Lex and Verum

The National Association of Workers' Compensation Judiciary

Number XCVIII
October 2017

NAWCJ President's Page

By Hon. Jennifer Hopens

Welcome to the October edition of the *Lex & Verum* newsletter.

In the wake of the devastation wrought by Hurricane Harvey in August, I ended last month's President's Page with wishes for a peaceful September. Unfortunately, Mother Nature had other plans. For those of you affected by last month's Hurricanes Irma, Jose, and Maria, I hope you and your families weathered the storms safely. You have been in NAWCJ's thoughts, and, as challenges certainly remain as a result of these disastrous events, we continue to think of you and wish you all the best during this difficult time.

As the end of the year looms on the horizon, it is only natural to reflect on important developments over the course of this year. In that spirit, among the offerings in this issue of the *Lex* is an article on "2017's Top 10 Workers' Compensation Cases" by Thomas A. Robinson, J.D. Perhaps it will include a case out of Pennsylvania involving the *AMA Guides*? Yes, *Protz v. Workers' Comp. Appeal Bd.* is in there. And maybe the one where a judge in Alabama found the state's workers' compensation act to be unconstitutional? Yes, *Clower v. CVS Caremark Corp.* made the list as well. No more spoilers – I hope you enjoy the article!

This edition of the *Lex* also features "10 Minutes" with T. Scott Beck, Chair of the South Carolina Workers' Compensation Commission. This piece is part of our continuing series of spotlights on our NAWCJ Board of Directors. Commissioner Beck has devoted his professional life to public service, and he boasts a resume that is as varied as it is impressive. In addition to his time with the Commission, he has worked in law enforcement, including service as an assistant attorney general prosecuting healthcare fraud cases. He has also held elective office, with terms as a city councilman and a member of the South Carolina House of Representatives. It has been a pleasure working with Commissioner Beck, and I thank him for his commitment, dedication, and service to our organization.

The President's Page, from Page 1.

Speaking of the board, I recently attended a roundtable discussion featuring workers' compensation state regulators, which included two of our current NAWCJ board members (Judge Deneise Turner Lott of Mississippi and Commissioner Wes Marshall of Virginia) and a past board member (retired Commissioner of the Kentucky Department of Workers' Claims Dwight T. Lovan). W. Ryan Brannan, the Commissioner of Workers' Compensation for the Texas Department of Insurance, Division of Workers' Compensation, moderated the panel, which was part of the program on September 11-12, 2017, at the Sheraton Hotel and Conference Center in Georgetown, Texas (just up the road from Austin). What followed was an engaging and thought-provoking conversation about how each jurisdiction addresses important issues, such as attorney's fees, presumptions, fraud enforcement, medical issues, and mediation. The regulators' roundtable is on the agenda for the next Education Conference, which will take place from October 12-13, 2017, at the Renaissance Dallas Richardson Hotel in Richardson, Texas. Joining Commissioners Brannan and Marshall on the panel this time will be Commissioner Beth Aldridge of Mississippi and Judge David Langham (another NAWCJ board alum) from Florida. I look forward to another excellent panel presentation in Richardson!

I wish you all a fantastic start to autumn.

In This Issue

Texas Workers' Compensation Education Conference

Judge Jennifer Hopens plays quizmaster on attorney withdrawal and ex parte communication issues.

Judge Hopens (TX), Director of Hearings Allen Craddock (TX), and Deputy Commissioner for Hearings Kerry Sullivan (TX) presented together on the topic of dispute resolution for health care providers.

Left to right are Dwight Lovan (KY), Deneise Lott (MS), Wesley Marshall (VA), and Ryan Brannan (TX) on the Regulator Panel

Spotlight on Associate Members: Gerald Rosenthal, Esq.

By: Per Curiam

SPOTLIGHT ON GERALD A. ROSENTHAL

Gerald Rosenthal is a partner in the West Palm Beach Florida law firm of Rosenthal, Levy, Simon & Ryles and has practiced in the area of workers' compensation representing injured workers. Mr. Rosenthal has been practicing law since 1973 after he graduated from University of Florida College of Law.

Attorney Rosenthal is one of the most experienced and respected workers' compensation lawyers working on behalf of injured workers in Florida and also has been an Adjunct Professor of Law at the Florida State University. He also received the N. Michael Rucka Lifetime Achievement Award from WILG in 2015. Additionally, he serves on the Board of Trustees for the University of Florida College of Law.

