which is in itself "pathological" and points a finger of blame at the physicians, drug companies, and medical device makers who "victimize the feckless patient" with needless treatments that have not been shown to scientifically provide a cure.

Torrey even points to the various ways that members of the public and the media have become adversaries of the workers' compensation system. This cabal includes the injured worker who feels he's received the short end of the stick, the aggrieved spouse and others who file lawsuits against employers or insurers, as well as *New York Times* reporters and other media types who publish articles exposing the demise of the Grand Bargain or write books about workers' egregious experiences.

Despite this criticism aimed at the (state-based) workers' compensation system, Torrey cautions members of the workers' compensation community to avoid having an "existential crisis" over the cacophony. "Workers' compensation in fact has significant purposes, and it is this characteristic that has lent the system its durability," argues Torrey.

According to Torrey, the "significant enduring value" of workers' compensation is that it "continues to serve its century-old purpose of benefitting both employers and employees." These are the "two pivotal groups" that benefit the most from an enduring system, and not the entrenched special interest groups usually given the credit (or blame) for stomping out efforts at reform.

Torrey points out that, to date, neither of these two groups accomplished any significant long-term change. Torrey calls out organized labor as not taking a stand against the state-based system by putting its support behind any other type of a replacement structure. When discussing Oklahoma's recent opt out legislation Torrey emphasizes how the legislature preserved the system by refusing to abolish workers' compensation outright. There are some who would strongly disagree with Torrey's take on employers (particularly large and multistate employers) who are wielding their political power to create opt out systems in Tennessee and South Carolina and possibly other states. While opt outs in Oklahoma are too new to judge (and lawsuits challenging the constitutionality of the law are still pending), we do have a long standing "nonsubscriber" system in Texas.

Torrey most definitely recognizes the shortcomings of workers' compensation. His article is replete with bare truth statements like, "legitimate injuries are…not compensated promptly" and also "workers' compensation by design metes out 'average justice', and workers experiencing above-average harm get the short end of the bargain." Yet Torrey reminds us about the majority of injury claims that are promptly handled by employers and carriers and about a system that manages to compensate workers while it shields them from the harsh realities of tort litigation.

Continued, Page 29.

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/

Adversaries and Frenemies, from page 28.

The plain truth is that the current state-based workers' compensation system helps injured workers—many of whom live paycheck to paycheck—to avoid financial hardship. For Torrey this is a key component underlying the enduring nature of the workers' compensation system.

Yet Torrey is nevertheless a "believer" that workers' compensation serves its purpose by promoting safe workplaces. Citing a 2005 study concluding that the experience rating of workers' compensation actually does reduce injury rates, Torrey takes a clear stand when he admits that this is "a real and not merely a theoretical proposition."

For more than 100 years, the workers' compensation system has survived a barrage of critics, cynics and adversaries. Yet despite its flaws and failures, Torrey demonstrates the numerous ways in which it has shown "remarkable durability." And if his predictions run true, the grand bargain will not only continue to survive. It may surprise us all and actually begin to live up to its true potential.

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Do We Need More Judges, How Does Your State Compare?

By Hon. David Langham*

There has been a fair amount written regarding the comparison of various states' workers' compensation laws. This year, National Public Radio (NPR) and ProPublica[1] jointly produced a series of articles comparing benefits for specific kinds of injuries. The International Association of Accident Boards and Commissions (IAIABC) produces various comparative tools[2] on topics such as agency funding, legal fees, and more (though these are restricted to members of the IAIABC). The National Association of Workers' Compensation Judiciary (NAWCJ) has published a series of comparative studies in the last year also.[3] Another paper on the NAWCJ website compares trends in insurance premiums over the last 20 years.[4]

These bring a "big picture" perspective to how the jurisdictions around the country share similarities and yet display sometimes marked distinctions. One that is striking from the litigation perspective is how diverse the adjudication processes are. Using the exceptional work of Commissioner Delia Schadt (MD) and Workers' Compensation Judge David B. Torrey (PA) as a foundation,[5] this analysis follows.

There are essentially five adjudication system models, with some modifying characteristics with which each could be further subdivided.

