Lex and Verum

The National Association of Workers' Compensation Judiciary

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NAWCJ President's Page

By Hon. Jennifer Hopens

Happy holidays, dear reader. Welcome to the final issue of *Lex & Verum* for 2016. I hope you all enjoyed a pleasant Thanksgiving.

American culinary master James Beard summed it up best – "Food is our common ground, a universal experience." In that spirit, you are in for a treat (no pun intended) in this month's edition of the *Lex* – a collection of favorite holiday dishes from our members. Bon appetit!

The curriculum is shaping up nicely for next year's NAWCJ Annual Judicial College, which will take place from August 7-9, 2017 at the World Center Marriott in Orlando, Florida. More details on the program will be found in upcoming issues of the *Lex*. Judge Bruce Moore of Kansas, the chair of the Curriculum committee (and NAWCJ's Secretary), has been instrumental in putting together next year's College program, and we greatly appreciate his efforts (you can read more about Judge Moore later in this issue of the *Lex*). A note of appreciation to the members of Judge Moore's committee for their time and dedication as well – Judges John Lazzara (Florida), Kenneth Switzer (Tennessee), Neal Pitts (Florida), Sheral Kellar (Louisiana), Bob Swisher (Kentucky), Jim Szablewicz (Virginia), and Wes Marshall (Virginia). Thanks also to Conference Committee Chair, Judge Jane Williams of Kentucky, and the members of her committee – Judge Ralph Humphries (Florida) and Judges Marshall, Lazzara, Pitts, Swisher, and Moore – for all of their logistical work behind the scenes in Orlando.

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The President's Page, from Page 1.

As mentioned in prior President's Page articles, there are a number of NAWCJ committees on which to serve. For further information, feel free to contact me at 512-804-4033 or at jennifer.hopens@tdi.texas.gov.

I hope you enjoy this edition of the *Lex*. I wish you all a safe, fun, and happy holiday season, and great food as well.

Mark your calendar! Judiciary College 2017
August 6-9, 2017
Before School – Bring the Kids!

In This Issue

2016-18 NAWCJ Officers

Lex and Verum Editorial Committee

You be the Judge: Best Holiday Foods

By: Hon. LuAmm Haley*

Judges have many interests and pursuits outside of the law and their courtrooms and one that is apparent during the holiday season is favorite foods. November and December bring in the holiday season which in turn generally includes celebrations and special holiday food favorites. While issues of culinary delights are outside of our usual subject matter jurisdiction, what follows is an accumulation of the holiday food favorites of the members of the Board of the NAWCJ.

In addition to learning more about the members of our board, we hope that this article will make your mouth water when thinking of your own holiday memories and treats. One Disclaimer is necessary before you begin, that is, the favorite foods and traditions recognized by our board are not always the healthiest holiday choices, but merely, their highly subjective food favorites and personal memories. You will see below that the submissions have been broken down into categories including holiday food memories and food. Hopefully, this article will result in a holiday smile.

Holiday Memories

Bruce Moore, Salina, Kansas: I've been cooking Thanksgiving dinner at our house for as long as I can remember. Every once in a while my wife has some new recipe that she wants to try, and I have to yield all or some part of the menu to her. Typically, I roast a turkey breast, make mashed potatoes and gravy, green bean casserole, stuffing, sweet potatoes, cranberries and fresh bread. Sometimes, if we're having a large group, I'll also do a ham. I don't do dessert, however, so my wife makes pumpkin and apple pies. It's a typical Thanksgiving menu, easy to do, and brings back lots of great family memories.

Melodie Belcher, Georgia: If you haven't seen the Publix Supermarket commercials at Christmas time, you are really missing something. They capture the meaning of a holiday meal. The food, beautifully prepared and divinely aromatic, brings everyone to the table, but the focus isn't the food, it's the family. Folks are genuinely happy to be with each other, sharing a holiday meal. The son the family thought would not arrive, the grandparents in cardigans and aprons, mom and dad serving and carving, and the children, rambunctious and adorable in their holiday finest – all smiling to sit at the lovely, food laden table. In my family, we aim for a Publix Supermarket holiday meal! The food varies, but yes, there are favorites – sweet potato casserole, creamed onions, cranberry relish, and the standards – turkey and ham. Yes, we want them both, and the table is always beautiful with Christmas china, the good silver, a holiday centerpiece, and candles.

We've had a few disasters – the turkey that was bad when we removed the outer wrapping, the burnt casserole, forgotten in the oven until the smoke alarm sounded, and the broken stovetop when my husband leaned too hard against it (don't tell him I told you!), but those are fond memories too. Of course, we are dessert lovers and late in the day, after the dishes are done, we always find room for rum cake, served with hot buttered rum sauce, or peppermint cheesecake with a chocolate crust. There are always cookies too! Cut out sugar cookies with powdered sugar icing are the favorites even though they take an entire day to make and decorate. We usually have oatmeal cherry cookies, Russian tea cakes, and eggnog snickerdoodles, and there are always some new ones to try as well. Food is a force during the holiday season. I guess that is why we all plan to exercise in January. I don't know about you, but I'm planning my menus and making my grocery lists already. Next year let's talk about Christmas movies. I think I've watched 10 already this season!!!

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Best Holiday Foods, from Page 3.

Frank R. McKay, Atlanta, Georgia: "It's time to come to the table" my mother finally called out at the appointed hour which was always 2:00 p.m. on Christmas Day. The hungry hoard of aunts and uncles, cousins, grandparents, and immediate family members were more than willing to oblige the command. For me it was never about one particular food item, but it was *all about* the entire feast and the wonderful smells that had emanated from the kitchen all week in preparation for the Day and then the delicious aroma of the fresh turkey roasting in the oven all morning. I always went with my father the day before to pick up the specially ordered 22 lb. fresh turkey. The memories are flooding my eyes as I write.

Grandmother always made the cornbread dressing (not stuffing; after all we do live in the deep south!), snapped fresh green beans, made yeast rolls and her famous coconut cake. Aunt Mary always made the deviled eggs, sweet potato soufflé with pecan topping, and brought her homemade pickles. Mother always made a seven layer salad, a Bing cherry salad, creamed corn, pumpkin pie and pecan pie. Add in a few other assorted side dishes and we had quite a feast as we sat around the dining room table eating, talking and catching up on family news, and giving thanks for our many blessings and the reason for the season.

Deneise Lott, Jackson, Mississippi**:** My mother made the best banana pudding that I have ever tasted, but desserts were not her specialty. Luckily for my family and me, the citizens of the small town where I grew up gave gifts of food to express their brotherly love for each other during the Christmas season. Tins of cookies lined our kitchen counter during the holidays. I still remember the crinkle of wax paper and the aroma of home-baked goodness as I peeled back the layers of wrapping to inventory each offering. And there were plates of fruit cakes covered in tin foil or plastic wrap and decorated with dime store bows or Christmas ribbon - gifts as much from the hearts as from the hands of each cook. The cakes, however, were the prize. Three layer or sheet cakes, coconut or red velvet, they were all exotic to the eyes of this child. And whether served with ceremony on china at Christmas dinner or wolfed down from a paper napkin while standing over the kitchen sink, each bite was better than the last. Just as each bite was a reminder that favorite foods are meant to share, especially with family and friends and especially at Christmas.

Holiday Food

Jane Williams, London, Kentucky: Here's one of our family favorites. The original recipe (at least the origin in my family) came from my grandmother, which is somewhat of an irony as she was nothing like the typical homemaker-in-the-kitchen grandmother - but that's another story.

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Best Holiday Foods, from Page 4.

Through the years we ate less and less of the traditional pumpkin pie in favor of this delicious chiffon pie. Now we don't even bother with the traditional version of pumpkin pie. And as a bonus, with a gluten free crust, the dessert is gluten free. We make this pie every Thanksgiving and every Christmas. I think there is a tiny sliver hidden in my fridge from yesterday - a perfect after-Thanksgiving side dish for my morning coffee - but I better grab it before the rest of the household begins to stir.

Pumpkin Chiffon Praline Pie: 1 Pie Shell (unbaked); 1/3 c Butter; 1/3 c Brown sugar, packed; 1/3 c Pecans, chopped; 1 c Sugar; Gelatin, unflavored, 1 envelope; 1 ½ tsp Pumpkin pie spice; ¾ tsp salt; 1 can Pumpkin, plain, 16 oz.; 4 eggs; 3/4 c milk.

1. Bake pie shell in preheated 450 degree oven for 15 minutes. Combine butter, brown sugar and pecans; spread on bottom of pie shell. Bake for 5 minutes longer. Cool Crust.

