Lex and Verum

The National Association of Workers' Compensation Judiciary

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President's Page

By Hon. Michael Alvey*

Thanks for all of you who have graciously volunteered to serve, and continue to serve on the various committees which support our activities. Without your assistance we would be unable to provide the services, or engage in activities at our current level. Thanks for all you do.

At this time I would like to take the opportunity to congratulate those of you who have been nominated for membership as Fellows of the College of Worker's Compensation Lawyers. Good luck in this endeavor.

For the last several months, the Kentucky Department of Worker's Claims has been involved in the development and implementation of an online filing system, which we refer to as Litigation Management System, or LMS. For those of you who have been through this process, I am quite sure you can sympathize with the effort exhausted in implementing such a system. For those of you who have not yet undertaken such an endeavor, I believe, at the end of the day, the effort expended will be worthwhile. I can also assure you any such effort will also produce many headaches. We learned there is a definite communication gap between legalese and computerese.

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In the not so distant future I hope to prevail upon Commissioner Dwight T. Lovan, or Chief Administrative Law Judge Robert L. Swisher, or both, to provide an article for the *Lex & Verum* outlining the experience. The LMS program was delivered on November 1, 2015, and fielded for use by the administrative law judges and the Worker's Compensation Board on November 4, 2015.

Initially, there will be a transition period during which time practitioners have the option of filing paper pleadings or using LMS. By January 1, 2017, all filings will be through LMS. Isn't it nice to have a plan?

In any event, wish us luck with the implementation of this system. Remember, if everything does not go as planned, we still have bourbon.

Have a great Thanksgiving everyone.

2015NAWCJ Membership Directory

The NAWCJ Membership Directory, November 2015, has been published and distributed to all paid members. If you have not received your copy, please contact Ms. Shirley Kendall: skendall@resourcemanagers.net

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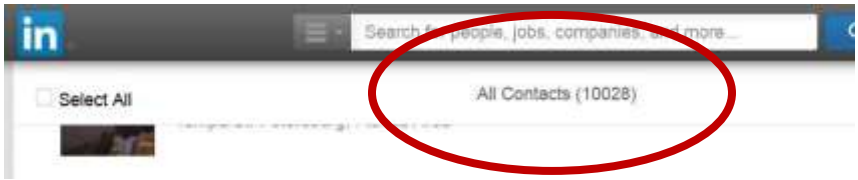

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My Impressions as a First-Time NAWCJ Judicial College Attendee

By Hon. Shannon Bruno Bishop

I took the bench earlier this year and my Chief Judge (Sheral Kellar) suggested that I attend the NAWCJ Conference. Presented with this opportunity, I was excited to attend and looked forward to what was to come. I mean…who wouldn't be excited to go to Orlando, Florida, right? Beautiful Florida – wonderful weather, Mickey Mouse and the gang (if you have time), and the list goes on. Well, beautiful Florida, I did not experience except for the travel time from my hotel to the Convention Hotel. Why? Everything that I needed was between these locations.

Let's start off with some basic info. The NAWCJ Judicial College is held in conjunction with the Workers' Compensation Institute Annual Workers' Compensation Educational Conference. This was a little confusing for me, at first, as I attempted to register. The WCI Conference is the larger conference with the smaller more concentrated College for Workers' Compensation Judiciary. The WCI website describes the NAWCJ Judicial Conference by stating that it is "designed to provide educational opportunities for adjudicators that preside over workers' compensation matters. The college focuses on issues that are unique to the field of workers' compensation and includes adjudicators both at the trial and appellate levels." So, now that you have the basics, I will provide you with a little insight into what I experienced as a first time attendee.

Networking Opportunities:

In attendance at the College were numerous workers' compensation judges from across the U.S. During the different seminars and breakout sessions, I had an opportunity to mingle and share ideas, procedures, and pointers. We discussed issues ranging from legal matters to in-house policies. We shared ideas about court decorum, bailiffs, judicial attire, legal issues, hearing matters/challenges, etc. These networking opportunities were very beneficial as I shared with and absorbed information provided by my colleagues.

Seminars and CLE credits:

The College provided many interesting seminars (as discussed in more detail by Judge Torrey in this Newsletter). All of the seminars were informative, but my favorites were "Dealing with Difficult Litigants, Dealing with Pro Se Litigants, Judicial Writing, and How to Avoid a Remand." Aside from being informative, I received the much needed and often dreaded state required CLE hours.

Exhibit Hall:

Aside from the nice trinkets and bags that were given out, I had the opportunity to meet many vendors and obtain very useful information. Although many of the vendors provided services which were limited to the Florida region, I was able to meet and make contact with numerous vendors who provided nationwide translation and interpretation services. In Louisiana, we have a large Hispanic population of injured workers and employers. I also encounter individuals who speak Vietnamese, other language dialect, or utilize sign language. The conference vendors offered translation services (verbal and written) which is an invaluable service in my Court. In Louisiana, in order to appear before the Court, there must be a court-appointed translator. To have access to in-person, as well as telephonic translation services, made the vendor booths worthwhile.

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Moot Court Competition:

One of the most rewarding experiences of the conference was serving as a Moot Court Competition Judge. I had the opportunity to listen to very intelligent, well-prepared law students and offer critique to future litigators. It was an enjoyable experience and I look forward to participating in the future.

Observing a live surgery:

Admittedly, I did not have the opportunity to view the surgery, but many of my fellow judges expressed how much they enjoyed the experience. This is definitely on my list of things to do next year!

Social events:

What's a conference without a little socializing? Aside from daily networking during breakout sessions, I had the opportunity to mingle with fellow judges during the Joan Jett & The Blackhearts concert, as well as the dinner at Smokey Bones barbeque restaurant. Both events provided good food, good folks, and good fun!

The NAWCJ Judicial Conference was such an enjoyable experience that I began anticipating next year's conference before the 2015 conference had come to an end. If you have never attended the NAWCJ Conference, and more specifically, the Judicial College, it is a must! You will not be disappointed.

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* Judge Shannon Bruno Bishop joined the Office of Workers' Compensation (OWC) as the District Judge in the Harahan, Louisiana office. She presides over workers' compensation claims, rendering final appealable judgments in the claims. Judge Bishop is a native of New Orleans and graduated from Tulane University with a B.A. in Sociology and The University of Mississippi School of Law with a J.D. She is admitted in Mississippi and Louisiana. Prior to becoming District Judge, Judge Bishop served as mediator, in Harahan and New Orleans, where she mediated hundreds of workers' compensation cases each year.

Judiciary College 2016

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282 days 'til Judicial College 2016!

NAWCJ Board of Directors

Notes from a Seminar: The NAWCJ Judicial College 2015

By Hon. David B. Torrey*

I. Introduction

The Judicial College this year was, as usual, an enriching experience! So enriching, indeed, that I was able to take copious notes summarizing the high points of many of the presentations. In this short essay, I will highlight some of the most memorable points, and those that in the present day might be termed – for better or worse – "take aways." Here I will treat (1) Professor Ehrhardt's comments about evidence; (2) Judge Moore's comparative law panel's discussion of opt-out legislation and medical causation standards; (3) Judge Swisher's panel dealing with difficult parties; and (4) Commissioner Williams' interactive presentation on handling injured workers who are *pro se*.

II. Evidence with Professor Ehrhardt

The first presentation was by Professor Edward Ehrhardt, the long-time evidence professor at Florida State University Law School – and, rightly, a celebrity in the region. Professor Ehrhardt has addressed us several times, and his lecture is always a can't miss.

Florida is remarkable in that the *Daubert* expert evidentiary standard is now applicable in workers' compensation cases. I believe this still to be the minority approach among jurisdictions. On this point, the professor made an equally remarkable observation – most of the *Daubert* appellate cases in Florida have their genesis not in civil or criminal cases, but in workers' compensation appeals. Indeed, Professor Ehrhardt recently advised assembled criminal prosecutors in Florida to read the workers' compensation cases.

In particular, he recommended that they appreciate the appeal from an adjudication of Judge Ellen Lorenzen (Tampa), *Booker v. Sumter County Sheriff's Office*, 166 So.3d 189 (Florida 1st DCA 2015). In that case the court, in a concise opinion, turned didactic and specifically wrote "to address the steps necessary for [courts to undertake the *Daubert*] analysis." The case is a minor treatise on the legislature's 2013 adoption of *Daubert* and the courts' response to date. Of note is that the court specifically stated that the legislature had undertaken a "codification of the federal *Daubert* test …." Ultimately, the court held that Judge Lorenzen had not committed error in rejecting the claimant's argument at trial that employer's expert testimony did not meet the *Daubert* test.

The vehicle this year for the professor's presentation was commentary on three short videos produced, in advance, by judges from three states: Mississippi (Judge Lott), Kentucky (Judge Williams), and Pennsylvania (this writer). Volunteer lawyers of these states had assisted in these courtroom dramas. Each video depicted a mock hearing during which thorny evidentiary and procedural issues were raised by the parties. A lawyer would raise an objection and, before the judge would have a chance to make his or her ruling, Professor Ehrhardt would hit pause, analyze the situation, contextualize the issue, and foreshadow the likely ruling.