The first is the civil court model. Alabama now stands alone in this category. In Alabama, workers' compensation disputes are decided by the same constitutional judges that hear criminal, family, and tort claims. The Alabama workers' compensation regulatory agency does provide some dispute resolution services through a mediation program, but has no adjudicatory authority. Other states have workers' compensation cases decided by judges within their judicial system, rather than executive agency judges.[6] However, despite being part of their state's judicial branch, these judges' jurisdiction is nonetheless focused specifically on workers' compensation claims.

The second model has workers' compensation regulation and adjudication governed by a multi-member board or commission. In many of these settings, the commissioners act as the first level of appellate review in the jurisdiction. In several examples of this model, there are typically "administrative law judges" (ALJs),[7] "arbitrators,"[8] "deputy commissioners" (DCs),[9] "hearing officers,"[10] "judges," [11] "magistrates,"[12] or "referees"[13] employed by the board or commission. These designees, of whichever title, conduct trials and render decisions. First-level appeals are then heard by the commission or board. Georgia, Hawaii, Mississippi and Virginia are good examples of this model.

A third model has an integrated appellate process, but appeals are not heard by the regulatory commissioners or board members. In this model there is similarly a group of trial-level adjudicators using one of the various titles detailed above, and a second strata of specialist adjudicators provide appellate review of trial judge decisions. The District of Columbia, Kentucky, Massachusetts, Minnesota, Pennsylvania and Tennessee are jurisdictions using a form of this example. It is noteworthy that Tennessee only recently joined this model in 2014. Prior to that transition, Tennessee was the second-to-last adherent to the civil court model that now includes only Alabama.

The fourth model is focused more specifically on adjudication, with little regulatory authority or appellate responsibility included in the adjudicatory organization. The states using this model generally use the title of "judge" for the adjudicators. Jurisdictions using this model include Florida, Nebraska, and New Mexico.

Continued, Page 31.

Need More judges, from page 30.

A fifth model functions with a board or commission, but without the delegation of trial responsibilities to deputies or others. In this model, the commissioners or board members themselves hear the cases. In some of these jurisdictions, panels comprised of multiple commissioners may hear appeals of commissioner decisions. Examples of this model include Alaska, Indiana, Maryland, and South Carolina.

In addition to the distinctions in process and structure, there are distinctions in the size of various states' adjudicatory agencies. Agency size may not be predictable based on the state's area or population.

In terms of population, California is the largest state, with over 38 million people.[14] It has 168 workers' compensation judges,[15] or one judge for every 230,967 people. Wyoming has the least population in the country, about 584,153.[16] With 11 workers compensation adjudicators,[17] there is an adjudicator for every 97,818 people. It might be expected that population size and adjudicator population would produce some figure between these two for each of the states. That is not the case however.

The highest population to judge ratio is in Montana, not California. Montana has one workers' compensation judge. The population[18] there is approximately 1,023,579. Thus the ratio in Montana is roughly 4 times what it is in California and 10 times what it is in Wyoming. The top ten states in terms of population per judge are:

	Judges[19]	Population per Judge[20]
Montana	1	1,023,579
Indiana	7	942,408
Texas	33	816,878
South Carolina	7	690,355
Florida	31	641,719
Maryland	10	597,641
Tennessee	11	595,396
Michigan	17	582,934
North Carolina	20	497,198
Illinois	26	495,407

Four of the nation's ten most populous states are in this group: Texas (2), Florida (3), Illinois (5) and North Carolina (9).[21] It is noteworthy that of the top five states based on population per adjudicator, only Florida and Texas are among the nation's most populous states. Texas, however, has a voluntary workers' compensation system. According to *The Insurance Journal*, roughly thirty-three percent of Texas' employers do not participate.[22] Florida's coverage is mandatory for most employers.

As a corollary, which states have the lowest population per workers' compensation adjudicator?

	Judges[23]	Population per Judge [24]
Alaska	18	40,930
Wyoming	11	53,105
Hawaii	16	88,723
Delaware	9	103,957
Rhode Island	10	105,517
Washington	61	115,763
Ohio	93	124,668
West Virginia	14	132,166
Pennsylvania	90	142,080
Oregon	26	152,702

Continued, Page 32.

Need More judges, from page 31.

While large states are perhaps expected in the highest ratio list, two of the nation's ten most populous states are in this group: Pennsylvania (6) and Ohio (7).