2. Combine ¾ cup sugar, gelatin, spice and salt in double boiler. Stir in pumpkin, slightly beaten egg yolks and milk. Cook, stirring constantly, over hot water for 15 minutes. Chill until thickened.

3. Beat egg whites until foamy, beat remaining ¼ cup sugar, 1 tablespoon at a time into egg whites until stiff peaks form. Place meringue in bowl of ice. Beat pumpkin mixture until fluffy, fold into meringue. Turn into pie shell. Chill until firm. Serve topped with whipped cream.

LuAnn Haley, Tucson, Arizona: The one food that comes to mind as I approach the holidays each year has to be "Mrs. Haley's Christmas Cookies". Each year my mother, before she passed away in 2011, would begin making her famous Christmas cookies early in December. Because she would make more than 20 different types of cookies, it was her habit to make several dozen of one type of cookie each day before December 25th. Mother would make many mouthwatering cookies, including: traditional chocolate chip, snow balls (powdered sugar covered short bread), peanut butter, treasure chest bars, peanut butter blossoms (Hershey kiss topped cookies), various fudges, nut rolls, buckeyes (chocolate covered peanut butter balls), thumbprints (short bread cookie with drop of frosting filling) and many more. After one type of cookie was made, she would stash them in our large basement freezer until Christmas Eve. Every visitor to our home during the holidays would be greeted with a tray of her famous cookies and no one left our house without a special tin of a selection of their favorites. My mom was so renowned for the cookies that the local Methodist Church heralded her as the "cookie grandma" in the Church's newsletter. I have kept her handwritten cookie recipes in a scrap book, which I made in her memory after she passed, and would be happy to share any of her mouthwatering cookie recipes, should you email me at: luann.haley@azica.gov.

We hope that this article has brought some holiday cheer to all of our readers and also gives you a glimpse of next year's theme. As suggested by Judge Belcher, look forward to hearing of our favorite holiday movies! Happy Holidays from the *Lex and Verum* Committee as well as the Board of NAWCJ.

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* Judge Haley is an Administrative Law Judge in Arizona, a member of the NAWCJ Board, and Chair of the *Lex and Verum* Committee.

Judiciary College 2016

Judge Jennifer Hopens (TX), NAWCJ President, chaired and presented at the evidence program at NAWCJ Judiciary College 2016!

The 2016 Evidence panel included (L-R) Hon. David Torrey (PA), Hon. Shannon Bishop (LA), Hon. Melodie Belcher (GA), and Hon. Jennifer Hopens (TX).

All of the programming was carefully monitored by Judiciary College Curriculum Chair, Hon. Bruce Moore (KS)

Spotlight on Associate Members: Douglass Bennett, Briggs Perry, Michael Ryder and Richard Watts of Swift, Currie, McGhee & Hiers

By: Hon Melodie Belcher*

When I was asked to spotlight associate members from Swift, Currie, McGhee and Hiers, I was thrilled to do so, because Swift, Currie is my old firm, and I've known the associate members for nearly 25 years. I clerked at Swift, Currie when I was in law school and joined the firm after graduation. The firm taught me workers' compensation and the practice of law, and also cemented my belief that the workers' compensation bar is by far the best of the best!

Briggs Peery practices both workers' compensation and general liability litigation defending insurance carriers and self-insureds. He is a member of the Atlanta and American Bar Associations and the State Bars of Georgia and Virginia. Briggs has served as the Legal Committee Chairman for the Georgia State Board of Workers' Compensation Steering Committee, playing an integral role in program development for the Board's annual seminar. He speaks regularly at Claims and State Bar seminars, and at Employer, Self-Insurer, Municipal, and Chamber of Commerce functions. Briggs is also a Georgia Representative for the Steering Committee for the annual Workers' Compensation Institute in Orlando, Florida.

Briggs Perry

Briggs received his law degree from the Walter F. George School of Law at Mercer University in 1986. He was a member of the Moot Court Board, National Moot Court Competition and the National ABA/LSD Moot Court Competition Team. He graduated with a B.A. degree from Hampden-Sydney College in 1983 where he was a member of the Phi Alpha Theta, Phi Sigma Iota, and Phi Delta Phi honor societies.

An avid road cyclist, Briggs enjoys combining cycling adventures with family travel, although the family has not quite bought into how fun that really is…yet.

Douglas Bennett attended the University of Georgia, graduating in 1976. While an undergrad, Doug worked as a UGA police officer full-time, serving as a patrol officer and detective. He went on to obtain his law degree from Georgia in 1980, graduating cum laude. While in law school, Doug served on the law review and with the prosecutorial clinic. He also worked as a teaching assistant in the Business School. After years of practice with Swift, Currie, Doug attended Georgia State and received a BA in English in 2006, thinking that he would have a second career as a high school coach and teacher, but ultimately deciding against the pay cut. Doug is a past member of the Executive Committee of the Workers' Compensation Section of the State Bar of Georgia and served as Chairman from 2003 to 2004. He has been selected as a Super Lawyer by *Atlanta* magazine each year since 2004 and has been listed in The *Best Lawyers in America* each year since 1995. In 2017, he was recognized in *Atlanta Best Lawyers 2017*.

Douglas A. Bennett

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Spotlight on Associate Members, from Page 7.

Doug is currently representing his second death row client in post-conviction litigation. He has coached 25 youth league teams in various sports, including boys' and girls' soccer and basketball, little league baseball, football and girls' fast pitch softball. In 2012, Doug converted to Judaism. He has been taking electric guitar lessons for the last five years, concentrating on classic rock and roll and blues music.


Michael Ryder

Michael Ryder practices in the workers' compensation defense section of the firm. Mr. Ryder is admitted to practice in Georgia and Florida. Since 1988 he has concentrated his area of practice in workers' compensation defense and employment law issues on behalf of employers and insurers. Mr. Ryder was appointed and served on the Governor's Workers' Compensation Commission. He is a past member of the Board of Directors for the Atlanta Bar Association's Workers' Compensation Section and the Board of Governors for the Florida Bar Young Lawyers' Division. Mr. Ryder served as Editor of the State Bar of Georgia's Workers' Compensation Section Newsletter and has served on numerous State Bar of Georgia committees. Mr. Ryder is the founding director of the Atlanta Bar Association Workers' Compensation Section's annual "Kids' Chance Run," a charitable fundraiser that has been held annually since 1991. Mr. Ryder frequently lecturers on workers' compensation defense strategies to employers and insurers around the country and is a speaker on Georgia Workers' Compensation law at the annual Florida Workers' Compensation Law Institute Educational Conference.

Mr. Ryder earned his undergraduate degree and his law degree from the University of Florida, where he was a member of Florida Blue Key, Omicron Delta Kappa and Phi Delta Phi.


Richard Watts

Richard "Rusty" Watts received his law degree from the Walter F. George School of Law at Mercer University in 1992. While in law school Rusty served as the Chairman of the Moot Court Board and received the Most Outstanding Oralist award at the 1991 Florida Workers' Compensation Moot Court Competition. He is a member of the State Bar of Georgia Workers' Compensation Section and also serves as a part-time professor at the Georgia State University School of Law and School of Risk Management and Insurance. He also teaches at Mercer University's Stetson School of Business. Rusty is a past president of the Mercer Law School Alumni Advisory Board and is a current member of Mercer Law School Board of Visitors. He is a frequent lecturer both in Georgia and at national conferences for organizations focusing on workers' compensation issues.

Rusty enjoys swimming and golf. He worked his way through college as a swim coach and currently acts as the announcer for the summer swim league at Ansley Golf Club. Rusty has a son, Pross (also a swimmer), who is fourteen.

The NAWCJ thanks the associate members from Swift, Currie for their continued support of NAWCJ.

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* Judge Belcher serves as an Administrative Law Judge in the Columbus, Georgia office of the Georgia State Board of Workers' Compensation.

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The Year of Equal Justice and Due Process

High Courts in Several States Strike Down Legislative Challenges to the Heart of the Workers' Compensation System

By: Thomas A. Robinson, Esq.*

As we put together last year's edition of the *Workers' Compensation Emerging Issues Analysis* series, I observed that 2016 would likely be a turbulent year, one that we could easily call "the year of the Opt Out." That, of course, was a safe prediction, given the fact that battle lines had been so clearly drawn over Oklahoma's controversial Opt Out law and that somewhat similar legislation had been introduced in the state houses of both South Carolina and Tennessee, with rumors that North Carolina would soon follow. Based on several constitutional challenges to the Oklahoma law, legislators in South Carolina and Tennessee allowed their sessions to expire without acting on the proposed laws.