An entertaining performance – and one from which many thought-provoking reminders about evidence law, in both its practical and theoretical aspects, could be derived. Here are my top ten. These are items that any lawyer or trial judge must know "cold."

1. A lawyer's failure to respond to an adversary's objection does *not* create a waiver for purposes of appeal.

2. On the other hand, a lawyer needs to carefully phrase his or her objections. A poorly phrased objection may be subject to an argument that it *has been* waived.

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3. A lawyer's failure to disclose evidence, at eve of trial or hearing is, in lieu of prejudice, usually deemed a harmless default under most state procedural rules. Thus, such tardily-disclosed evidence is usually not suppressed.

4. Trial judges must know cold the definition of *relevance*! That is, testimony or evidence that assists the fact-finder and that is reasonably probative of what needs to be proven. Under the Pennsylvania Rules (those of my state), the formal definition, at Rule 401, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

5. Judges should recall that they end up being reversed more for "keeping stuff out" – than letting it in. This is particularly so for an administrative law judge, where the concern over the fragile jury, from which misleading or other prejudicial proofs must be kept, is usually not an issue.

And here a wry quip from Professor Ehrhardt: "Let it in, but then ignore it!"

6. It is normally the lawyer's job to "make the record for appeal." It is not, in contrast, a task for the judge. (I would add that it is a trial judge's *duty to allow* the lawyer to make his or her record.)

7. The judge must understand the trial concept of "offer of proof." A Pennsylvania evidence expert states the issue as follows: "An offer of proof informs the court of the substance and purpose of the proffered evidence. The offer of proof must consist of a precise description of the testimony to be offered."

Of course, the trial judge must remember that when excluding certain testimony or evidence, the appellate court needs to understand some later allegation of error. In this regard, where a party is denied the right to introduce evidence because the same is hearsay, lacks authentication, or is otherwise objectionable, "that party must make a proffer of what the evidence would have shown in order to preserve the issue for appeal."

Here Professor Ehrhardt made an *ironic* comment: on the issue of admitting or excluding evidence, *danger* may exist in "explaining too much on the record" about the judge's rationale for an evidence ruling: "The more the judge speaks, the more likely that error will be found."

8. Judges must understand the concept of "self-authentication." Evidentiary statutes, regulations, and case law provide methods through which an exhibit may become "self-authenticating." The point: "A self-authenticated document needs no further evidence of authenticity than the document itself." Easy examples? In Pennsylvania, certified copies of public records, official publications, newspapers, and periodicals are all the type of items that are plainly self-authenticating under our Rule 902.

Professor Ehrhardt on this point stressed that an "outsourced" *drug test* report is not a "medical record" of the type that may well be admissible, as self-authenticating, under some evidence codes. With this type of evidence, the submitting party will have to show fidelity to the business records rules. That is, the outsourced drug test report, to be admissible, will likely have to be duly authenticated by the testimony of the custodian or another qualified witness. (Under the Pennsylvania Workers' Compensation Act, the courts have held that the Business Records as Evidence Act does indeed apply.)

9. Authentication of "Facebook" pages and similar online information raises intriguing issues. For example, as to #8, above, Facebook pages, as printed out, are not self-authenticating. It is well known, in this regard, that false Facebook and Twitter accounts can be created. Still, Facebook page authentication, and the like, is in substance no different than authenticating any other document.

To prove the contents of any document, it must be formally submitted into evidence. Thus, a Facebook page, one way or another, must similarly be presented. In contrast, a third party's testimony – like that of a private detective – that "I saw [and read] the Facebook page," is *not* admissible.

Professor Ehrhardt asserted that a Facebook page user's posts, over the years, showing that he had been a "pothead," is not probative of the assertion that some recent situation was occasioned by the use of drugs. In this regard, evidence of "general use of drugs" is generally not relevant with regard to a specific allegation that, on the day in question (let's say of a work accident), the individual was under the influence. This type of evidence, in the Professor's view, should be excluded.

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Notes from a Seminar, from page 6.

Professor Ehrhardt recommended that all judges and lawyers read a Florida case that involved Facebook evidence. *See Nucci v. Target Corporation*, 162 So.3d 146 (4th DCA 2015). This case, too, is a highly didactic opinion discussing the discoverability of social media in a personal injury case. The court reviews far and wide the court decisions that have been published on the issue, and the academic literature as well. Ultimately, the court obliged the plaintiff to turn over photographs she had posted on her Facebook page, including some that had been deleted during the litigation. The court held, among other things, that claimant's "minimal" right to privacy in this context was "overwhelmed" by the relevance of the photographs.

10. One more time – the "Best Evidence Rule." Here we are talking about the difference between the original evidentiary document and, typically, some oral recitation of what such document was or is. For example, the "best evidence" with regard to what has been seen on some videotape is what is on the tape, and not a security guard's comment, "I was watching the live feed and here's what I saw ...."

Under a typical rule, like Pennsylvania Rule 1002, "To prove the content of writing, recording, or photograph, the original writing, recording, or photograph is required," except where otherwise provided by statute or rule. In the present day, importantly, many statutes and rules *exist* that dispense with the need for an original.

III. Comparative Law Panel

The comparative law panel this year was expertly headed by Judge Bruce Moore of Kansas. His panel consisted of Judges Watkins (Washington); Judge Switzer (Tennessee); Judge Goodnough (Maine); and Commissioner Beck (South Carolina).

A. Opt-out

The first discussion for the panel was the issue of "opt-out," and specifically whether legislation for same, said to be pushed by large employers, particularly retailers and service providers, was cognizable in those states. Advocacy for opt-out is usually paired with promises of less litigation. These avowals are fairly compelling, if only for the dismaying reason that opt-out eliminates the workers' compensation adjudication forum.

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THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY
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Notes from a Seminar, from page 7.

By way of background, an opt-out law (like the one that has been enacted in Oklahoma[1]), permits an employer to remove itself from the workers' compensation system entirely if it substitutes an ERISA-governed employee benefit plan for work accidents. When an Oklahoma employer does so, it retains, remarkably, its historic immunity from tort suit – that same immunity which formed the basis of the original workers' compensation compromise or "bargain." The overriding intent of the opt-out legislation is employer cost-cutting, particularly of the medical benefits which form so large a share of work injury costs. In case of dispute, no hearing is held. An appeal may ultimately be taken to the Commission, but not on the facts.

It is notable that the employee does not have the option to pick whether he or she is covered by an opt-out plan or retains the protections of the state workers' compensation law. The "opt-out" choice is under the strict control of the employer.

Opt-out proponents portray the work accident plans as innovative cost-savers. They further argue that the ability to opt out should be welcomed by both employers and injured workers alike. It's a dynamic 21st century invention that leaves workers' compensation, its stale bureaucracy, and its incomprehensible "volumes of statutes" behind. Opt-out is a dramatic change. Indeed, the advocacy underlying opt-out rejects not only the original intent of workers' compensation laws but the reform calls of the 1972 National Commission on State Workmen's Compensation Laws. The Commission's over-arching recommendation was for "mandatory, universal coverage," with the specific admonition "that coverage by workmen's compensation laws be compulsory and that no waivers be permitted."[2]

An important point to be noted at the outset: there are in fact a number of different opt-out formulations. In Texas, of course, employers can opt out – and always could – but they can be sued in tort.[3] This type of arrangement is obviously different from the Oklahoma law.

A variant of the Texas system has been proposed in Tennessee, and there the worker's ability to sue the employer in tort has been depicted as promising a system of complete justice. Judge Switzer, however, characterized the "tort-suit-as-remedy" as "a false promise." This is so because of the reality that many, if not most, employee injuries and deaths do *not* arise from actionable negligence, and hence do not form the basis of a tort suit. (Nor, notably, did they 100 years ago.) Opt-out proposals in Tennessee have been "always changing" and have been hard to fully comprehend, as proponents sought to mollify critics. Judge Switzer asserted that opt-out proposals in his state seemed plagued with a lack of information from the lobby groups advancing the law. (For his part, Judge Moore characterized as "fluff" the purported data supporting opt-out plans as promising a better remedy than that available under workers' compensation laws.)

In any event, the Tennessee Senate had been supportive of opt-out, but the House has not been sympathetic. The advisory panel, meanwhile, had recommended 7-0 against permitting opt-outs. The law has hence not yet been enacted in Tennessee. Still, while the Tennessee opt-out bill did not pass in the first part of 2015, such proposals are likely to be back in his state.