Interestingly, Montana also has the greatest land area per judge, 147,047 square miles.[25] The casual observer would likely guess that Alaska would be first, based purely on its sheer size. Alaska is second, because Montana has one adjudicator and Alaska has 18. The top ten states in terms of land area in square miles per workers' compensation adjudicator are:

	Judges[26]	Land Area Per Judge[27]
Montana	1	147,046
Alaska	18	36,468
South Dakota	3	25,707
New Mexico	5	24,320
North Dakota	3	23,568
Idaho	5	16,715
Nevada	7	15,795
Utah	7	12,129
Nebraska	7	11,051
Wyoming	11[28]	8,893

Texas (8,139) and Kansas (8,228) are each close to the top ten as regards area per adjudicator. In this analysis, Florida (34th) is not even close. The square miles per judge in Florida is just under 2,000. The states with the least area in square miles per workers' compensation adjudicator are:

	Judges	Land Area Per Judge
Rhode Island	10	155
New Jersey	47	186
Delaware	9	277
Connecticut	16	347
Hawaii	16	404
Ohio	93	482
Massachusetts	21	503
Pennsylvania	90	512
New York	96	567
California	168	974

So, in some jurisdictions there is a great deal of territory to cover. Depending on whether adjudicators and staff are centralized or distributed through a jurisdiction could make access for proceedings difficult. It could be a long trip to trial, whether the judge is coming to the parties or vice-versa.

The import of this data could be interpreted in a number of ways. Whether resources and personnel are distributed throughout a state may influence the amount of impact resulting from the volume of adjudicators compared to the state land area. Likewise, the mix of occupations between agricultural and industrial vocations could impact the volume of adjudicators needed compared to population.

The mediation element also bears discussion. Florida utilizes a mediation process mandated by statute for all workers' compensation claims. There are other states that also mandate mediation, and still others that strongly encourage the process. To this end, Florida employs 28 full-time mediators. Other states, such as Georgia, Virginia and Washington, have judges performing the mediation function.

Continued, Page 33.

Need More Judges, from page 32.

One might argue that the volume of Florida adjudicators is artificially suppressed by the co-service of full-time mediators. That may be a valid criticism of the statistics herein. In the states in which adjudicators mediate, some are dedicated to the mediation process, while other adjudicators perform both mediation and adjudication functions.

With those caveats, however, these figures support that the Florida Office of Judges of Compensation Claims is one of the most efficient in terms of the volume of adjudicators. Florida's rank of fifth overall in terms of the population of adjudicators compared to population is indicative of a significant volume of claims or petitions per judge. In 2013-14 the volume of petitions for benefits filed in Florida was 59,292, approximately 1,912 per judge. The volume of new cases was 29,771, approximately 960 per judge.[29] Obviously many of those are resolved short of trial, but even those that are resolved result in motions for consideration, settlements that must be reviewed and approved, and various other ancillary responsibilities beyond trial itself.

Much credit for the resolution of claims surely belongs to the mediators employed by the OJCC. Many issues resolve prior to mediation. On average, only about 25% of the OJCC mediations result in impasse,[30] meaning that no issues were resolved.

The remaining issues pending after mediation are heard on average within 150 days of petition[31] filing; orders are issued in an average of 14 days after hearing.[32] The work-ethic of the Florida Judges, bringing cases to trial in a timely manner and issuing timely orders is important. Parties in Florida know that disputes will be managed, and brought to trial. The days of waiting months or even years for a decision are behind us. This effectiveness brings parties and attorneys a faith in the process.

In the scope of a national comparison, the Florida Office of Judges of Compensation Claims demonstrates an efficiency that is a benefit to Floridians.

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* David Langham is the Deputy Chief Judge of Compensation Claims in Florida. He has served as Deputy Chief since 2006 and as judge since 2001.

Endnotes on page 39.

Governor Rauner Appoints Ory as Arbitrator

Governor Bruce Rauner recently announced that he has appointed Christine Ory to be an arbitrator for the Illinois Workers' Compensation Commission. She is an experienced workers' compensation attorney, working in the field since 1975. She began her career in the insurance industry before becoming an attorney.

Currently, Ory runs her own practice, which focuses solely on workers' compensation claims. Prior to opening her own firm in 2005, she was a partner and president of Gabric, Millon & Ory, P.C. She began working in private practice in 1986.

Prior to becoming a lawyer, Ory worked as an insurance claims adjuster and workers' compensation claims supervisor for Hartford Insurance Company.