Lex Larson and I posited that during 2016 those Oklahoma challenges would likely produce some of the most important case law in decades. That turned out to be true. As discussed below, in September 2016, the Supreme Court of Oklahoma, in a 7–2 decision, struck down the core provision of the Opt Out law as unconstitutional, doing so on the basis that the law favored one group of injured employees over another, based solely on whether the employer had chosen to stay within the classic, state-run system.

While Opt Out discussion often sucked the oxygen out of many workers' compensation debates and conferences during 2016, there were other important challenges afoot in other states, particularly Florida. Earlier this year, the Florida Supreme Court handed down its long awaited decision in *Westphal* and another important decision in *Castellanos*, both discussed below as well.

And so, as we put together the theme for this year's edition of *Workers' Compensation Emerging Issues Analysis*, my close colleague, Robin Kobayashi, and I settled on "Equal Justice Under the Law," since that term more or less encapsulates the common thread that seems to wind its way through all the important 2016 court decisions. Can state legislatures—often at the bidding of well-heeled employers—carve out special laws that eat away at the original workers' compensation bargain and yet continue to provide immunity from suit for employers?

Can lawmakers allow some employers to set up shadow systems of compensation law, with shortened notice and claim provisions, arbitrary statutes of limitations, restrictive definitions of injury, employer-managed medical care, and no real recourse to state courts where conflicts arise? Should employers be given "a choice" without a commensurate choice allowed for the employee? Does society sit back and watch, forgetting that it is supposed to be the third party at the work-related injury and illness table since significant costs may end up being shifted to the public sector?

Within this new edition, whether it is altogether satisfactory to do so, we have joined these questions into the "equal justice" theme. Do terms such as equal justice and due process still apply to work-related injuries and illnesses? We hope so. A great deal is at stake. Here follows a quick overview of five significant equal justice decisions during 2016.

Oklahoma Supreme Court Strikes Down State's Opt Out Law

As noted above, the most significant case this year—indeed in many years— was *Vasquez v. Dillard's, Inc.*, 2016 OK 89 (Sept. 23, 2016). Speaking for the majority, Justice Watt observed that the employer, Dillard's, had contended the Opt Out law was not a "special" law, since it applied to "all employers," rather than injured employees. The majority was unconvinced, noting the title of the Act made no mention at all of employers. Instead, it referenced "injured employees."

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Due Process, from Page 9.

The majority also cast aside Dillard's argument that the Opt Out law provided a baseline of "Core Coverage" in § 203(B), guaranteeing individual employees equal treatment, finding that position "incredible" [Opinion, ¶ 20]. The majority stressed that instead of providing employees of qualified plan employers equal rights with those of employees falling within the traditional Workers' Compensation Act, the "clear, concise, unmistakable, and mandatory language" of the Opt Out law provided that "such employers are not bound by any provision of the Workers' Compensation Act for the purpose of: defining covered injuries; medical management; dispute resolution or other process; funding; notices; or penalties [Opinion, ¶ 22, emphasis by the majority].

Nor was the Opt Out law related to any legitimate government objective. As noted above, the majority indicated the state could have no legitimate interest in treating one group of injured workers one way and another group of similarly situated workers differently based solely upon a choice that their employer had made. The majority added finally that the offensive provision could not successfully be severed from the Opt Out law. The majority indicated the decision applied not only to the *Vasquez* dispute, but also to all other pending cases. Opt out employers have 90 days from a subsequent order to be entered by the Court in order to secure the required coverage under the state-run system.

Oklahoma High Court Strikes Down State's 180-Day Cumulative Trauma Employment Rule

The Supreme Court of Oklahoma didn't just find fault with the state's Opt Out law, it also held an important provision in the "conventional," state-run system could not pass constitutional muster. In March 2016, the Court, in in *Torres v. Seaboard Foods, LLC*, 2016 OK 20 (Mar. 1, 2016), held the provision in Okla. Stat. tit. 85A, § 2(14) that disqualifies a claimant from recovering for a "cumulative trauma" injury unless the claimant has completed at least 180 days of "continuous active employment with the employer" was unconstitutional as violative of the Due Process Section of Oklahoma's Constitution [Art. 2, § 7].

Torres, a former employee, filed a workers' compensation claim alleging that she had sustained a cumulative injury arising out of and in the course of her employment with her former employer and that she needed surgery to treat the injury. The employer denied the claim, contending that Torres had not worked a continuous 180-day period and could not prevail under the restrictions contained in Okla. Stat. tit. 85A, § 2(14). The ALJ denied Torres' claim on that basis and the Commission affirmed.

Using a point that it would later take up in *Vasquez*, the Court said that the language of § 2(14) created two classes of employees alleging a cumulative injury and that there was insufficient reason to treat them so differently. Nor was the court persuaded that the state's interest in preventing fraud justified the disparate treatment since the 180-day bar provision prevented the filing of a non-fraudulent workers' compensation claim as well as a fraudulent one.

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Due Process, from Page 10.

Florida: 104-Week Limitation on TTD Benefits

In June 2016, a divided Supreme Court of Florida rendered its long-awaited decision in *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016), striking down as unconstitutional the state's 104-week limit on temporary total disability benefits [see § 440.15(2)(a), Fla. Stat.] for workers who are totally disabled and incapable of working, but who have not yet reached maximum medical improvement. The majority found that the provision violated article I, section 21, of the Florida Constitution, as a denial of the right of access to courts, since it deprived an injured worker of disability benefits for an indefinite amount of time, and in the process, created "a system of redress that no longer functions as a reasonable alternative to tort litigation" [Opinion, p. 2].

The majority said it could not rewrite a statute, like § 440.15(2)(a), that was plainly written. There was but one reading of the statute: the 104-week limitation on TTD benefits results in a statutory gap in benefits, in violation of the constitutional right to access to courts. The majority added that while the stated purpose of the workers' compensation law was to "assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer" [§ 440.015, Fla. Stat.], § 440.15(2)(a), Fla. Stat. operated in the opposite fashion. The majority concluded that for workers like Westphal, the workers' compensation law lacked adequate and sufficient safeguards and could not be said to continue functioning as a "system without contest" that stands as a reasonable alternative to tort litigation.

Some of the majority's language in *Westphal* may sound familiar. It echoes some of the points argued by the intervenors in the *Padgett* case discussed in last year's edition. They contended that over the years Florida workers' compensation benefits to injured workers had been eroded to the point that the workers' compensation law was no longer a reasonable alternative to tort litigation. In August 2014, Judge Jorge E. Cueto, Circuit Court for Miami-Dade County, agreed. He held the exclusive remedy provision of the state's Workers' Compensation Law [§ 440.11, Fla. Stat.] was unconstitutional. As reported last year, however, in *State of Florida v. Florida Workers' Advocates, et al.*, 2015 Fla. App. LEXIS 9531 (1st DCA, June 24, 2015), Judge Cueto's decision was repudiated, largely on procedural grounds. The majority's decision in *Westphal* shows that the underlying issues presented in *Padgett* have not gone away.

Florida: Mandatory Attorney Fee Schedule for Claimants

In another split decision, the Supreme Court of Florida, in *Castellanos v. Next Door Co.*, 2016 Fla. LEXIS 885 (Apr. 28, 2016), held that the mandatory attorney fee schedule contained in § 440.34, Fla. Stat., which precludes any consideration of whether the fee award is reasonable to compensate the attorney, is unconstitutional under both the Florida and the United States Constitutions as a violation of due process.

In the underlying case, through the assistance of an attorney, Castellanos prevailed in his workers' compensation claim. Because § 440.34 limits a claimant's ability to recover fees to a sliding scale based on the amount of workers' compensation benefits obtained, the fee awarded to Castellanos' attorney amounted to $164.54, $1.53 per hour for 107.2 hours of work, as determined by the JCC (note that the employer/carrier's attorney expended 115.20 hours in the case).

The majority of the Court indicated that in Florida, the right of a claimant to obtain a reasonable attorney's fee when successful in securing benefits had been considered a crucial feature of the workers' compensation law since 1941 and that the litigation of workers' compensation claims had become more complex to the detriment of the claimant, "who depends on the assistance of a competent attorney to navigate the thicket." The court said it immaterial that the fee schedule could, in some cases, result in a constitutionally adequate fee. The statute precluded every injured worker from challenging the reasonableness of the fee award. That was the statute's downfall.

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Due Process, from Page 11.

New Mexico High Court Strikes Down Farm and Ranch Laborer Exclusion

A provision of the New Mexico Workers' Compensation Act (Act) [N.M. Stat. Ann. § 52–1–6(A) (2015)] that excludes farm and ranch laborers from its protections, although other agricultural workers are not so excluded, is unconstitutional under the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution, held the state's Supreme Court, in a divided decision [*Rodriguez v. Brand West Dairy*, 2016 N.M. LEXIS 150 (June 30, 2016)].