Judge Watkins stated that there was "no chance" of opt-out in Washington state. This reality is certainly so given the current political environment. He pointed out that the system is so paternalistic (this writer's term), that even compromise settlements are highly restricted. Meanwhile, opt-out in Maine is "definitely not in store ...." However, alternatives to workers' compensation are being advanced in South Carolina. Commissioner Beck did not think that one of the proposals, the Senate's "elimination" bill, which would in effect dismantle workers' compensation, would progress.[4]

B. Medical Causation Standards

A movement exists among states to "tighten" causation requirements by demanding that work causation predominate in the injury and/or disability. This writer believes that the prevailing test is still whether the work impetus was a "material" or "substantial" contributing factor. This the law, for example, in California,[5] New York,[6] and Pennsylvania.[7] Florida and Oregon, however, are states well-known for introducing restrictive causation standards. In these two states, the worker must show that work was a "major contributing cause."[8]

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In Memoriam Judge Louis Jerome of NY

Judge Louis R. Jerome of New York passed at age 89 in October. He was a World War II veteran who served twenty-seven years, from 1971 through 1998, as a New York workers' compensation judge. He was a graduate of St. Peters' College and Fordham University law school.

Judge Jerome gained notoriety in 1978 when a litigant presented at his chambers on the 36th floor of the World Trade Center. This litigant threatened to destroy the workers' compensation office with various explosives.

The building was evacuated, as a siege ensued. Nine hours later, Judge Jerome had enough. Grabbing a flagpole, he charged at the litigant, later telling the Associated Press "I had had enough." The event became his calling card, and he was thereafter referred to as the "hero judge."

Notes from a Seminar, from page 8.

The panelists discussed the laws of their respective states. Judge Moore, addressing Kansas, noted that since 2011, the standard is that work causation must be the "prevailing factor."[9] Unfortunately, the judge explained, this concept is not defined in the statute. He did note, in his written materials, "An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

In Washington, the standard is "well-settled" as proximate cause.[10] In a 2006 case, the Board of Industrial Injury Appeals, correcting its ALJ, remarked, "In the Proposed Decision and Order, the industrial appeals judge determined that the industrial injury was not a 'significant proximate cause' of the claimant's need for low back surgery. The term 'significant proximate cause,' is not the correct standard to apply in an industrial injury case. We reiterate that the industrial injury need only be a proximate cause of the condition for which compensation is sought. We have long since abandoned the language that the injury must be a significant cause of the condition for which surgery was necessary. *See Brashear v. Puget Power and Light*, 667 P.2d 78 (1983)."

In Tennessee, the recently-enacted standard is that work causation must be the "primary" cause.[11] (This writer notes editorially that a recent case, decided just before the convening of the college, declined to accept an employer's argument that this law, effective July 1, 2014, should be applied retroactively.[12])

In Maine, the standard is "a contributing factor." The statute provides, "If a work-related injury aggravates, accelerates or combines with a preexisting physical condition, any resulting disability is compensable only if contributed to by the employment in a significant manner."[13]

IV. Dealing with Difficult Parties: Displaying Dignity and Keeping Order

The panel "Dealing with Difficult Parties," treated an issue on which all spoke the same language. Still, the extraordinary variations in approaches spoke loudly to the fact that workers' compensation has always been an intensely state-based program, where customs and practices have developed independently of one other.

A principal issue for discussion was courtroom arrangement – and whether the judge, and room, are configured to promote order.

Judge Beck, a Florida judge, noted that she does not wear a robe. She believes that this gesture at informality may help relax the claimant. Meanwhile, no bailiff is on hand in Florida workers' compensation proceedings. It seems that this is the majority approach among states.

In contrast, Louisiana is well known for having an armed, government-employed bailiff in the courtroom. Judge Kellar's courtroom is "configured like the constitutional courts." She believes that having a formal courtroom "conveys the seriousness of the proceedings." Louisiana hearing rules, notably, provide for procedures which promote order.

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Notes from a Seminar, from page 9.

In Maryland, the workers' compensation courts and proceedings "mimic" those of the district (trial) courts. As in Louisiana (at least in Baltimore), bailiffs are present. These attendants are typically retired state troopers enjoying their second career. There is, however, no metal detector. Maryland Commissioner Miraglia, like Judge Kellar, asserted that a formal courtroom and the presence of an armed guard conveys the seriousness of the proceedings. She noted that venues for hearings in Maryland used to be extremely humble, and she believes that increased formality undertaken by the agency constitutes an improvement.

In Kentucky, venues for hearings are much more humble. There are no bailiffs present. This informality, and the fact that state has a small workers' compensation bar, generates the need to avoid personal informality. Displays of overfamiliarity can, in this regard, generate the idea that the judge is partial, and this idea in turn may beget distrust on the part of litigants.

Commissioner Miraglia noted that when she has a disruptive and "vocal claimant," she first gently admonishes the individual to behave. Ultimately, however, she has the power to have the bailiff remove the individual. Generally, she gives two warnings and, thereafter, upon anther infraction, removal follows. It is notable that in Baltimore, Commissioner Miraglia's hearings "are like the DMV," with a number of lawyers, claimants, and other witnesses in the room. If discipline is not enforced in this setting, *chaos* will follow.

As for the claimant (or other witness) who engages in rolling of the eyes, and sighing and groaning, etc., during the proceedings, "lawyers should tell clients that this type of behavior overall hurts credibility."

A minority of states may have a bailiff in the room, but most compensation judges do not, in the end, have valuable *contempt* powers. (An exception is Louisiana.) Thus, the Maryland Commissioner can have a difficult party removed, but cannot hold the disruptive individual in contempt. In Florida, the judge, consistent with the majority approach, has no contempt powers, but the issue can be certified to civil court if necessary.

All judges agreed that "every office has a chronic filer." Such individuals, who file claim after fruitless claim, inevitably present a challenge for judges and their staffs.

In general, patience and flexibility on the part of the WCJ are required to maintain dignity and order.

V. The Perennial Challenge: *Pro se* Claimants

Commissioner Williams, at the conclusion of the College, led an interactive discussion of working with *pro se* claimants. All agreed that a challenging task is presented when the judge must work with such workers.

In some states, self-represented workers are rare, and in others common. In Virginia, as many as 30% of the claimants are *pro se*, whereas under the new Tennessee system, the number is 50%.

In Texas, an agency exists to help advocate for workers who do not have lawyers. Thus, there are few "traditional" *pro se* claimants. Maine is another state where an advocate division exists. A few states have ombudsman programs.

Few surprises existed with regard to reasons *why* injured workers find themselves in self-representation. The first is that "there is no room for a fee," and thus the worker is left without a lawyer. Second, the claimant may think it is easy to prosecute a case. Third, the claimant may not be able to get a lawyer simply because it's a weak or meritless case.

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Notes from a Seminar, from page 10.

To what extent can the judge assist the worker? This quandary is one we have treated at the Judicial College several times. Some judges, like those in Pennsylvania, are specifically equipped with investigatory powers.[14] The WCJ in Pennsylvania hence has considerable leeway in assisting the worker with developing the proofs, though he or she may never become the worker's advocate. The WCJ must hence walk a fine line. Still, the appellate court has admonished that the Pennsylvania WCJ has a duty to the *truth*. Here is the poetic language that every earnest Pennsylvania WCJ holds close to his or her heart:

> The referee is entitled, and indeed bound, to attempt to bring out the truth. He is not a referee enforcing the rules of a match while two lawyers "slug it out," nor is he an interested spectator at the "rape of truth."[15]

Commissioner Williams pointed out that model rules exist in this area. Rule 2.23 of the *ABA Model Rules for Trial Courts* ("Conduct of Cases Where Litigants Appear Without Counsel"), admonishes, "When litigants undertake to represent themselves, the court should take whatever measures may be reasonable and necessary to insure a fair trial." The National Center for State Courts, meanwhile, has reminded judges that a litigant's perception of fairness is critical in his or her impression of the system – seemingly more important than the *outcome*.

Strategies exist to make it easier for *pro se* claimants to proceed. Most need to be coached on the basics. For example, a common problem with the *pro se* worker is the process of discovery, with workers not being aware that they have to exchange documents. A further problem with the *pro se* litigant is failure to bring the critical documents to court. In Pennsylvania, a frequent declaration is, "I didn't think I needed it. I have it back home." Many workers, meanwhile, do not realize that they must bring a signed note or report from their doctor verifying causation and disability. Why this task is puzzling to many workers has always struck me as odd – we all know that to get out of high school gym, military physical training, or to keep a child from school, a doctor's slip is required.

In the current day, agency websites should help the *pro se* claimant become oriented to what needs to be accomplished at the hearing. Texas, for example, has a website that features information for claimants.[16] The Minnesota Office of Administrative Hearings has produced a top-notch video, posted on its website, which tells individuals what to bring to the meeting, and actually depicts a typical proceeding.[17]

Here is a top-ten list of suggestions from Commissioner Williams' presentation for the WCJ to remember when dealing with a *pro se* claimant. Of course, remember *throughout* that the hearing with the injured worker may well be the first time that he or she has been in *any* type court:

1. Explain the process.
2. Avoid overfamiliarity with the opposing lawyer(s) or party(ies).
3. Remind the worker of the judge's position as an impartial, his or her role in the dispute, and power.
4. Identify all the "players" and their roles.
5. Suggest attorney representation.
6. At the conclusion of the hearing, ask a "clean up" question, to wit, something like, "Do you have anything that you wish me to consider that we have not already gone through?"
7. Always be on the record.
8. Interpret procedural rules with flexibility
9. Recall that a bungled *pro se* petition can be dismissed "without prejudice."
10. Avoid ruling from the bench.[18]

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Notes from a Seminar, from page 11.