She is a member of the Workers' Compensation Lawyers Association, and is the previous chair of the Illinois State Bar Association Workers' Compensation Committee. In addition, she has experience as an arbitrator in DuPage Circuit Court. She earned her bachelor's degree in business from North Central College and her law degree from John Marshall Law School.

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Endnotes from the Complete Guide to Fishback & Kantors, from pages 5-16.

[1] *See* WALTER F. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION, p.194 (1936); H.M. SOMERS & A.R. SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY (1954).

[2] See, e.g., Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Columbia Law Review 50 (January 1967). For a summary, see Pennsylvania Bar Association Workers' Compensation Newsletter, Vol. VII, No. 120, p. 43 (December 2014). See also Section V of this summary.

[3] Crystal Eastman, Work Accidents and the Law (Russell Sage Foundation 1910). This book can now be read on line via "Google books." See http://books.google.com/books?id=18sJAAAAIAAJ&dq=Eastman+Work+Accidents+and+the+Law&printsec=frontcover&source=bn&hl=en&ei=F7oASrylEergtgfq4aWZBw&sa=X&oi=book_result&ct=result&resnum=4.

[4] These defenses were the fellow servant rule, assumption of risk, and contributory negligence.

[5] According to the legal historian John Fabian Witt, early court opinions like *Priestly v. Fowler* (UK 1837), and *Farwell v. Boston & Worcester R.R. Co.* (Mass 1842), which established the fellow servant rule, reasoned that workers in effect charged a premium in wages for laboring in dangerous work places. However, by the end of the nineteenth century this idea was disdained by managerial engineers and others who favored workers' compensation and top-down safety programs implemented by employers. See John Fabian Witt, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKING MEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (Harvard University Press 2004).

[6] On the general theory that many employers desired workers' compensation because they thought they could write off the cost by reducing wages, the authors remark, "of course, most employers who supported workers' compensation were not likely to make these statements very forcefully in public for fear of chilling the support that workers provided the program."

[7] In Chapter Eight, the authors remark further on this point as follows:

> Both parties would have liked to have written a contract whereby workers, before any accident occurred, waived their rights to a negligence suit in return for a fixed and guaranteed set of benefits. Yet, the common law and legislation in a number of states prevented employers and workers from individually negotiating pre-accident contracts. Workers, reformers, and judges seemed to have decided that individual workers could too easily have been persuaded to sign away their rights to negligence suits for an inadequate set of benefits, and thus, the lot of the typical worker would be improved by having the benefits negotiated through the political process. The workers' compensation laws therefore both allowed these pre-accident contracts and completed the contract by establishing the set of benefits to be paid.

FISHBACK & KANTOR at 199.

[8] Thus, it appears that analysts have, from the very start, been concerned about "perverse incentives" surrounding medical care – and billing for the same – in the workers' compensation context.

[9] I do not believe that such caps ever made it into any workers' compensation law. They were never part of the Pennsylvania system.

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[1] Section 440.02 of the Florida Statutes defines "accident" as only an unexpected or unusual event or result that happens suddenly. Disability or death due to the accidental acceleration or aggravation of a venereal disease or of a disease due to the habitual use of alcohol or controlled substances or narcotic drugs, or a disease that manifests itself in the fear of or dislike for an individual because of the individual's race, color, religion, sex, national origin, age, or handicap is not an injury by accident arising out of the employment. Subject to s. 440.15(5), if a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only acceleration of death or acceleration or aggravation of the preexisting condition reasonably attributable to the accident is compensable, with respect to any compensation otherwise payable under this chapter. An injury or disease caused by exposure to a toxic substance, including, but not limited to, fungus or mold, is not an injury by accident arising out of the employment unless there is clear and convincing evidence establishing that exposure to the specific substance involved, at the levels to which the employee was exposed, can cause the injury or disease sustained by the employee. happens suddenly. …

OCGA Section 4-9-1(3) of the Georgia statutes defines "injury" or "personal injury as only injury by accident arising out of and in the course of the employment and shall not, except as provided in this chapter, include a disease in any form except where it results naturally and unavoidably from the accident. Except as otherwise provided in this chapter, "injury" and "personal injury" shall include the aggravation of a preexisting condition by accident arising out of and in the course of employment, but only for so long as the aggravation of the preexisting condition continues to be the cause of the disability; the preexisting condition shall no longer meet this criteria when the aggravation ceases to be the cause of the disability. "Injury" and "personal injury" shall not include injury caused by the willful act of a third person directed against an employee for reasons personal to such employee, nor shall "injury" and "personal injury" include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment. Alcoholism and disabilities attributable thereto shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment. Drug addiction or disabilities resulting therefrom shall not be deemed to be "injury" or "personal injury" by accident arising out of and in the course of employment except when such addiction or disability resulted from the use of drugs or medicines prescribed for the treatment of the initial injury by an authorized physician.