The majority indicated that the farm and ranch laborers excluded by § 52–1–6(A) were similarly situated to other employees of agricultural employers with respect to the purposes of the Act. The majority concluded that there was no unique characteristic that distinguished injured farm and ranch laborers from other employees of agricultural employers. Moreover, such a distinction was not essential to accomplishing the Act's purposes.

The Pendulum Swings

It's likely an oversimplification, but some within the workers' compensation community say that our world is like a pendulum; it swings back and forth, sometimes favoring the employee, sometimes the employer. Employee-oriented interests appear to have had a good year. They would likely argue that 2016 is a single year and that it comes on the heels of a long period during which employers have been favored. As most of us know, it is often an issue of whose ox is being gored.

Currently, Oklahoma employer groups argue it's their ox that is feeling the pain. Those groups will continue to push back wherever possible. As one colleague recently quipped to me in a phone conversation regarding the Oklahoma Supreme Court's holding in *Vasquez*, there is some talk in the Sooner State of mounting a campaign to replace some of the *Vasquez* majority with justices that might be more employer-friendly. As I understand things, the justices are currently serving staggered six-year terms. It might take some time to replace the required number and even then, would they ignore the doctrine of *stare decisis*? Is equal protection primarily a matter of politics? I hope not.

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Due Process, from Page 12.

Tensions are mounting on both sides in Florida and several other states. There is even some push back from the federal level, where the increases in outlay for Social Security benefits is prompting some to suggest we need a set-aside system for permanent indemnity benefits to match the one already in place for future medical care. May we live in interesting times.

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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/.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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NAWCJ Celebrates Kids' Chance Awareness Week 2016!

THE WHITE HOUSE

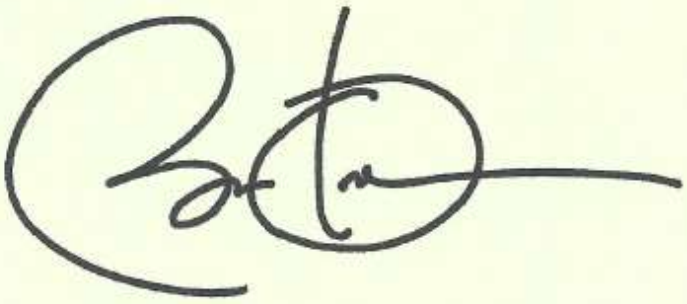
WASHINGTON

November 1, 2016

I send greetings to all those participating in Kids' Chance Awareness Week.

At the heart of the American story lies the belief that anyone, no matter what their circumstances are, should be able to make of their lives what they will—yet too many children around our country still face challenges when it comes to getting the education they deserve. By fighting to make a difference in the lives of young people who experienced a parent's work-related injury or death, you are helping put opportunity within reach for our Nation's rising generation. This important work is helping America's daughters and sons achieve their dreams and is integral to building a more vibrant, more prosperous future for all.

As you mark this week and continue striving to help people pursue their education and their aspirations, you have my best wishes.



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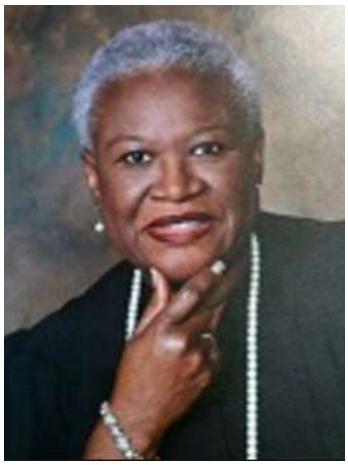
From the Pages of workcompcentral

OWCA Grapples With Medical Treatment Guidelines, Opioid Abuse

By J. Todd Foster
November 1, 2016

The head of Louisiana's workers' compensation agency said Monday that making the state's five-year-old medical treatment guidelines more user friendly is her top immediate priority and that ultimately she wants to create an integrated e-filing system as well.



Newly inaugurated Gov. John Bel Edwards in January appointed longtime workers' compensation Judge Sheral Kellar to director of the Louisiana Workforce Commission's Office of Workers' Compensation Administration. Insurance groups say Kellar has her work cut out for her.

Kellar hosted a series of town hall meetings for stakeholders across Louisiana in September and got an earful. "It confirmed my suspicions that there were some problems for our stakeholders," she said in a telephone interview on Monday. "There are a variety of problems that make it difficult to navigate the process by which we implement medical treatment guidelines." Louisiana has many lingering problems holding back its workers' compensation system, the American Insurance Association says. Among them: employee misclassification, confusing medical treatment guidelines, the lack of a closed formulary and — the biggest issue of them all — opioid overprescribing.

Louisiana physicians wrote 4.8 million opioid prescriptions in 2015 in a state with 4.65 million residents, the Times-Picayune reported Sept. 22. Between 2004 and 2014, 6,088 Louisianans died from drug overdoses, mostly prescription opioids and heroin, the newspaper reported. During that same decade, pharmaceutical companies and their allies made more than $1 million in political contributions in Louisiana.

The Associated Press and Center for Public Integrity found during a joint investigation whose conclusions were published in September that a little-known coalition called the Pain Care Forum spent more than $740 million from 2006-15 to lobby federal and state lawmakers across the country about the importance of painkillers, and donated more than $140 million to their political campaigns. An email to the Pain Care Forum went unanswered Monday. "The mother's milk of politics, of course, is money," said Fred Bosse, an AIA vice president for state affairs. "Because of people interested in perpetuating the status quo, it's easy to understand that change is hard to come by.

"Every system can use fine-tuning," Bosse said. "But I think in Louisiana, we've had a long period where we haven't been able to get improvements addressed. Louisiana is a challenging environment and that has a lot to do with their fiscal situation. They've had a very, very difficult budget shortfall that they've spent a couple of special sessions trying to address."

Continued, Page 17.

Opioid Abuse, from Page 16.

A bill drafted last year by the Louisiana Association of Self Insured Employers to create a closed drug formulary did not make it past the Workers' Compensation Advisory Council, a 17-member panel that advises the Legislature on draft reform proposals. The council held its first meeting in six months last week after the governor stocked it with new appointments and reappointments.

LASIE and the Property Casualty Insurers Association of America want a formulary because Louisiana's opioids epidemic is statistically worse than most other states. "Closed formularies can be very effective in preventing inappropriate and harmful drug dependence, especially if the drug formulary can be integrated seamlessly with the treatment guidelines," said Trey Gillespie, PCIAA assistant vice president for workers' compensation. "Long-term opioid use is associated with poor return-to-work and health outcomes."

LASIE Executive Director Gary Patureau said he expects the formulary bill, HB 725, to pass after the Legislature convenes its 2017 session April 10. "We'll pass the pharmacy formulary bill next year," Patureau said. "The situation's gotten much more dire. There's more of a political will to make it happen. A formulary would not just address opioids but all narcotics. "The main goal, of course, with this pharmacy formulary bill is to dovetail directly into our medical treatment guidelines so that injured workers will have two very good tools to ensure they get appropriate care and return to work. We don't do that now in Louisiana. We don't return people to work. We have one of the highest duration rates in the country," he said.

Metairie defense attorney Joe Guilbeau emailed Monday that "a drug formulary is sorely needed to close one of several areas of charging abuse by the medical providers." The Louisiana State Medical Society declined to comment.

Kellar, who served as a workers' compensation judge for 25 years before being named OWCA director, said she is not opposed to a formulary as long as injured workers are not singled out as the face of the opioid epidemic. "Many people would suggest it's a workers' compensation problem, and I don't believe it is," she said. "I believe it's a general health care problem. We need to address it in the context of general health care and hit injured workers as well."

Julie T. Cherry, a longtime advisory council member who represents the Louisiana AFL-CIO, said she wants the medical community to take the lead on combatting the opioids epidemic. She does not oppose a formulary on principle but said it would be "difficult to support" without knowing how it would be implemented. "It's dangerous because it can be used as a means of denying treatment," she said, noting that some payers are using the medical treatment guidelines for the same purpose. "We still have some payers on a learning curve, and unfortunately, we have some payers who manipulate the guidelines to slow up treatment," Cherry said.

Continued, Page 18.