VI. Conclusion

With this summary, I have treated just the tip of the iceberg of subjects treated at the 2015 Judicial College. We also listened to presentations on medical marijuana, the role of guardians, judicial ethics, the role of evidence-based medicine and guidelines in determining medical causation, and we enjoyed an invaluable return visit from the dynamic writing instructor Professor Timothy Terrell.

I'm sure that Judge Langham is busy designing the 2016 program, and I for one will be back. Indeed, as Judge Bishop of Louisiana writes in her article for this edition of *Lex & Verum*, attending the Judicial College is a "must." So start making plans for August 2016 – and be prepared to take notes of your own!

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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 31.

California Chief Judge to Become Secretary and Deputy Commissioner for Appeals Board

Chief Judge Richard Newman will leave the Division at the end of November and assume the position of Secretary and Deputy Commissioner for the Workers' Compensation Appeals Board on Dec. 2.

Prior to his appointment as Chief Judge of the DWC in September 2011, Newman worked for the Division as an attorney, judge and presiding judge. As Chief Judge, Newman had the responsibility of overseeing the Division's 24 district offices, including the hiring and supervision of judges and judicial staff and involvement in facility and personnel issues.

During his tenure, Newman re-instituted yearly statewide judge and information and assistance training and regular presiding judge training. He worked to promote uniform district office procedures and forms.

Thanks to our 2015 NAWCJ Judiciary College Sponsors:

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

New Study on Low Back Pain Examines Costs and Benefits of State Workers' Compensation Policy Variations

By Thomas A. Robinson, J.D.*

While employer control reduces medical costs, allowing employees a one-time change in physician may not be as expensive as employers fear

According to a recent study published in the *Journal of Occupational and Environmental Medicine,* states that give an injured employee broad latitude in choosing the initial treating provider have higher average medical costs and longer average length of disability for claimants than states that allow the employer to make the initial treating provider choice, at least for workers' compensation claims involving lower back pain [see "Length of Disability and Medical Costs in Low Back Pain," by Mujahed Shraim, MPH, PhD, et al., October 20, 2015; doi: 10.1097/JOM.0000000000000593].

That was one of several findings researchers gleaned when they dovetailed a large workers' compensation database of a single private insurer containing more than 59,000 cases from 48 states and the District of Columbia with state-by-state workers' compensation policy information supplied by the US Chamber of Commerce and Workers Compensation Research Institute. The policy comparison covered a time period beginning in 2002 and ending in 2008. The large number of cases represented almost 10 percent of the U.S. private workers' compensation market.

While that finding regarding employer designation of treatment providers might be music to the ears of many employer groups who see employer control of medical care as the key to overall cost containment, the study also noted that while the average length of disability was lower in states that restrict a dissatisfied employee's ability to change the health care provider than in states with no such restrictions, there was no corresponding reduction in average medical costs. Allowing the injured employee a say in his or her treatment is not, therefore, always expensive. The researchers posit that when injured employees feel dissatisfied with a medical provider—particularly early in the treatment process—the inability to change treating physicians may lead to mistrust of the system generally and second-guessing of the treating physicians decisions in particular, resulting in longer disability periods and increased medical care costs.

Key State-By-State Variables

While there are, of course, considerable differences between and among the states in their handling of wage replacement benefits and provision for medical care for injured employees, the researchers concentrated on a number of specific workers' compensation policies that may vary from state-to-state:

- Wage replacement percentage (e.g., where the injured worker receives 2/3rds of his or her AWW);
- Duration of waiting period (number of days before an injured worker is eligible for indemnity benefits);
- Retroactive period (number of days before the injured worker is eligible for indemnity benefits covering the waiting period);
- Employee's or employer's ability to choose initial treating provider or change treating provider;
- Medical fee schedules that set the maximum reimbursement amount for medical services from a provider.

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Study's Findings

After adjusting for interstate differences in individual-level variables, the researchers uncovered in some cases exactly what one might expect to find: for example, as noted above, where employers choose the initial caregiver, overall average medical care costs are lower. However, the researchers noted no significant associations between the length of a state's waiting period or the presence of a medical fee schedule and the average medical costs per case. An increase in the relevant waiting period was associated, however, with an increase in the length of disability. An increase in the retroactive period also tended to extend the average length of disability, but not nearly as much occurred with an increase in the waiting period. The researchers acknowledged that critics of waiting periods have for years argued that they are counter-productive, that they only provide an incentive for the injured worker to remain out of work for a longer period of time in order that he or she can qualify for some temporary disability indemnity. This study would appear to support that criticism.

Suggestions Based Upon the Study's Findings

Based on this analysis, the researchers suggest that a shorter retroactive period and early referral of injured workers to qualified caregivers might reduce both average medical costs and the average length of a worker's disability. And while employer involvement in physician choice does appear to bear dividends in terms of cost containment, allowing the injured worker to change treating providers, at least in some instances, might result in better outcomes and cost savings.

The study pops the balloon of those who see medical fee schedules as a key to overall medical cost containment in workers' compensation cases. The study actually supports the view that such schedules are counter-productive in that they are associated with longer average length of disability for injured employees.

Study Limitations

The researchers acknowledge that their study, like virtually all studies, has limitations. The database, for example, contained no information related to the severity of the injury or the functional limitations suffered by an injured employee. One would expect that with more severe injuries would be associated with higher medical costs and longer terms of disability. The same is true for patients encountering more severe functional limitations. The study could not allow for differences that might be associated with other important predictors of disability duration, such as occupation, physical demands of the job, and the like. The researchers also noted that their analysis of the costs associated with allowing provider choice/change was based on state workers' compensation laws. The researchers observed that they had no information about whether employees and/or employers actually exercised the rights that were mandated in those laws.

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Texas Hires New Hearing Officers

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) – has recently hired new Hearing Officers.

Houston West Field Office:

Robin Burgess. Ms. Burgess is a graduate of the City University of New York School of Law, and, prior to joining TDI-DWC, she worked as a prosecutor in New York State and also represented claimants in hearings before the Social Security Administration.

Early Moye. Ms. Moye is a graduate of the University of Houston School of Law, previously worked as a hearing representative for Liberty Mutual Insurance Company.

Francisca Okonkwo. Ms. Okonkwo graduated from the Thurgood Marshall School of Law at Texas Southern University. Before joining TDI-DWC, she was an Assistant Attorney General for the Texas Office of the Attorney General, Child Support Division.

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Conclusion

For those who clamor for greater employer control of the medical treatment process, this study provides some important supportive findings. On the other hand, the study appears to suggest that the best alternatives come from a combined approach, with strong employer participation, yes, but where the situation also allows some flexibility in physician choice on the part of the injured employee. The study also undercuts, at least to some degree, the notion that medical fees schedules are an effective mechanism in monitoring workers' compensation medical costs. Additional study is necessary to determine if the trends and results found in analyzing this large cohort of lower back pain cases can be repeated across the board.

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* Thomas A. Robinson, Durham, N.C., received his B.A., *cum laude*, for both Economics and History, in 1973 from Wake Forest University, his J.D. in 1976 from Wake Forest University School of Law, where he served as Managing Editor, *Wake Forest Law Review*, and his M.Div. in 1989 from Duke University Divinity School. From 1976 to 1986, Mr. Robinson was in private practice, where he focused on workers' compensation defense work. From 1987 to 1993, he was research and writing assistant to Professor Arthur Larson. From 1993 until December 2014, Mr. Robinson worked closely with Lex Larson as senior staff writer for *Larson's Workers' Compensation Law* (LexisNexis) and *Larson's Workers' Compensation, Desk Edition* (LexisNexis). Since January 2015, Robinson has assumed the role of co-author of those treatises with Mr. Larson. He is an Editor-in-Chief of *Workers' Compensation Emerging Issues Analysis* (LexisNexis) and a contributing author or editor to five other LexisNexis workers' compensation publications. Robinson also serves on the executive committee of the Larson's National Workers' Compensation Advisory Board (LexisNexis). His award-winning blog, The WorkComp Writer, can be accessed at http://www.workcompwriter.com/.

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Substantial Evidence Must Have Some Substance

By Stephen C. Embry, Esq.*

Science, clinical medicine, and the law live in the same city but in different neighborhoods. Each of the disciplines is concerned with the development and organization of information to answer questions, but the methods and purposes do not fully overlap. Science is interested in universal truths, and its methods are designed to seek absolute rather than relative truth.

The scientific method generally requires that a hypothesis be tested under controlled circumstances and the results found to be repeatable in numerous settings. Even then the spirit of science is suspicion and the scientist must keep an open mind and believe that future tests and experiments will produce different results.