[2] L.S.A.-R.S. 23:1021(1).

[3] *Louisiana Workers' Compensation, Second Edition*, Denis Paul Juge, Section 8:1

[4] The plaintiffs were the retired employees of the defendants, Graphic Packaging International, Inc. and its predecessor, Olin Mathieson Chemical Corporation, except one who was still employed. The retired plaintiffs ranged in age from 69 years old to 74 years old. The lawsuits were commenced in district court in various years beginning in 2005, 2007, and 2008.

[5] L.S.A.-R.S. 23:1031.1 Occupational disease

A. Every employee who is disabled because of the contraction of an occupational disease as herein defined, or the dependent of an employee whose death is caused by an occupational disease, as herein defined, shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.

B. An occupational disease means only that disease or illness which is due to causes and conditions characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such disease. Occupational disease shall include injuries due to work-related carpal tunnel syndrome. Degenerative disc disease, spinal stenosis, arthritis of any type, mental illness, and heart-related or perivascular disease are specifically excluded from the classification of an occupational disease for the purpose of this Section.

C. Notwithstanding the limitations of Subsection B hereof, every laboratory technician who is disabled because of the contraction of any disease, diseased condition, or poisoning which disease, diseased condition, or poisoning is a result, whether directly or indirectly, of the nature of the work performed, or the dependent of a laboratory technician whose death is the result of a disease, diseased condition, or poisoning, whether directly or indirectly, of the nature of the work performed shall be entitled to the compensation provided in this Chapter the same as if said laboratory technician received personal injury by accident arising out of and in the course of his employment.

As used herein, the phrase "laboratory technician" shall mean any person who, because of his skills in the technical details of his work, is employed in a place,

devoted to experimental study in any branch of the natural or applied sciences; to the application of scientific principles of examination, testing, or analysis by instruments, apparatus, chemical or biological reactions or other scientific processes for the purposes of the natural or applied sciences; to the preparation, usually on a small scale, of drugs, chemicals, explosives, or other products or substances for experimental or analytical purposes; or in any other similar place of employment.

Except as otherwise provided in this Subsection, any disability or death claim arising under the provisions of this Subsection shall be handled in the same manner and considered the same as disability or death claims arising due to occupational diseases.

D. Any occupational disease contracted by an employee while performing work for a particular employer in which he has been engaged for less than twelve months shall be presumed not to have been contracted in the course of and arising out of such employment, provided, however, that any such occupational disease so contracted within the twelve months' limitation as set out herein shall become compensable when the occupational disease shall have been proved to have been contracted during the course of the prior twelve months' employment by a preponderance of evidence.

E. All claims for disability arising from an occupational disease are barred unless the employee files a claim as provided in this Chapter within one year of the date that:
   (1) The disease manifested itself.
   (2) The employee is disabled from working as a result of the disease.
   (3) The employee knows or has reasonable grounds to believe that the disease is occupationally related.

F. All claims for death arising from an occupational disease are barred unless the dependent or dependents as set out herein file a claim as provided in this Chapter within one year of the date of death of such employee or within one year of the date the claimant has reasonable grounds to believe that the death resulted from an occupational disease.

G. Compensation shall not be payable hereunder to an employee or his dependents on account of disability or death arising from disease suffered by an employee who, at the time of entering into the employment from which the disease is claimed to have resulted, shall have willfully and falsely represented himself as not having previously suffered from such disease.

H. The rights and remedies herein granted to an employee or his dependent on account of an occupational disease for which he is entitled to compensation under this Chapter shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents or relatives.

I. Notice of the time limitation in which claims may be filed for occupational disease or death resulting from occupational disease shall be posted by the employer at some convenient and conspicuous point about the place of business. If the employer fails to post this notice, the time in which a claim may be filed shall be extended for an additional six months.