Interesting Workers' Compensation Blogs

Law Professor's Blog
http://www.lawprofessorblogs.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
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O*pioid Abuse, from Page 17.*

The OWCP on Monday published in the Louisiana Register proposed changes to the medical treatment guidelines under Chapters 25, 27, 51, and 53 of the Louisiana Administrative Code. The proposed amendments won't save money directly but will benefit all stakeholders by maintaining consistent medical billing and coding procedures, regulators said in the Register notice. Kellar said that if she can fix through administrative rule-making the problems with the medical treatment guidelines and also move the system to e-filing, "I think I would have done a great deal."

Unlevel Playing Field?

By Sherri Okamoto
November 10, 2016

Editor's note: This is the third in a five-part series published in the Word on Workers' Compensation report, presented Saturday at the fifth annual WorkCompCentral Gala and Comp Laude Awards in Burbank.

Spending on defense and claimants' attorney fees in Florida was about even before passage of a reform bill in 2003 that removed a requirement that claimants' attorneys be "reasonable." Afterward, spending on claimants' attorneys plummeted to the point that defense attorneys are now paid nearly two-thirds of the total.

Ideally, states that cap workers' compensation attorney fees find a Goldilocks formula generous enough to ensure adequate representation for injured workers but miserly enough to protect employers from the expense of undue litigation. But appellate court decisions in Florida and Utah earlier this year showed how precarious it can be for employers and insurers to rely on any attempt by state lawmakers to find middle ground.

The Florida Supreme Court in April ruled that a statutory fee cap that limited an attorney's rate of pay to $1.53 an hour violated claimants' due-process rights.

The Utah Supreme Court in May ruled that state lawmakers have no business setting attorney fees because the state Constitution grants the judicial branch exclusive authority to regulate the legal profession.

The Florida high court's decision in *Castellanos v. Next Door Co*. was based on broader due-process principles that are more likely to spread to other jurisdictions. In essence, the court ruled that state lawmakers had violated claimant Marvin Castellanos' constitutional rights by passing a reform bill that removed the requirement that fees be "reasonable" and required strict adherence to the statutory formula. The National Council on Compensation Insurance projected that the return of the mandate that attorney fees be reasonable would increase costs by 15% to 18.1% and recommended a 19.6% rate increase. Insurance Commissioner David Altmeier decided that a 14.5% increase was sufficient, with about 10% of that attributable to Castellanos.

The high court's ruling applies to all claims dating back since the statute took effect in 2003. That immediately created a $1 billion unfunded liability for workers' compensation insurers, according to an actuarial analysis by NCCI. Even before NCCI released its projection, American International Group increased its workers' compensation reserves by $109 million in reaction to the ruling. Michael J. Winer of Tampa, one of the attorneys who represented Castellanos, said the lesson is that balance is needed when determining the appropriate level of compensation for legal services to injured workers. "If fees are too low, justice for individual clients and the public suffers," Winer said. "But if fees are too high, the credibility of the legal system is called into question."

Different approaches

States that set no maximums at all for workers' comp attorneys are the exception, not the rule. But there's a wide variation in both methods and the amount of the caps.

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Playing Field, from Page 18.

Florida's statutory formula set maximum fees at a variable percentage of benefits, starting at 20% of the first $5,000 in benefits secured for a client, 15% of the next $5,000 and 10% of any amount secured in excess of $10,000. What ran afoul of the state Constitution is the unyielding nature of those caps. The statute made no allowances for any variations.

In addition to Florida, at least 20 states limit attorney fees by a percentage of benefits awarded. The District of Columbia does, as well. Other states set maximum hourly rates, which are sometimes coupled with a total-dollar ceiling. Some of those caps apply to claimants' attorneys only, but other states cap fees for both the claimants' and defense attorneys.

West Virginia limits a worker's attorney fees to $125 per hour, and Vermont has a cap of $145 on fees awarded to a claimants' attorney by a workers' compensation commissioner.

The maximum hourly rate for claimants' attorneys in North Dakota is $150, but attorneys are also subject to a series of caps on their total compensation depending on how far a case is litigated. If a matter makes it all the way to the state Supreme Court, a North Dakota attorney can recover a fee of no more than $11,300.

Texas caps hourly fees at $150 for both sides of bar, but the Division of Workers' Compensation has proposed a rule change that will increase the maximum to $200 per hour, on Jan. 1. That will mark the first increase since the fee caps were adopted 25 years ago.

Not all fee caps are tied to disability benefit awards. According to the Workers' Compensation Research Institute, Colorado, Minnesota, New Hampshire, Oregon and Tennessee have provisions to allow a fee for an attorney in "medical-only" disputes — but Arkansas, Oklahoma, Georgia and Maryland generally prohibit an attorney from getting a fee based on medical benefits or services.

Happy campers

Other states have kept workers' comp attorneys relatively happy by allowing fees beyond a fixed percentage of benefits for complex cases, or simply by capping fees at a higher percentage of benefits.

Illinois limits attorneys who represent injured workers to a fee equal to 20% of the client's recovery, up to an amount equal to 20% of the value of 364 weeks of permanent total disability payments. However, Illinois attorneys can petition an arbitrator or the Workers' Compensation Commission for a fee in excess of the 364-week fee cap, and it's "not unusual" for attorneys to do so, said Marc Perper, a claimants' attorney and partner with Horwitz, Horwitz & Associates in Chicago.

As the standard Illinois fee agreement provides for a 20% contingent fee, Perper said he believes that the best practice for an attorney wishing to charge a fee in excess of 20% is to enter into a written agreement with the client setting forth the fee percentage for which the attorney ultimately intends to seek approval. In his experience, Perper said, "more often than not," the fee petitions are granted, particularly where the client has no objection to the increased fee.

Given the leniency of the cap, Perper said he had "no serious complaints" with it.

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On the defense side, Jason Kolecke of Hennessy & Roach, and Mark Cosimini of Rusin, Maciorowski & Friedman, both said the 20% cap hasn't been a controversial or contentious issue in any of their cases, and they haven't heard any grumbling about it from opposing counsel.

In Pennsylvania, too, workers' comp attorneys say they've heard few complaints about the the state's hard cap on attorney fees at 20% of benefits secured, which state lawmakers enacted in 2006. That change withstood a constitutional challenge in 2011. Pennsylvania Workers' Compensation Judge David Torrey said the hard cap that has existed since then doesn't seem to be a sore spot for attorneys.

Larry Chaban, a past chairman of the Pennsylvania Bar Association Workers' Compensation Section and a claimants' attorney with the Alpern Schubert law firm in Pittsburgh, said adoption of an absolute ceiling really hasn't been a big deal because most attorneys never tried to claim a fee in excess of 20%. Vincent Quatrini, a claimants' attorney with Quatrini Rafferty in Greensburg, said Pennsylvania's fee structure generally produces enough income for attorneys to recoup the money they invested on cases they don't win, and allows them the "luxury" of being able to take on cases that may not provide a "good fee, but can make good law."

In Ohio, fees are capped at 33.33% of a worker's award from the Industrial Commission, according to Philip Fulton, a claimants' attorney and author of the "Ohio Workers' Compensation Law" treatise. While this is a larger percentage than what's allowed in most other states, Fulton said the amount of the awards workers get generally are not very large because most injured workers do not get sizable awards. He said attorneys "either have to do a very high-volume practice, or other types of law," to make ends meet.

Legislature vs. judiciary

Michael C. Duff, vice chairman of the Workers' Compensation Committee of the American Bar Association's Tort Trial and Insurance Practice Section and a professor at the University of Wyoming College of Law, said regulating the workers' comp system is tricky because the system involves participation of all three branches of government. That necessarily creates some "ambiguity with respect to separations of power."

With Utah now a notable exception, Duff said state legislatures are generally free to "do just about anything they want," as long as they aren't "intermeddling with fundamental rights" and have a "rational basis" for their actions. In many states, Duff said, lawmakers decided to "make it harder for claimants to have access to attorneys" because of a belief that "attorney involvement increases the expense of claims." Often those controls are based on a percentage of benefits, which invariably causes lawyers to overlook cases that don't involve large disability benefit awards.

Duff said he didn't enjoy working under a fee schedule when he was in private practice as a claimants' attorney in Maine from 1995 to 1997. "I was unable to provide representation in many cases striking me as clearly meritorious," he said.

Still, Duff said he likes Wyoming's approach to attorney fees. It has a monopoly state Workers' Compensation Fund that pays a flat fee of $150 per hour to a claimants' attorney, regardless of the outcome of the case. Defense attorneys have the same cap on their fees. Duff acknowledged such a program would be "a political non-starter" in many other states. He said the next best thing would be to have a fee schedule set by the legislature, with allowances for an attorney to petition a court for a higher fee for exceptionally complex cases.