Clinical medicine is concerned primarily with differential diagnosis, which, by definition, involves uncertainty and probability. The doctor can use standardized tests and acquired knowledge to derive possible causes for pathologies and to diagnose disease and then must choose from a range of treatments. This involves an approach to treatment based on probabilities rather than a scientific analysis of absolute treatments. This uncertainty principle arises from the very nature of treatment of individual patients. These individual patients have different and idiosyncratic responses to different stimuli and pathogens and will respond differently to recommended courses of treatment. The clinician cannot afford to only treat disease based on the standards of universal scientific certainty, but must always be pushing forward into, at best, partially-charted territory. The doctor must constantly correct course based upon results and failures. The treatment will usually not be final although the results may be irreversible.

The law is also required to engage in evaluation of evidence and ultimately choose among limited options. The purpose of the law, however, is dispute resolution and not truth determination. The system is designed to produce tension and fear of loss to encourage compromise so that the parties can agree upon a resolution of their dispute. If this fails and the litigation proceeds to conclusion, the result is always based on probabilities, but the conclusion must be final, even if flawed.

A Zenn diagram of science, clinical medicine, and the law would overlap in part but legal solutions will rarely coincide entirely with scientific certainty. This principle is recognized and memorialized by Section 20 of the Longshore and Harbor Workers' Compensation Act (33 U.S.C.S. § 920), which generally resolves doubts in favor of the claimant. *Barscz v. Director,* OWCP, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007).

The District of Columbia Court of Appeals, in *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968), fully explored the tension between medical and legal definitions of causation. There, the claimant had died while answering the call of nature at the worksite. The employer's medical expert indicated that he did not believe this activity caused the decedent's heart-related death. The *Wheatley* court noted that the presumption of compensability of 33 U.S.C.S. § 920(a) is based in part on the humanitarian purpose of the Longshore Act. It further noted that in order to rebut this presumption the respondent must do more than simply offer a bald opinion by an expert, and must instead offer "substantial evidence to the contrary." The court noted that such "evidence may be hard to develop, given the limits of medical ability to reconstruct why 'something unexpectedly goes wrong within the human frame.' But that is precisely why the presumption was inserted by Congress. It signals and reflects a strong legislative policy favoring awards in arguable cases." Consequently, the evidence must be evaluated to determine if it is "substantial." Mere "isolated" evidence will not rise to the level of "substantial." *Wheatley*, supra, at 313-314.

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The court in *Wheatley* also noted that the issue to be determined was a legal, not a medical issue. The "premise underlying [the expert's] opinion is at core a proposition of law, not science, which lies outside the province of his expertise." Stated differently, the question is one of legal, not medical, causation.

The core of legal causation is based on positive evidence and generally the presumption cannot be rebutted by negative inferences and, in fact, the absence of evidence is not evidence at all. *Adams v. General Dynamics Corp.*, 17 BRBS 258 (1985).

In *Wheatley* the employer's expert testified that Mr. Wheatley had arterial heart disease, which was the "major reason," he had the heart attack. However, he had had this disease for an indeterminate time prior to his death, and something caused him to go from being alive with coronary disease to being dead with coronary disease. The precipitating factor was the legal cause, while the pathological condition was the medical cause. The two concepts did not overlap, and it was the failure to rebut the presumption that the act of urinating in the cold was the precipitating factor that decided the case.

In evaluating the evidence to determine if it is substantial one must determine if it is supported by the facts underlying the opinion.

In *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981), the Benefits Review Board found that the opinion of the medical expert was based on an incorrect reading of scientific studies and was thus not substantial evidence.

In order for the evidence to be "substantial" it must be based on a correct reading of the evidence found in the record. In *American Grain Trimmers, Inc. v. OWCP (Janich)*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999), cert. denied, 528 U.S. 1187, 146 L. Ed. 2d 98, 120 S. Ct. 1239 (2000), the employer presented expert opinion that the claimant's heart attack was not work-related. The Seventh Circuit noted that "substantial" evidence required more than some evidence, it must be of a certain quality, it must be "specific and comprehensive, not speculation."

In *Janich*, the doctor stated with reasonable medical certainty that claimant's work did not cause the injury, but admitted that he did not have any idea what work Mr. Janich was doing. The court found that this medical opinion was not "substantial evidence."

There has been a recent trend to simply elevate any evidence to the level of "substantial," and some trial courts have held that the mere production of a medical opinion will rebut the presumption if "a reasonable man might believe it." However, the statute does not provide that the presumption is rebutted by the production of some evidence, but only substantial evidence. Consequently the administrative law judge must first determine if the medical opinion is based on the legal, not scientific or medical, definition of causation. The judge must also determine whether the medical opinion is based on actual, non-speculative evidence in the record, and by positive evidence and not negative inference or the lack of evidence.

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* Stephen C. Embry is a 1971 graduate of American University, School of International Service and received his Juris Doctor degree from the University of Connecticut in 1975. He practices in Groton, Connecticut with the law firm of Embry and Neusner, where he focuses on personal injury, workers' compensation, and employee rights litigation. He is past chairman of the American Trial Lawyers Section on Workers' Compensation, a sustaining member of the National Organization of Social Security Claimants' Representatives, and a Past President and board member of the Work Place Law and Advocacy Group of AAJ. Mr. Embry also serves on the LexisNexis Benefits Review Board Service—Longshore Reporter Advisory Board and the LexisNexis National Workers' Compensation Advisory Board.

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Judges from the Florida First District Court of Appeal presided over the Moot Court Finals at Judiciary College 2015.

Judges Wilbur Anderson (FL), Melodie Belcher (GA), and Melissa Jones (DC) presided over a preliminary round of the Moot Court Competition at Judiciary College 2015.

Kentucky Workers' Compensation Commissioner Dwight Lovan lunches with a group of Kentucky judges before the Moot Court Competition at Judicial College 2015.

The Pennsylvania Bar Association's Pennsylvania Workers' Compensation Act Centennial (1915-2015) Celebration

By Hon. David B. Torrey

I. Introduction

The Pennsylvania Workers' Compensation Act was promulgated in 1915, and the Workers' Compensation Law Section of the Pennsylvania Bar Association has been celebrating the law's centennial this year.

I am pleased to say that our effort in Pennsylvania was largely inspired by the Massachusetts example in 2011. In March of that year, I attended a ceremony in New York City noting the centennial of the Triangle Shirtwaist Fire. There, Mr. Alan Pierce, a longtime claimants' counsel, introduced me to Joe Agnelli of the Keches Law Group. Mr. Agnelli, who served on the Massachusetts Workers' Compensation Centennial Planning Committee, briefed me on the project and encouraged me to attend the April 7, 2011 Centennial Symposium and the dinner which was to follow.

I did so, along with other NAWCJ members. Thus, in Boston the next month, we gained the benefit of hearing presentations by some of the renowned national figures in the field, including Les Boden, John Burton, Emily Spieler, Richard Victor, and Lex Larson. The lectures were well-attended, as was the gala dinner, both of which were convened at the Intercontinental Hotel.

Centennial Committee Members, June 1, 2015. Judge Torrey is at far right; Director of Adjudication Crum (NAWCJ) is fourth from right.

As one who had always been attentive to the history of the program in Pennsylvania, I was inspired by the Massachusetts Centennial to make sure that the heritage of our state's law would be similarly celebrated. I was also inspired by the 2011 commemoration of the International Association of Industrial Accident Boards and Commissions (IAIABC), and the Philadelphia Bar Association workers' compensation law committee. The Philadelphia group early on started its recognition of the Pennsylvania centennial, and in a creative move commissioned the creation of several immense paintings depicting the legacy of the city's industry and its workers.

Also, I knew that a 75th Anniversary celebration had at one time been planned by the head of the Pennsylvania agency and the distinguished attorney, Mr. Benjamin Costello. Indeed, when the plan was aborted, the agency head, in 1991, shipped me a box of the materials that had been developed as part of the project. I fortunately kept those materials and they ultimately provided invaluable background for our own effort a quarter century later.

As our centennial year approached, I decided to approach Mr. Costello to ascertain whether he would collaborate with me in recommending to the Pennsylvania Bar Association (PBA) that the organization be a leader in a 2015 commemoration. When he was obliging, we then persuaded attorney R. Burke McLemore, of Harrisburg, PA, to join us in the effort and to be Chairman of our proposed committee.

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The three of us advocated the project to the Workers' Compensation Law Section in September 2013. That advocacy was supported by a prospectus-style briefing paper that described our proposal and the importance of noting the centennial. The Governing Council of the bar, upon the motion of attorney Larry Chaban, approved our establishing the Centennial Committee under its auspices. The Department of Labor & Industry then agreed to partner with PBA on the project.

We thereupon formed a committee, all of whom were practicing lawyers except for myself, the Chief Judge (Director of Adjudication) of our system, and the head of our administrative agency (Bureau Director).

We met and formed a mission statement, declaring that we were committed to (1) promoting awareness of the anniversary; (2) reacquainting the workers' compensation bar with the philosophy and history associated with the development of the Pennsylvania Workers' Compensation Act; (3) commemorating the event once June 2015 arrived; and (4) procuring the involvement of all of the key groups that participate in the administration of the Act.