After thirty years of practice at Rosenthal, Levy, Simon & Ryles, Attorney Rosenthal sums up his philosophy on his firm's website by saying: "the most important elements of our legal system are fairness and equality. In representing my clients, it is a privilege to use my ability and resources to level the playing field for them."

NAWCJ salutes Gerald A. Rosenthal for his continued support of our group as an associate member.

Left to right, Hon. Bob Cohen (FL), Neal Pitts (FL), John Lazzara (FL) and Jennifer Hopens (TX), as Judge Pitts presents Judge Lazzara a lifetime achievement award on behalf of the Florida Judges' conference

Book Review

John Henry Wigmore and the Rules Of Evidence: The Hidden Origins of Modern Law

by Andrew Porwancher
University of Missouri Press. 221 pp. 2016.

By Hon. David B. Torrey*

Arthur Larson famously declared, in his treatise, "[t]he evidence problem in workmen's compensation is not the admissibility of evidence incompetent by common law standards, but the ability of such evidence to support an award." By this admonition, he synthesized the then-current majority rule among workers' compensation systems, which *allowed* into evidence proofs which would be excluded at trial by jury, but which *demanded* that, in the end, "there be a residuum of competent evidence upon which the Commission's finding … rests."

Of course, we know in the present day that jurisdictions differ significantly in their approach to treatment of evidence in disputed workers' compensation cases. The rules do not apply at all, for example, in administrative proceedings in Texas, whereas they have complete application in Florida. Then there are states like Pennsylvania, where the statute, coming close to the Larson formulation, provides at once that the rules of evidence do not apply, but that every decision must be based on substantial and legally competent evidence. This latter provision has made the rules of evidence essential in the Pennsylvania practice – if the WCJ cannot rely on legally incompetent evidence, hearsay in particular, why listen to it in the first place? Lawyers in our practice are expected to object to classically objectionable proofs, and judges are expected to make accurate rulings. Default by either is incompetence.

Appreciating the evidence law in workers' compensation proceedings was certainly evident to me when I was first in practice as a defense lawyer. I soon sought to organize the rules, statutory and common law, in a 1991 law review article, *The Rules of Evidence Under the Pennsylvania Workmen's Compensation Act: Sources and Theoretical Considerations.*[1] I could imagine, at the time, Larson frustrated that someone would publish an article with such a title, but the reality of the litigation trenches was that the evidence issue in Pennsylvania workers' compensation was *both* the admissibility of evidence *and* the ability of such evidence to support an award. While that article is, in part, obsolete, I have kept my own tattered copy close at hand, lo these many years, and still find many occasions to consult it.

Knowledge of the evidence law is hence critical to the workers' compensation lawyer. It is further submitted that knowing where the modern principles and rules of trial evidence came from only enriches such appreciation. Of course, we all know that many trial evidence rules have their genesis in the concern that certain potentially confusing proofs must be kept from the jury – not usually a concern in workers' compensation – but more exists to the story.

Author Andrew Porwancher, who teaches Classics at the University of Oklahoma, has aided us in this respect with the publication of his marvelous new book, *John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law*.

Wigmore (1863-1943), of course, is a name known by every law school graduate, one synonymous with the influential treatise on evidence which he wrote. That book, eventually reaching ten volumes, went through three editions, 1904, 1923, and 1940, and Porwancher, among others, considers the text to be one of the most influential in the history of law. While the Federal Rules of Evidence now stand as the default state-of-the art compilation of modern evidence rules, it was Wigmore who first "tamed the unwieldy field and subjected evidence doctrine to the tenets of legal modernism."

Porwancher has written a biography, and we come to know the man (cerebral, ambitious, workaholic, temperamental), and his career (Harvard Law graduate, Dean of Northwestern Law School, colonel in the World War I JAG Corps).

Continued, Page 6.

Wigmore and Evidence, from Page 5.

Still, true to the book's title, the author's goal is to explore how Wigmore brought legal realism (also known as modernism) to the law of evidence and hence to the regime of American jury trials. Wigmore, Porwancher explains, in essence put to work Oliver Wendell Holmes' famous declaration about the life of the law being not logic, but experience.