The problem, said Duff, is that legislatures sometimes stray too far toward cost containment and away from ensuring adequate representation. Duff said the problem for Florida was that the Legislature established a fee schedule that made no recognition of differences in the difficulty of cases, and "represented an attempt by the Legislature to assume plenary control of attorney fees." Duff said that it'd be more likely for the type of analysis done by the Florida court to spread to other jurisdictions than the Utah Supreme Court's reasoning, as the outcome of the Utah case turned on the fact that the state had a constitutional provision placing the practice of law under the supervision of the judiciary.

He said he didn't think this means lawmakers would "give up on fee schedules," and his hope is that the schedules "will be closely supervised by the judicial branch." But, he cautioned, "anytime a legislature tries to wrest complete control over a subject, it's going to get a judicial response."

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Playing Field, from Page 20.

Trouble spots

Around the country, attorneys are working to make sure the judicial branch keeps a close eye.

Even though Florida attorneys won a victory with the high court's ruling that their fees must be reasonable, legal battles over work comp attorney fees continue. In August, the Florida 1st District Court of Appeal ruled in *Miles v. City of Edgewater* that limiting a worker's ability to retain counsel under a contract that provides for the payment of a reasonable fee for the attorney's services violates the worker's constitutionally guaranteed right to free speech, freedom of association and right to petition for redress.

The decision "creates an absolute right of worker to contract for representation at an hourly rate" in Florida, and it could be persuasive precedent for challenging a the law in "any state that has fees tied exclusively to a fee schedule and restricts the ability of a worker to go out and hire an attorney on an hourly basis," said attorney Geoff Bichler of Bichler, Kelley, Oliver & Longo in Maitland. He represented Martha Miles in the case before the appellate court, along with Winer, who is mentioned above.

In Texas, where state regulators have proposed to tack an extra 33% onto hourly fees and bring the hourly rate to $200, some attorneys are still demanding greater flexibility to ensure that injured workers are not left without an advocate.

Texas attorney Brad McClellan, of counsel for the Law Offices of Richard Pena in Austin, has two cases pending at the district court in Travis County in which he is arguing that the failure to provide for an attorney fee in medical-only disputes is unconstitutional. In *Dixon v. TDI*, and *FedEx v. Trejo*, McClellan is seeking a declaratory judgment that the inability of an attorney to get a fee in medical treatment disputes violate the rights guaranteed by Article 1, Section 13, of the Texas Constitution. This provision requires that courts "be open" for every person to seek a remedy "for an injury done him." McClellan is arguing this section "includes at least three separate constitutional rights: 1) courts must actually be operating and available; 2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and 3) meaningful remedies must be afforded.

McClellan said the way the Texas attorney fee limit is written, the only way an attorney can get paid is by taking a chunk of a worker's award of indemnity benefits. If there are no indemnity benefits in dispute, then there's no potential fee for the attorney, he explained. The worker can't offer to pay an hourly fee either, since the statute expressly limits fees to 25% of indemnity, McClellan said. The end result, he said, is that workers in medical-only cases "go pro se, and they usually lose."

Continued, Page 22.

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CourtCall has been a proud sponsor of the NAWCJ for the past two years, and has enjoyed the opportunity to exhibit at the Judicial College in Orlando.

Michael Wapnick (Associate Member status pending) oversees CourtCall's Workers' Compensation Division and can be reached at: MichaelW@courtcall.com or (888) 882-6878 ext. 884.

Playing Field, from Page 21.

McClellan said he also dislikes the idea that fees come out of a claimant's recovery when there is an indemnity award. "When were taking about a limited recovery to begin with," and a worker "already can't pay his bills and things," McClellan contended "it's just not right" to have an attorney taking money away from the worker. With the absence of a bad faith claim in Texas, he said carriers can wrongfully deny a claim without fear or reprisal, and when a worker challenges this action, the attorney fee serves as "a penalty, basically, for being right."

McClellan said he thought that the rule should be that any time a carrier disputes a claim, it should be liable for the claimant's reasonable attorney fees. "That would bring a little more attorney representation into the Texas comp system, and it wouldn't penalize the worker for prevailing," he said.

On the other hand, Texas has an Office of Injured Employee Counsel that can handle complex cases with low value that private attorneys don't want to take, points out Trey Gillespie, senior workers' compensation director for the Property Casualty Insurers Association of America.

Several states — including Kansas, Maine, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, New York, Oregon, North Dakota, South Carolina, Tennessee and Washington — also provide injured workers with the assistance of ombudsmen or public advocates, free of charge.

Gillespie said the Texas OIEC provides workers with "competent and qualified representation" at no cost. And for that reason, he doesn't think Texas is as vulnerable to the type of constitutional challenges that rattled Florida this year.

Free markets

Some states stay completely out of fee-setting business for workers' comp attorneys. Laws in Connecticut, Hawaii, Maryland, Montana, North Carolina, New York, Oregon, South Carolina and Virginia require only that attorney fees be reasonable.

Nebraska attorney Roger Moore, of Rehm, Bennett & Moore in Lincoln, said a comp system needs to give workers the ability to hire an attorney under a contingent fee arrangement. A cap on fees — as either a percentage of recovery or a dollar amount, "forces attorneys to take a very restrictive view of cases," he said. Moore said he believes most claimants' attorneys in Nebraska take a contingent fee "in the one-third range." He said he wasn't aware of anyone who tried to take more.

John C. Fowles, a fellow Nebraskan and claimants' attorney with the Fowles Law Office, said he generally sees agreements in the 25% to 33.3% range. He said the Workers' Compensation Court is "not overly difficult about fees" that stay within those parameters. He said he never heard of an instance where the court told anyone, "Your fee is not appropriate." But the lack of fee controls still doesn't mean that claimants always get representation. Fowles said he has turned away potential clients with low-value indemnity claims because it was unlikely his fee would be enough to offset his investment of time.

Missouri regulators keep their hands off attorney fees as well, as long as a hearing officer deems the fees reasonable. Martin Klug, a defense attorney with Huck, Howe & Tobin in St. Louis, said "as a matter of custom, fees are typically 25% of a worker's recovery." He said that custom probably serves as a disincentive for attorneys to take low-value claims. Workers tend to "lawyer up on big cases and go pro se on smaller ones," he said.

Continued, Page 23.

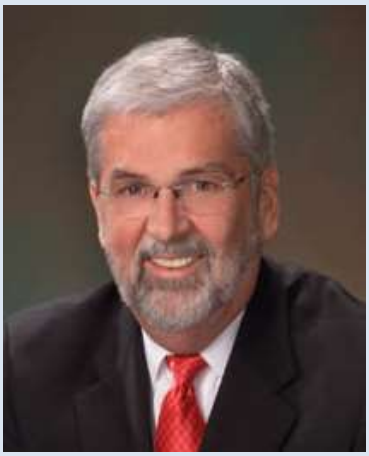
Paying Field, from Page 22.

California also has a requirement that attorney fees be "reasonable," in light of the responsibility assumed by the attorney, the care exercised in litigating the case, the time spent by the attorney and the results obtained. California defense attorney Tim Kinsey of Grancell, Stander, Reubens, Thomas & Kinsey said that from what he's seen, most workers' compensation judges treat 15% as meeting the state's "reasonable" standard, and his opponents do not complain about this. He said he believed the percentage tends to stay low so it "won't preclude a worker from getting an attorney" and so the worker's recovery "won't be substantially reduced" by the attorney's fee.

Alan Gurvey of Rowen, Gurvey & Win in Sherman Oaks, California, said fees present a conundrum for the attorneys, like him, who represent injured workers. "The system says that we are entitled to a percentage of their recovery and of their benefits, but many of my clients need the money and it is hard to justify taking more money from them," he said. Gurvey said it's possible to get a fee above 15% in cases involving claims involving retaliation, employer misconduct or penalties, but the amount usually has to be included in a retainer agreement signed by the worker when the attorney is hired. Most of the time, the 15% mark is the "de facto" ceiling, he said, and attorneys very rarely ask for more, as the extra money "would come from the applicant's pocket."

The articles on pages 14-21, *OWCA Grapples With Medical Treatment Guidelines, Opioid Abuse* and *Unlevel Playing Field?* 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.

Kentucky Commissioner Dwight Lovan Announces Retirement



Kentucky Commissioner Dwight Lovan has announced that he will retire December 31, 2016.