Centennial Committee Booth at the L&I Conference: Mr. Ross Miller (PBA), Chairman R. Burke McLemore, Esq., Daniel K. Bricmont, Esq., and Mr. Hib Gavel (Bridon American Corp.)

Over the next three years, the committee convened a telephone conference call the third Monday of each month. One of our first meetings was late in the afternoon, on Monday, April 15, 2013, when we were coached by Mr. Agnelli. That date was significant, as it was the day of the Boston Marathon bombing. Our meeting hence had a very grave ambience.

In the end, we raised roughly $125,000.00 and were able to donate the majority of the same to our pre-designated charity, Kids' Chance of Pennsylvania. We also published many original writings and commissioned articles from two of the leading national workers' compensation scholars, Professor John F. Burton, Jr., and Professor Michael C. Duff. We published our ambitious centennial book on June 2, 2015, the precise centennial date, and convened a gala dinner and several conferences.

II. Pittsburgh as Ground Zero; Crystal Eastman's *Work Accidents and the Law* (1910)

All of us were reminded, through the centennial celebration process, of what a great "ground zero" Pittsburgh was in terms of the genesis of workers' compensation laws. In this regard, the industrial scene in Pittsburgh was the focus of a legendary study of work conditions in the first decade of the last century. It was called "The Pittsburgh Survey," and one of its final components was a review of work accidents and how they were treated by the law. This aspect of the survey was undertaken by the social reformer and law school graduate Crystal Eastman.

An excellent book to contextualize the study is *Pittsburgh Surveyed: Social Science and Social Reform in the Early Twentieth Century*, edited by Maurine W. Greenwald and Margo Anderson (University of Pittsburgh Press 1996). This book is a series of essays explaining the origins and nature of the Pittsburgh Survey. Major works of the Survey were *The Steel Workers*; *Homestead: Households of a Mill Town*; and *Women and the Trades*.

All constitute a critical analysis of late nineteenth century capitalism, of which Eastman's assessment was an integral part.

And, indeed, for over a century, students of pre-workers' compensation and pre-safety culture have regarded her book, *Work-Accidents and the Law*, as one of the essential classics of the field.

Pittsburghers, of course, don't have any excuse for not knowing about this book, as it is commemorated by a historical marker at Market Square.

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She determined that the vast majority of the costs of injuries were in fact transferred to workers, their families, and charity, with employers often paying little or nothing. In her view, this regime was both wasteful and unjust. Common law methods of recovery for injury, she asserted, were not fit for conditions of work in modern industry, as opposed to conditions that prevailed in an agrarian society. She also asserted that industrial safety could easily be improved, and that social insurance schemes such as those adopted in England and continental Europe should replace the then-current unsatisfactory system.

A common subject of Eastman's book is the then-prevailing employer conviction that work deaths were predominately caused by careless workmen, and that nothing could be done to prevent their unsafe habits. Eastman sought to explode this myth by studying precisely what happened in most of the deaths, and trying to categorize whether each was caused by the worker, the employer, or was essentially unavoidable. She insisted that only a small minority of deaths could reasonably be attributed to an utterly feckless employee.

In any event, she asserted that safety should be a top-down affair, with employers, who controlled the premises and the means of production, responsible for demanding safety practices. Thus, aside from the drunken or utterly foolhardy, she refused to assign primary responsibility for an accident to a negligent employee. (If one recalls that many industrial workers of the time were right off the boat and could barely speak English – never mind reading the occasional safety placard that might exist – this type of assertion is less paternalistic than it sounds.)

A major point of Eastman's analysis was the quality and effectiveness of the then-fairly new in-house insurance schemes, such as that introduced at U.S. Steel. She criticized these plans as parsimonious, and as requiring, as a condition precedent to any payment, a release with regard to civil liability. She also noted that such plans were often completely controlled by the employer, which had unfettered discretion as to whether to make payments.

The second edition of the book (1916), features a summary and comment on the newly-enacted Pennsylvania Workmen's Compensation Act. Eastman was only partially satisfied with the law, remarking that it was rather parsimonious compared to that of other states.

III. A Few Surprises Along the Way

As my colleagues and I prepared for the centennial, and set about research, we encountered a number of surprises. This was particularly so for this writer, as I had promised to produce a centennial book with the aid of a number of collaborators.

First, as it turned out, our agency did not have any archive of materials that would contribute to constructing a history of the agency.

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Interesting Workers' Compensation Blogs

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

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

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

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

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

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

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

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

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

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Thus, for historical items like biographies of early leaders, photographs, and activities of the agency, original research was required.

Second, I discovered that, in the midst of the Depression, the Governor's Office had commissioned a study of the performance of the workers' compensation system. The "Governor's Committee on Workmen's Compensation," also known as the Kulp Committee, produced an elaborate, *tour de force* report which was highly critical of our system. It concluded with recommendations that were never manifested until the 1970's. The funding for the book came from the federal government, and it is illustrated by remarkable art deco-inspired tables and diagrams.

Third, we determined that the Pennsylvania Act has a godfather, to wit, Francis H. Bohlen, a renowned torts scholar and Professor at the University Pennsylvania School of Law. His identity was certainly known to me, as he wrote frequently about the nascent systems. Still, I was unaware of the extent of his involvement with our law in terms of formation, promulgation, interpretation, and amendments. Bohlen served on the Industrial Accidents Commission which studied the industrial injury situation in Pennsylvania and which ultimately recommended that the legislature pass a workers' compensation law. After the law was enacted, he served as the Board's first legal counsel and obviously prepared, along with his assistants, many of the Board's early opinions. A conservative who could be distrustful of workers, he was later persuaded that in many ways the law was too impecunious, and he successfully recommended that the law be liberalized in the 1920's.

IV. Activities of the Committee

Our first task was to borrow, for a fee, the logo of the Wisconsin workers' compensation centennial organization. We rebranded it to make it fit our state's critical years, and have used it on our website and hardcopy publications. From the time of the committee's formation, we also published essays addressing historical topics in the Section's quarterly newsletter. Some of this material was later reworked and included in the centennial book which is described below.

Our other activities included the following:

A. *Website.* We soon established a website. The URL is http://wc100pa.org. It is intended to highlight the existence of our project, and recognize our donors, but more importantly to share information regarding the history of the program with the broad public. The website features a short history of the law as well as also more detailed histories of certain aspects of the same. Early in the process, meanwhile, we videotaped interviews with several of the most senior veterans of the practice, and these videos are now on the site. We plan to maintain the site for the next ten years.

The 2015 Pennsylvania commemorative Centennial Medal

B. *Wall Calendar for 2015*. To publicize our committee, and the fact of the centennial, we produced a wall calendar for the year 2015. We provided the calendar by mail free to all members of the PBA Workers' Compensation Law Section. The calendar is illustrated with 8x10 images reflecting the history of the law and the related field of workplace safety. The calendar pages themselves note various critical dates pertinent to our law over the years.

C. *Centennial Medal.* We also sponsored the design and production of a Centennial Medal. The medal was the brainchild of Mr. Costello, who is a veteran coin collector and who had previously been involved in the design and production of a commemorative medal for Frank Lloyd Wright's famous "Fallingwater." We produced a limited number of silver medals and a larger number of bronze. I noted, at the time:

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Commemorative medals have a long history. Associations of governments, the military, professionals, and academics are among those who have, over the centuries, recognized the importance of marking pivotal events with lasting artistic mementos. Commemorative medals such as these are cultural expressions of the momentous events of our times.

The year 2015, of course, marks yet another pivotal event: the 100th Anniversary of the enactment of the Pennsylvania Workers' Compensation Act. With this law, the epidemic of uncompensated work injuries and deaths was addressed in our state.

The new enactment, passed on June 2, 1915, was of a kind that was sweeping the country, and involved employers' acceptance of no-fault liability for insurance benefits for work injuries, in exchange for freedom from civil liability. This first tort reform has, for a century, been referred to as "The Grand Bargain." The law, in the words of one court, "constitutes a grand bargain in which injured workers forego the possibility of larger awards potentially available through the tort system (the quid) in exchange for a no fault system that provides more certainty of an award (the quo)."

The Centennial Committee is, in the traditional spirit of marking significant events, excited to have ordered the production of the medal. We hope that this valuable souvenir, with its depictions of a brighter day for Pennsylvania labor and industry, and its symbolic portrayal of the Grand Bargain, will be a keepsake that will remind us all of the importance of the law, its long history, and our own critical participation in the system it long ago created.

D. *Regional seminars*. As our centennial approached, we convened, early in 2015, regional one-hour seminars at bar association gatherings. These brief sessions, which focused on ethical themes surrounding the genesis and practice of the law, were held in Erie, Pittsburgh, Harrisburg, and Philadelphia. There, one of our members, Dan Schuckers, gave a lecture on the history of our law. Those sessions were followed by receptions where we started to sell the commemorative medals and advertised to the bar our larger enterprise.