[6] L.S.A.-23:1209. Prescription; timeliness of filing; dismissal for want of prosecution

A. (1) In case of personal injury, including death resulting therefrom, all claims for payments shall be forever barred unless within one year after the accident or death the parties have agreed upon the payments to be made under this Chapter, or unless within one year after the accident a formal claim has been filed as provided in Subsection B of this Section and in this Chapter.

(2) Where such payments have been made in any case, the limitation shall not take effect until the expiration of one year from the time of making the last payment, except that in cases of benefits payable pursuant to R.S 23:1221(3) this limitation shall not take effect until three years from the time of making the last payment of benefits pursuant to R.S. 23:1221(1), (2), (3), or (4).

(3) When the injury does not result at the time of or develop immediately after the accident, the limitation shall not take effect until expiration of one year from the time the injury develops, but in all such cases the claim for payment shall be forever barred unless the proceedings have been begun within three years from the date of the accident.

(4) However, in all cases described in paragraph (3) of this Subsection, where the proceedings have begun after two years from the date of the work accident but within three years from the date of the work accident, the employee may be entitled to temporary total disability benefits for a period not to exceed six months and the payment of such temporary total disability benefits in accordance with this Paragraph only shall not operate to toll or interrupt prescription as to any other benefit as provided in R. S. 23:1221….

[7] In *Parks v. Insurance Co. of North America*, 340 So.2d 276, 281 (La. 1976), the court held that acute bronchitis was a personal injury by accident arising out of and in the course and of employment under the LWCA and therefore, compensable.

[8] *Tullier v. Tullier*, 464 So.2d 278, 282 (La. 1985)

[9] *Arrant v. Graphics Packaging Int'l, Inc.*, 2013-2878 (La. 05/05/15); 169 So.3d 296, Lexis pg. 54

[10] Id., at Lexis page 60

[11] See www.ohiomfg.com

[12] Repetitive motion disorders (RMDs) are a family of muscular conditions that result from repeated motions performed in the course of normal work or daily activities. RMDs include carpal tunnel syndrome, bursitis, tendonitis, epicondylitis, ganglion cyst, tenosynovitis, and trigger finger. RMDs are caused by too many uninterrupted repetitions of an activity or motion, unnatural or awkward motions such as twisting the arm or wrist, overexertion, incorrect posture, or muscle fatigue. RMDs occur most commonly in the hands, wrists, elbows, and shoulders, but can also happen in the neck, back, hips, knees, feet, legs, and ankles. The disorders are characterized by pain, tingling, numbness, visible swelling or redness of the affected area, and the loss of flexibility and strength. For some individuals, there may be no visible sign of injury, although they may find it hard to perform easy tasks. Over time, RMDs can cause temporary or permanent damage to the soft tissues in the body -- such as the muscles, nerves, tendons, and ligaments - and compression of nerves or tissue. Generally, RMDs affect individuals who perform repetitive tasks such as assembly line work, meat-packing, sewing, playing musical instruments, and computer work. The disorders may also affect individuals who engage in activities such as carpentry, gardening, and tennis. www.medicinenet.com/repetitive_motion_disorders

[13] See www.spineuniverse.com/wellness/ergonmics/spine.

[14] *Rando v. Anco Insulation Inc.*, 08-1163 (La. 05/22/09) 16 So.3d 1065.

[15] L.S.A.-R.S 23:1020.1 provides in pertinent part that:…
D. Construction. The Louisiana Workers' Compensation Law shall be construed as follows:
(1) The provisions of this Chapter are based on the mutual renunciation of legal rights and defenses by employers and employees alike; therefore, it is the specific intent of the legislature that workers' compensation cases shall be decided on their merits.
(2) Disputes concerning the facts in workers' compensation cases shall not be given a broad, liberal construction in favor of either employees or employers; the laws pertaining to workers' compensation shall be construed in accordance with the basic principles of statutory construction and not in favor of either employer or employee.
(3) According to Article III, Section 1 of the Constitution of Louisiana, the legislative powers of the state are vested solely in the legislature; therefore, when the workers' compensation statutes of this state are to be amended, the legislature acknowledges its responsibility to do so. If the workers' compensation statutes are to be liberalized, broadened, or narrowed, such actions shall be the exclusive purview of the legislature.
Acts 2012, No. 860, §1.

[16] *Arrant*, supra, at Lexis page 60.