Commissioner Lovan received his Bachelor's degree from Baylor University and J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1977, Commissioner Lovan then worked as a staff attorney for the Kentucky Court of Appeals with responsibility for workers' compensation appeals for 15 months. From 1979 to 1990 he practiced law in Owensboro, concentrating in the areas of workers' compensation and civil litigation. In May of 1990, Commissioner Lovan was appointed Administrative Law Judge (ALJ) and remained in that position until August of 1994 when he was named to the Kentucky Workers' Compensation Board. The Board adjudicates all appeals from the decisions of Kentucky's ALJs. Between July 2000 and January 2004, Commissioner Lovan served as Chairman of the Kentucky Workers' Compensation Board before returning to private practice in the firm of Jones, Walters, Turner and Shelton. By executive order signed on February 7, 2008, Dwight was appointed to serve as the Commissioner of the Department of Workers' Claims.

Commissioner Lovan has served on innumerable committees and has been a frequent public speaker on workers' compensation. He has been a consistent leader, and is a former President, of the Southern Association of Workers' Compensation Administrators.

2017 ZEHMER MOOT COURT

SAVE THE DATES!!!!

The E. Earle Zehmer National Moot Court Competition will be held at the Orlando World Center Marriott from August 5th – 7th, 2017 in Orlando, Florida.

This competition affords students the opportunity to argue in the preliminary and quarterfinal rounds before sitting workers' compensation judiciary from across the country. The semi-final rounds are judge by retired Judges of Compensation Claims with the final round argued before presiding Judges from the First District Court of Appeals of the State of Florida.

Most competition expenses are generously covered by the Workers' Compensation Institute, including travel to/from the competition (mileage or reasonable coach airfare for out of state competitors); hotel accommodations for two nights; a meal per diem for two days, and copy costs. Please encourage all law schools in your state to consider participation and pass along this information to the law school deans and/or Moot Court Boards. Should you have any questions about the competition, please direct those to one of the following:

Judge Jennifer Hopens
jennifer.hopens@tdi.texas.gov
Jacqueline Steele
jsteele@mcconnaughhay.com
Judge David Langham
david.langham@doah.state.fl.us
Judge Michael Alvey
michael.alvey@ky.gov
Judge James Szablewicz
james.szablewicz@workcomp.virginia.gov

Ten Minutes with Hon. Bruce Moore

Ed. Note: This is the first in a series of interviews with NAWCJ Board members and officers regarding their responsibilities and lives.

L&V: What is your formal title?

BEM: Administrative Law Judge for the Kansas Department of Labor, Division of Workers' Compensation.

L&V: How long have you been at your current position?

BEM: I joined what was then the Kansas Department of Human Resources, Division of Workers' Compensation, as an ALJ in October, 1995.

L&V: Where is your office?

BEM: My main office and courtroom are in Salina, Kansas, but I "ride a circuit" that includes 36 of Kansas' 105 counties, or about a third of the state. I hear cases in Salina and four other cities. When not in Salina, I use District Court courtrooms in those other cities.

L&V: How many judges are in your office?

BEM: Just me. My Administrative Assistant, Sandy, and I share our office suite with three other Department of Labor employees in the Unemployment Tax Division.

L&V: How many workers' compensation judges are there in Kansas?

BEM: There are ten of us spread across five offices throughout the state.

L&V: What is your caseload like?

BEM: At any one time, I usually have about 800 open files assigned to me, give or take. I hold hearings four days per week, Tuesday through Friday. Mondays are usually spent catching up on orders, conducting telephone conference calls and preparing for the upcoming week. I usually have 5 or 6 hearings set on each morning and afternoon docket, Tuesday through Friday. On out-of-town dockets, I schedule about twice as many hearings, but I don't break for lunch. We go until the docket is done.

L&V: Are you required to apply the Rules of Evidence in your hearings and decisions?

BEM: Technically, no, but ultimately, my decision must be based on "substantial competent evidence." Evidence that doesn't meet the standards of the rules of evidence may not be either substantial or competent.

Continued, Page 26.

Hon. Bruce Moore, from Page 25.

L&V: Do you rule from the bench?

BEM: Yes, whenever I can, particularly in preliminary hearings, where entitlement to medical treatment and/or temporary total disability benefits are at stake. If I need time to review the evidence and/or research the issue, I must enter my order within 5 days of the close of the record in a preliminary hearing. At the ultimate trial to determine permanent impairment or disability, I cannot rule from the bench, as both parties have the right to supplement the record for a period of time after the trial. Once the parties have completed their submission of evidence, I have thirty days to issue a final written Award.

L&V: What did you do before you became a judge?

BEM: I was a county prosecutor for about 4 years before becoming an ALJ. Before that, I was in private practice in the Kansas City area. I had a general civil practice, doing collections, divorces, criminal defense and personal injury work. I represented both claimants and employers/insurance carriers in workers' compensation proceedings.

L&V: Why did you want to be a judge?

BEM: Obviously, it was the immense wealth and power of the position! Seriously, I always wanted to be a judge, and have been fortunate to have served as a district court judge pro tem, and as a municipal court judge pro tem. The opportunity to become an ALJ seemed like a natural choice.

L&V: What do you like the most about judging?

BEM: I enjoy the challenge and responsibility of controlling my courtroom and my docket. Every day presents new challenges and issues. The best part of my job is that I get to do what I love, and I don't have to keep time records or chase clients for unpaid fees.

L&V: What do you do to relieve the stress of judging?

BEM: I spend most of my lunch hours either at the Salina Animal Shelter or at home tending to my "foster kittens." At the shelter, I socialize traumatized and bewildered cats and kittens that have either been picked up by Animal Control or dropped at the shelter by the public. I work with cats and kittens to make them less fearful and more social, keys to getting them adopted as quickly as possible. I also foster pregnant or nursing mother cats, as well as orphan kittens. Focusing on calming a young animal helps calm me, as well. A lap full of purring kittens is a magical mental health balm!

L&V: Are you active in the legal community?

BEM: Yes, but more on a national level. I have been on the faculty of the National Judicial College in Reno, Nevada, since 2009, and teach on average once or twice per year. I am also honored to be serving NAWCJ as Secretary, and on the Curriculum Committee for NAWCJ's annual judiciary college in Orlando in August.

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Hon. Bruce Moore, from Page 26.

L&V: Are you active in your community?

BEM: Yes, I enjoy doing volunteer work. I have served as the president of two Rotary Clubs and on the boards or committees of several non-profits, including the United Way, the Boy Scouts, Hospice and the Salina Community Theatre. These activities enable me to meet a lot of people and develop friendships and working relationships with people outside the legal community.

L&V: Tell us about your family.

BEM: I've been married to my wife, Julie, for 36 years. Julie is a pathologist. She serves as the supervisor of laboratory services for the local medical center, and co-owns a reference laboratory that services hospitals and clinics across north-central Kansas. We have three grown children, but no grandchildren.

L&V: What are your hobbies?

BEM: I have a pilot's license, but don't fly much anymore. I love to scuba dive, but in the middle of Kansas, meaningful opportunities are limited. I like to read (Stephen King is one of my favorite authors). I have a 1954 Chevrolet 3100 Series pickup truck that I have been restoring for the last 20+ years. And then there are the animals . . . In addition to our own four cats and three dogs, I usually have 5-10 foster cats and kittens to feed, play with, and clean up after. With regular chores, "Honey, do"- lists, and all the other things going on around me, I always seem to have something I need to do.

L&V: What do you see as the value in your association with NAWCJ?

BEM: NAWCJ has provided me the opportunity to meet other workers' compensation adjudicators from around the country, and to learn that we all face many of the same issues and challenges in our roles as judges. I've met some really intelligent, motivated and talented people. We can all learn from one another, and the exchange of ideas and perspectives fostered by NAWCJ will help me become a better judge.

L&V: Do you have any words of wisdom you would like to share?

BEM: Find a reason to laugh; every day. A little bit of mirth can go a long way in fending off the madness of this crazy world we live in.

New Jersey Announces Supervising Judges

In November, Director and Chief Judge Russell Wojtenko announced Supervising Judges effective January 1, 2017.

The Hon. Maria Del Valle Koch will be the Supervising Judge of the Plainfield vicinage (district).

The Hon. George Gangloff will be the Supervising Judge of the Camden vicinage.

The Hon. Lionel Simon, Ill has been appointed the Administrative Supervisory Judge for the Vicinages of Freehold, Mt. Holly, and Camden.

Administrative Supervisory Judge Bradley Henson, Sr., will now supervise the Toms River, Atlantic City, and Bridgeton vicinages.

Administrative Supervisory Judge Ingrid French will continue to supervise the Trenton, Lebanon, and Mt. Arlington vicinages.

Administrative Supervisory Judge Philip Tornetta will supervise the Newark, Hackensack, and Paterson vicinages.

Administrative Supervisory Judge Ashley Hutchinson will supervise the New Brunswick, Plainfield, and Jersey City vicinages.

Cannabis > Opioids?