E. *Centennial conference, gala dinner, and lecture*. The centennial was officially commemorated on June 1-2, 2015. Inspired by the Massachusetts example, the PBA and the Commonwealth worked together to convene lectures on historical topics and a gala dinner. We convened our events in concert with the annual Department of Labor & Industry Workers' Compensation Conference. The venue was the Hershey Lodge, a large hotel and conference center in Hershey, Pennsylvania, a location the middle of the state.

The proceedings commenced with a major speech by the Dean of American Workers' Compensation, Professor John F. Burton Jr. His address, *Workers' Compensation: Can the State System Survive?*, can be accessed and read at Professor Burton's website: http://workerscompresources.com/.

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Meanwhile, one of the panels of the educational sessions that followed, "The History Channel: Late Night with Judge Torrey," featured an account of the law's genesis and history. At the conference trade show, meanwhile, the Centennial Committee maintained a booth where we displayed our educational posters detailing the history of the Act, and made our commemorative medal and book available for sale.

The long-planned Gala Reception & Dinner, also held at the Hershey Lodge, followed the educational program. The event was overseen by the Mr. McLemore, and roughly 500 guests attended the event.

All guests received a surprise gift: an exact reproduction of a 1916 booklet for workers of the Duquesne Light Company, entitled "Instructions and Explanations Covering Injuries to Employees and Workmen's Compensation Provisions." A key admonition: the law "makes the services of an attorney unnecessary under any circumstances, as the injured employee can, without paid assistance, easily ascertain to what he is entitled."

Justice J. Michael Eakin, meanwhile, was our Keynote Speaker. In addition to his many serious points about our law, one ironic comment certainly stood out: "In 1915, the legislature created the Workmen's Compensation law to eliminate litigation in the event of work injury or death. By the looks of this room, 100 years later the reform seems to have been a complete failure!"

We also presented a check in the amount of $50,000.00 to our designated charity, Kids' Chance of Pennsylvania.

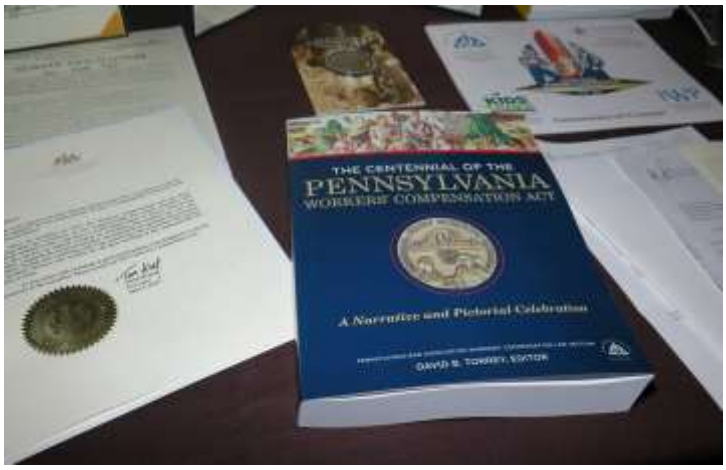
For photos of the conference, the gala, and time capsule events, see http://www.pabar.org/public/sections/wrk15/anniversary.asp.

F. *Writing contest award*. The Centennial Committee conducted a law student essay contest. The winner was Temple Law student Bradley R. Smith, *a Phi Beta Kappa* graduate of Gettysburg College (now of the Galfand Berger firm, Philadelphia). Mr. Smith, who wrote on the challenges of proving mental stress causing mental disability claims, was recognized with his award at the gala dinner; it was presented by contest chairman Dan Schuckers.

G. *The Time Capsule*. One June 2, 2015, upon the completion of the L&I conference, the agency and the Centennial Committee teamed together to bury a time capsule in the lawn in front of the Labor & Industry Building. This project was an additional, ambitious project of Mr. Costello. We buried the capsule in the midst of a steady, significant rain, and Appeal Board Chairman Alfonso Frioni stood out among us, in a moment of special heroism, in leaping down into the muddy ditch to ensure the capsule's proper placement!

H. *PBA Workers' Compensation Law Section Fall Meeting, October 2015*. Our concluding major project was convened in Hershey, PA on October 7-8, 2015. Our two-day annual CLE featured historical reflection as a theme in most of the presentations. And, of course, we again sold the commemorative medal and the centennial book. The highlight, however, was the opening, one-hour keynote address by scholar Michael C. Duff, a Professor and Assistant Dean at the University of Wyoming College of Law. His address, delivered in dynamic fashion, was entitled, "A Hundred Years of Excellence: But is the Past Prologue?"

I. *The Centennial Book*. A major project of the committee, again following the Massachusetts example, was the development and writing of a book. The text, like one about Massachusetts authored by Mr. Agnelli, is a celebration of participants in the system, past and present, but a treatment of substantive issues as well. In this respect, the centennial book of the IAIABC (2011) was a model.



The Pennsylvania Centennial Book, commemorating 100 years of workers' compensation. The centennial book (softcover) is $25.00 plus shipping. Write Judge Torrey if interested: DTorrey@pa.gov.

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The table of contents is as follows:

1. *Pennsylvania Workers' Compensation Act: History, Purposes, and Two Essential Narratives*
by Dave Torrey

2. *Before 1915 and the Workers' Compensation Act: The Pennsylvania Fellow Servant Rule and the Partial Reform of the Casey Act*
by Lawrence D. McIntyre, J.D.

3. *The History of Pennsylvania's Workmen's Compensation: 1900-1916*
by Jonathan L. Schaffer, M.D.

4. *Six Months' Experience under the Workmen's Compensation System of Pennsylvania: An Address before the Pennsylvania Bar Association, June 28, 1916, Bedford Springs, PA*
by Professor Francis H. Bohlen

5. *The Pennsylvania Workmen's Compensation Board's Dramatic First Year: Law, Policy, and Precedent*
by Dave Torrey

6. *The Administration of the Act: A History and the Present Role of the Bureau of Workers' Compensation and the Workers' Compensation Office of Adjudication*
by Hon. Elizabeth A. Crum, Hon. Stephen J. Fireoved, George Knehr, and Kathleen M. Dupin

7. *A History of the Pennsylvania Workers' Compensation Appeal Board: 1972-2015*
by Hon. Alfonso Frioni and Hon. Robert A. Krebs

8. *The Philadelphia Bar Association Workers' Compensation Section Centennial Arts Project*
by Hon. Scott Olin

9. *The Workers' Compensation Act, its Amendments, and Interpretation: 1916-present*
by Dave Torrey

10. *The Genesis of Act 147 of 1996*
by Lawrence R. Chaban, Esq.

11. *Efforts to Impose Federal Standards in Workers' Compensation: A Historical Account*
by Dave Torrey

12. *Occupational Safety and Health and Workers' Compensation in Historical Perspective*
by Dave Torrey, Robert Baker, Esq., and Dr. David Frank

13. *Outstanding Historical Figures, Workers' Compensation Officials, and State Bar Association Leaders – Plus a Memoir of the 1970s and an Encomium*
by Dave Torrey and Susan H. Swope, Esq.

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14. *William A. Skinner and his Contribution to the Development of Pennsylvania Workers' Compensation Law*
by Daniel R. Schuckers, Esq.

15. *Anecdotes from the Archives of Practice*
by Benjamin L. Costello, Esq. and C. Robert Keenan, Esq.

16. *A Brief History of a Parallel Law: The Heart & Lung Act*
by Kelly Dollins, Esq.

17. *Pennsylvania's Mental Lapse: A History of Pennsylvania's Treatment of Mental Disabilities Caused by Mental Stress in Workers' Compensation*
by Bradley R. Smith, J.D.

18. *The Durability of Workers' Compensation Law Against its Adversaries*
by Dave Torrey

Appendix I
Historical Documents:
The Mackey Five-Year Retrospective (1921)
Reviews: Great Essays on Workers' Compensation (Downey/Lubove/Epstein)

Appendix II
Workers' Compensation History:
(*An Annotated Bibliography*): Pennsylvania, National, International

Appendix III
Chairs of the PBA WC Law Section
Recipients, PBA WC Law Section
Irvin Stander Award
Recipients, Philadelphia Bar Association
Martha Hampton Award
Pennsylvania Members,
The College of Workers' Compensation Lawyers
Lawyers Certified by PBA/Pa. Supreme Court in the Practice of WC Law

Our committee still has commemorative medals and the softcover version of our centennial book for sale. We agreed at the outset of our project that we would sell our commemorative items for cost. The medal is $20.00 plus shipping; and the centennial book (softcover) is $25.00 plus shipping. Let me know if you are interested! Write DTorrey@pa.gov.

Texas Hires New Hearing Officers

The Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) – has recently hired new Hearing Officers.

Midland Field Office

Travis Dupree. Mr. Travis Dupree is a graduate of Mississippi College School of Law. He previously was a hearing officer with the Texas Workforce Commission.

Dallas Field Office:

Amanda Barlow. Ms. Amanda Barlow graduated from Texas Wesleyan School of Law (now Texas A&M University School of Law). Ms. Barlow formerly worked as a Staff Attorney with the Texas Department of Public Safety. While she will be assigned primarily to the Dallas Field Office of TDI-DWC, she will also travel as needed for hearings to other TDI-DWC offices, including the Denton and Fort Worth Field Offices.