Endnotes from Need More Judges. Pages30-33

[1] *Assault to Injury*, http://www.propublica.org/series/workers-compensation; including: *The Demolition of Workers' Comp* (March 4, 2015) https://www.propublica.org/article/the-demolition-of-workers-compensation, Reforms by State, (March 4, 2015) http://projects.propublica.org/graphics/workers-comp-reform-by-state, and How Much is Your Arm Worth? (March 5, 2015) http://www.propublica.org/article/how-much-is-your-arm-worth-depends-where-you-work. (Last visited May 2015).

[2] Comparative Studies and Surveys, http://www.iaiabc.org/i4a/pages/index.cfm?pageid=3990#Comparative Studies and Surveys. (Last visited May 2015)

[3] Comparative Adjudication Systems Project, http://nawcj.org/comparative_law_n.htm. This includes papers on admissibility of medical records, fact-finding authority, firefighter presumptions, carve-outs, and adjudicator details. (Last visited May 2015).

[4] Langham, *Comparing the Premium Cost of Workers' Compensation*, (March 17, 2015), http://nawcj.org/docs/Comparative_Law/Comparing_the_Premium_Cost_of_WC.pdf.

[5] Delia Schadt and David B. Torrey, *Workers' Compensation Judges: Numbers, Appointment, Terms of Service*, National Association of Workers' Compensation Judiciary, http://nawcj.org/docs/Comparative_Law/NAWCJ_WCJ_Numbers_Terms_Appt_Schadt_Torrey_2014.pdf. (Last visited May 2015).

[6] Nebraska and Rhode Island have their workers' compensation judges as part of the judicial branch.

[7] Jurisdictions with "administrative law judges" include Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Georgia, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, North Dakota, Oregon, South Dakota, and Utah. Schadt, *supra*.

[8] Jurisdictions with "arbitrators" include Illinois. Schadt, *supra*.

[9] Jurisdictions with "deputy commissioners" include Iowa, North Carolina, and Virginia. Schadt, *supra*.

[10] Jurisdictions with "hearing officers" include Delaware, Hawaii, Maine, Nevada, New Hampshire, Ohio, Texas, and Vermont. Schadt, *supra*.

[11] Jurisdictions with "judges" include Florida, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Washington. Schadt, *supra*.

[12] Jurisdictions with "magistrates" include Michigan. Schadt, *supra*.

[13] Jurisdictions with "referees" include Idaho. Schadt, *supra*.

[14] *State and County QuickFacts*, United States Census Bureau, (2014 estimated population), http://quickfacts.census.gov/qfd/index.html (Last visited May 2015).

[15] Schadt, *supra*.

[16] QuickFacts, *supra*.

[17] Schadt, *supra*.

[18] The figures herein were calculated using the total state population. An argument can be made for excluding those residents who are not in the "traditional" working population, i.e. those under 18 and those over 65. However, excluding these population groups does not markedly change the calculations and in the modern economy many in both groups are in the actual working population.

[19] Schadt, *supra*.

[20] QuickFacts, *supra*.

[21] *Id*.

[22] Stephanie Jones, *Opting Out of Texas Workers' Comp Doesn't Have to Mean Going Bare*, Insurance Journal (June 5, 2014), http://www.insurancejournal.com/news/southcentral/2014/06/05/330945.htm.

[23] Schadt, *supra*.

[24] QuickFacts, *supra*.

[25] Netstate.com, http://www.netstate.com/states/tables/st_size.htm, (Last visited May 2015). Includes land and water area.

[26] Schadt, *supra*.

[27] Netstate, *supra*.

[28] Wyoming workers' compensation cases are adjudicated by Central Panel hearing officers who do not specialize in WC.

[29] *OJCC Annual Report 2013-2014*, P.14 (2014), http://fljcc.org/jcc/files/reports/2014AnnualReport/Index.html#14/z.

[30] *2013-2014 Settlement Report and Mediation Statistics of the Office of Judges of Compensation Claims*, P.8, (2014), http://fljcc.org/jcc/files/reports/2014SR-MSR.pdf.

[31] Trials occur on a multitude of issues. Some are brought by a petition for benefits, others by motions of various descriptions. This average is a conglomeration of all trials, petition or motion.

[32] OJCC Annual Report, *supra 1t 38-39.*

Thanks Again to our 2015 Moot Court Judges!

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