By: Mark Pew*

The title of an article published in the Santa Fe New Mexican on November 4 certainly piqued my interest - "Advisory panel backs medical cannabis as tool in opioid war." While not binding or official until the Health Secretary decides how to proceed, the advisory board to the New Mexico Medical Cannabis Program voted 5-1 to add "opiate use disorder" to the list of qualifying conditions. Let that sink in for a little bit.

> The proposal drew support from health professionals, addiction specialists and lawmakers. Medical Advisory Board Chairman Dr. Mitch Simson cast the only vote against adding opioid addiction to the cannabis program, saying he was concerned about substituting one addiction for another.

So there you have it, the argument distilled into two simple sentences. Can cannabis help resolve our opioid epidemic? Or are we just trading one problem for another?

I heard this argument when lobbying for HB 195 earlier this year in Santa Fe that would have removed the case precedent requirement for Work Comp to reimburse injured workers for medical cannabis. Opponents of the bill made the argument that opioids are dangerous (I've been preaching that since 2003) and that cannabis could help resolve the epidemic. Proponents of the bill were mostly focused on the financial and legal repercussions but there certainly were concerns about sanctioning marijuana use by reimbursement.

I was quoted in a WorkCompCentral article today (subscription required) as follows:

> Is it (cannabis) a solution for the opioid issue? That may be in the eye of the beholder. If it supplants opioids in the treatment regimen, you could make the argument that it is. If it doesn't, you could say it's adding more fuel to the fire.

Given that there are six states I know of where Workers' Compensation has reimbursed for medical cannabis use (New Mexico, Maine, Minnesota, Connecticut, Massachusetts, New Jersey) ... and that recent decisions on reimbursement have often been based on medical efficacy and not concerns about Federal illegality (and in some cases were voluntary, not mandated) ... and that last Tuesday eight of nine states with ballot initiatives about marijuana received voter approval ... you can see how we've gotten to this point.

I usually ask three questions when I'm presenting on this subject. Granted, my audiences typically are Work Comp focused and payer-centric, but at times they have been broader in scope. The questions are:

How many of you think that cannabis is part of the solution to our opioid epidemic? Typically 10-15% will raise their hands.

How many of you think that cannabis is absolutely not part of the solution to our opioid epidemic? Typically 10-15% will raise their hands.

How many of you haven't decided yet and are open to either possibility? The remainder (70-80%) raise their hands.

I've seen this bell curve repeated so many times that I think it's truly reflective of where we are as a country. New Mexico has been #1 (!) on a variety of fronts. They were the first to have reimbursement mandated. They were the first to establish a fee schedule for reimbursement ($12.02 per dry gram). And now they may be the first to explicitly allow cannabis to be used to facilitate and make permanent weaning from opioids and other dangerous prescription drugs. Obviously, the Medical Cannabis Program is not exclusive to Work Comp, but it's naive to think that it will not have an effect.

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Oioids, from Page 28.

I don't have any insight into whether Health Secretary-designate Lynn Gallagher will accept the advisory council's recommendation. But given the politics I saw play out earlier this year in Santa Fe it would not surprise me if she did. And since her bio lists being "committed to working to prevent and treat substance abuse," it's easy to see how this message might resonate with her.

I found this interesting quote attributed to Anita Briscoe, an advanced practice registered nurse in Albuquerque who apparently was used by the advisory council as a subject matter expert:

> ... about 25 percent of her patients struggling with opioid use disorder have told her that cannabis soothes their cravings, relieves their pain and helps them stay off opiates. Three of her colleagues who certify patients for medical marijuana cards estimated that together, they've seen about 400 patients successfully kick opioid addictions with the help of cannabis.

Statistics? Yes. Anecdote? Yes. Scientific? No. Accurate? For the 400 people mentioned above, a reasonable person would probably say yes. Since dealing with chronic pain and overcoming addiction are highly individualized, science is somewhat less important than the anecdote of what works for that person at that time (NOTE: Choices should always be guided by evidence based medicine). So is the proposal yet another milestone in our national discussion on the benefits (or lack thereof) from cannabis? I don't know. But I'm confident this will further fuel the conversation on its merits (or lack thereof). And make managing a safe workplace even more complicated. If you thought this was an issue that is going away . . ..

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* Mark Pew, Senior Vice President of PRIUM, has been focused since 2003 on the intersection of chronic pain and appropriate treatment. That ranges from the clinical and financial costs of opioids and benzos, to the corresponding epidemic of heroin use, to the evolution in medical cannabis. Educating is his job and passion. Contact Mark at mpew@prium.net, on LinkedIn at markpew, or on Twitter @RxProfessor.

Kentucky Court Says Commission May Proceed with ALJ Nominations

Last spring, Kentucky abolished and recreated its Nominating Commission for workers' compensation judges. That ended various commissioners' terms, and the recently elected Governor appointed all of the members of the newly created Commission.

A lawsuit was filed regarding separation of powers and gubernatorial authority. The challenge asked the courts to prevent the operation of the new commission. As a result, for much of the last 6 months, the sitting Kentucky Administrative Law Judges (ALJ) have been doing their best to maintain docket control and render timely decisions. Kentucky law allows up to 19 ALJs. There are currently 12 serving, and there has been a recent history of 18 serving. There has thus been reference in the news to "6 vacant positions."

The Glasgow Daily Times recently reported that the Circuit Court has ruled that the Governor may "go ahead and appoint workers' compensation judges nominated by members of a new commission he appointed." In so ruling, the Circuit Judge "amended an earlier temporary injunction to allow Bevin's newly appointed members of the commission along with one holdover from the original commission to send the governor nominations for the vacancies."

Kentuckians will see progress from this decision. Certainly, there is the matter of perspective. Some may see it as positive progress and others as negative, but it is movement nonetheless. It will allow the new Commission to conduct interviews and propose candidates for appointment. In Kentucky the Commission nominates, the Governor appoints, and then the Senate has to confirm.

U.S. Supreme Court Politics and Why Florida May Not Produce the Test Case on Workers' Compensation Benefit Adequacy

By: Michael Duff*

When the U.S. Supreme Court denied cert in *Stahl v. Hialeah Hospital* earlier this fall, certain commentary around the blogosphere seemed to suggest that the reason for the declination was a lack of interest on the Court's part in the application of federal due process floors to state workers' compensation. As everyone will recall, there is an argument that *White* hinted at some required baseline of adequacy for workers' compensation benefits (see my article on these issues here). The problem is determining upon what the baseline could have thought to be grounded by the Court writing in 1917. The Court has assiduously avoided writing more on the adequacy of workers' compensation benefits, specifically, or more generally on the question of some measure of adequacy in connection with personal injury damages. However, Justice White, writing in dissent on the occasion of the Court's dismissal of a Petition for Cert of the California Supreme Court's upholding of California's medical malpractice damages limits in *Fein v. Permanente Medical Group,* 695 P.2d 665 (Ca. 1985), stated as follows:

> Whether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely that more States will enact similar types of limitations, and that the issue will recur. I find, therefore, that the federal question presented by this appeal is substantial, and dissent from the Court's conclusion to the contrary. 472 U.S. 892 (1985) (White, J., dissenting).

I don't think the legal situation regarding damages capping has changed much and suspect there is some sympathy at the Court for the notion of a damages floor protected by federal due process (just as the Court has been willing to establish a due process based damages ceiling in *B.M.W. of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Consider the judicial politics of the situation, however. If you were a Justice sympathetic to the notion of damages floors, why would you choose a case from Florida to fight the battle? What Florida is showing us over and over again is that its *state* constitution (and able plaintiffs' bar) is capable of fighting "floor battles" on state constitutional and statutory grounds. All that is required for establishment of a floor in Florida is working out state law theoretical questions of how to bring facial challenges to statutes. One suspects that the recent Florida trial level case insisting that NCCI rate setting proceedings comply with the state's open meeting, *Fee v. NCCI and the Florida Office of Insurance Regulation* (Nov. 23, 2016), is but another step on the road to a constitutionally based theory of benefit adequacy. In any event, if I were a clerk to a Supreme Court Justice I would not be focusing on Florida for a test case on the workers' compensation race to the bottom. There are better candidates out there and they are likely to make themselves known sooner rather than later.

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* Professor Duff became the Centennial Distinguished Professor of Law in 2014. He teaches the College of Law's courses in Torts I, Labor Law, and Workers' Compensation Law. He also teaches a course on Alternative Dispute Resolution in the Workplace. He has previously taught Administrative Law and Introduction to Law at the College of Law; and has also taught Labor Law and Administrative Law as a visiting professor at the University of Denver's Sturm College of Law.

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