This paper was first prepared for and has been published by MCLE New England in *Collected Papers, Massachusetts Workers' Compensation Law: 16th Annual Conference* (Boston, MA, Nov. 20, 2015).

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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.

CDC Opioid Guidelines May Bring Consistency to States

by Elaine Goodman
Tuesday, September 29, 2015

With states being all over the map on their guidelines for prescribing opioids, some say a new set of guidelines under development by the U.S. Centers for Disease Control will help establish a consistent approach to use of the drugs.

Many states do not have guidelines for prescription opioid use, according to Dr. Gary Franklin, chairman of the Washington state Agency Medical Directors' Group and medical director of the Department of Labor and Industries. Those that do include Washington state, which adopted guidelines in 2007 that were updated in June. Others are Connecticut, Ohio, Indiana, California, Colorado and Minnesota, according to information compiled by Franklin.

Franklin is part of a "core expert group" that gave input on the development of the CDC guidelines. He said the CDC guidelines, which are expected to be released next year, will be most useful to states without opioid guidelines and may serve as a basis for revisions in other states. "I am hopeful these guidelines will be very, very useful," Franklin said.

The CDC guidelines may also influence federal agencies, including the FDA, the Substance Abuse and Mental Health Services Administration, and the National Institute for Drug Abuse, Franklin said. How the CDC intends to encourage adoption of its guidelines remains to be seen. Franklin said it's possible grants will be sought for that purpose.

The CDC says the guidelines will provide recommendations for prescribing opioid drugs for patients 18 and older in primary care settings, with a focus on the use of opioids in treating chronic pain, specifically pain lasting longer than three months or past the time of normal tissue healing. End-of-life care will not be addressed in the guidelines.

The guidelines will address selection of opioid therapy, non-pharmacologic therapy, or non-opioid pharmacologic therapy in chronic pain, establishing treatment goals, discussing risks and benefits with patients, dosage and duration of treatment, assessing patient risk factors for adverse effects and arranging treatment for opioid use disorders.

The CDC held a two-day webinar with an overview of the guidelines on Sept. 16-17, followed by a 48-hour comment period. In addition to the core expert group, federal partners and a stakeholder group were asked to weigh in. But the CDC hasn't released a full version of the draft guidelines to the public. "We don't want clinicians to use or refer to these guidelines before all stages of review have been completed," said CDC spokeswoman Courtney Lenard.

Another member of the core expert group, Dr. Erin Krebs with the Minneapolis Veteran's Administration Health Care System and University of Minnesota, told WorkCompCentral that she wasn't authorized to comment on the guidelines; and core expert Pam Archer, director of the Office of Scientific and Research Integrity at the Oklahoma State Department of Health also declined to comment, referring questions to the CDC.

Continued, Page 29.

Opiod Guidelines, from page 28

While the CDC seeks better controls over opioids, one Massachusetts state lawmaker would have them banned completely in his state. Senate Bill 1032 by Sen. Robert Hedlund, R-Weymouth, says simply: "No pharmacy in the Commonwealth shall issue prescriptions for medications containing opioids."

The bill is under review by the Joint Committee on Mental Health and Substance Abuse, which held a hearing on the bill on Thursday and plans to continue its discussion, according to a legislative staff member. Hedlund was not available for comment on Monday.

Clinical Trial of Artificial Cervical Disc is Approved

Tuesday, October 20, 2015

Simplify Medical Inc. has received approval from the Food and Drug Administration to start a clinical trial of its Simplify Disc, a non-metal, cervical artificial disc as a treatment for cervical disc disease.

The FDA granted an Investigational Device Exemption for the two-level trial, which will compare the Simplify Disc to anterior cervical discectomy and fusion as a control, the company announced in a news release last week. The trial is a prospective study evaluating the Simplify Disc at up to 14 clinical sites in the U.S. and Australia.

The Simplify Disc is a cervical artificial disc composed of magnetic resonance imaging-compatible materials. Using advanced polymers and ceramic, it is designed to eliminate the need for radiation-intensive CT scans and myelograms, according to the company, based in Sunnyvale, California.

Neck pain is second only to low back pain in annual workers' compensation costs in the U.S., Simplify Medical said.

The articles on pages 28 and 29, *CDC Opioid Guidelines May Bring Consistency to States* and *Clinical Trial of Artificial Cervical Disc is Approved*, were originally published on WorkCompCentral.com and are reprinted here with permission. The NAWCJ gratefully acknowledges the contributions of WorkCompCentral to the success of this publication and the NAWCJ.

An Interesting Argument!

"Your Honor, in the first place, as they say, I am going to say it. I was going to say what you said and the reason I am going to say it, is not because you just said it. If you had not said it, I was going to say it first."

--A lawyer speaking to a judge.

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Endnotes from Notes from a Seminar, from pages 5-12.

[1] 85A Oklahoma Statutes §§ 200-213. The law is called the Oklahoma Employee Injury Benefit Act, and it was effective February 1, 2014.

[2] NAT'L COMM'N ON STATE WORKMEN'S COMP. LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, p.45 (1972), available at http://workerscompresources.com/?page_id=28 (last visited November 4, 2015).

[3] In actuality, many large employers opt-out, set up their own plans, and then condition employment on the worker's agreement to arbitrate any dispute under the plan.

[4] ARAWC is the lobby group that promotes opt-out. Its website, under its "Blog" link, details the nature and progress of the South Carolina legislation. *See* www.arawc.org/ (last visited Nov. 4, 2015).

[5] *Melendrez v. Ameron International Corp*., 240 Cal.App.4th 632 (Cal. App. 2015) ("if a substantial contributing cause of an injury arises out of and in the course of employment, the injury is covered by workers' compensation, even if another, nonindustrial cause also substantially contributed to the injury.").

[6] *See, e.g., Matter of Droogan v. Raymark Indus., Inc*., 872 N.Y.S.2d 752 (N.Y. App. Div. 2009) (for a causal relationship to exist between a decedent's death and a work-related illness, the illness "need not be the sole or even the most direct cause of death, provided that the claimant demonstrates that the compensable illness was a contributing factor in the decedent's demise").

[7] *See, e.g., McCloskey v. WCAB*, 460 A.2d 237 (Pa. 1983) (where there are multiple causes of death and the immediate cause was non-compensable, the requirements of `Section 301(c)(2) may be met by a showing with unequivocal medical evidence that the deceased suffered from an occupational disease and that it was a substantial, contributing factor among the secondary causes in bringing about death).

[8] *See generally Walker v. Broadview Assisted Living*, 95 So.3d 942 (Fla. 1st DCA 2012); *In re Compensation of Pruitt*, 198 P.3d 429 (Or. Ct. App. 2008).

[9] *See* KAN. STAT. ANN. § 44-508(d), (e), (2013); KAN. STAT. ANN. § 44-510k (2013). *See Bryant v. Midwest Staff Solutions, Inc*., 257 P.3d 255 (Kan. 2011) (court explains that the law regarding injuries was changed and now includes the requirement that an accident or cumulative trauma be the prevailing factor in causing a compensable injury, medical condition, or resulting impairment). [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.

[10] *In re Shauna Guyman*, BIIA Dec., 05 13662 (2006), available at http://www.biia.wa.gov/SDPDF/0513662.pdf (last visited November 5, 2015).

[11] TENN. CODE ANN. § 50-6-102 (13) (2014) (injury arises primarily out of and in the course and scope of employment "only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes.").

[12] *Marvel v. Roane Transportation Services*, 2015 Tenn. LEXIS 587 (Tenn. Jul. 23, 2015).

[13] *See* ME. REV. STAT. tit. 39-A,§ 201 (4) (2014). A leading case seems to be *Celentano v. Dept. of Corrections*, 887 A.2d 512 (Me. 2005) (court explains that the appropriate analysis is whether the employment, rather than the injury, contributed significantly to the employee's disability).

[14] Section 420 of the Act, 77 P.S. § 831.

[15] *Fonte v. Koppers Co., Inc*., 360 A.2d 836 (Pa. Commw. 1976) (judge was not "prejudiced" and did not commit reversible error by questioning the witnesses, because he was bound to attempt to bring out the truth).

[16] *See* https://www.tdi.state.tx.us/wc/employee/ ("Dispute Resolution") (last visited Nov. 5, 2015).

[17] *See* http://mn.gov/oah/administrative-law/videoguide/(last visited Nov. 5, 2015). This particular Minnesota presentation is not geared specifically to workers' compensation.

18 The panel agreed that ruling from the bench with a *pro se* claimant in not the best idea. Still, Judge Keller, from Louisiana, says she often makes such rulings. Judge Keller feels comfortable ruling from the bench because Louisiana hearings feature the presence of armed guards. She noted ironically that if her state shifts (downward) to unarmed "rent-a-cops," she will not carry on the bench-ruling practice.

Thanks Again to our 2015 Moot Court Judges!

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