Porwancher undertakes this exploration by a study of the philosophy of those who influenced Wigmore (Holmes, the Harvard pedagogue James Bradley Thayer, and Jeremy Bentham); by a comprehensive review of the treatise itself; and by analyzing the influence of the book and its assessment by others (Holmes, Benjamin Cardozo, Roscoe Pound).

The author's undertaking has yet a further goal, an aspect, indeed, of the book's central thesis – refuting (persuasively) a revisionist allegation, advanced by some, that Wigmore was *not* a legal realist but, with his efforts at categorization and "taming the unwieldy field," himself an old-fashioned "formalist."

Legal realism was a movement which argued against the "rigid formalism" of 19th century legal procedure. Thayer (who taught both Holmes and Wigmore at Harvard) and Bentham (in England) had complained for years of the waste and injustice that was occasioned by trial judges inflexibly applying evidence rules. This dominant approach had its genesis, at least in part, in the idea that a rule once established must be applied with inflexible logic – the judge a mere umpire to apply the rule "universally," without taking into account the particulars of a case and/or the consequences of applying the rule. The prevailing theory which supported this regime was that law was "autonomous" from, and not integral to, society and its needs, nuances, and vagaries.

Wigmore's intellectual forebears believed all of this to be nonsense. They believed, instead, that law was a social construct, and considered as hopelessly abstract and untrue the idea that law stood autonomously from society. The consequent idea that a rule should apply universally, without regard to the circumstances of the case and the consequences of application, was hence unsatisfactory. Indeed, a judge's devotion to rigid formalism could give rise to mindless inefficiencies and even the occasional monstrous result.

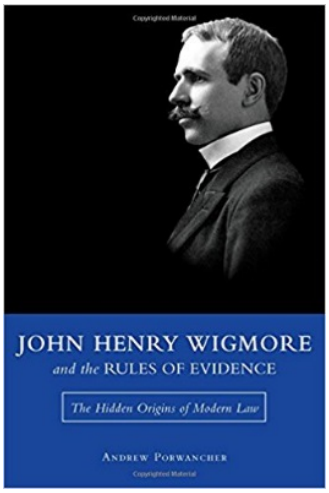
The legal realists instead favored consequentialism, to wit, balancing tests that considered the effects of a rule on the reality of the situation and on society in general. Meanwhile, the trial judge was not to be conceptualized as a mere umpire at time of trial, allowing the lawyers to undertake their "sport," but should be pro-active and possessed of significant discretion to evaluate the circumstances and decide whether or not evidence should be admitted or excluded.

Continued, Page 7.

2017 NAWCJ Board of Directors

Wigmore and Evidence, from Page 6.

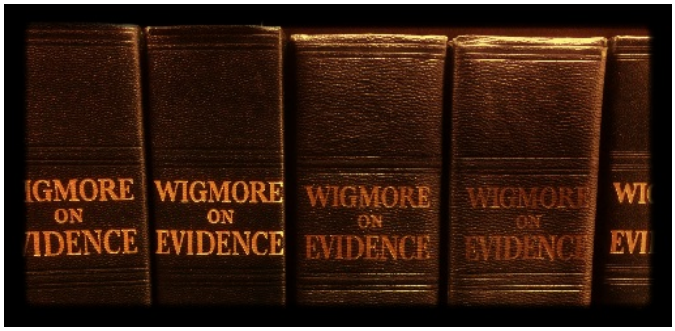
Porwancher shows that Wigmore, with his treatise, put into effect these modernist views, asserting, indeed, that the treatise is the "consummate expression of modern legal thought." While Wigmore sought to synthesize and categorize the law of evidence (indeed, the first edition featured 40,000 cites), the book was not some mere "taxonomy" of the evidence law. Instead, throughout the book he advanced the principles of modernism, "encouraging judges to eschew universal principles and instead treat cases on an individual basis." His book promoted balancing tests instead of formalism's "fetish for logical forms," and it accepted the "murky and conflict-laden character of the law, … prefer[ing] to acknowledge contradiction rather than impose a false sense of coherence."



Porwancher's book helpfully identifies many of Wigmore's recommendations as contrasted with the prior formalist practice. For example, in the 19th century, the so-called "Exchequer Rule" (here called "loathsome") held that a new trial should be automatically granted for even the most minor error in the admission or exclusion of evidence. Wigmore rejected this rule, insisting that the trial judge "must cease to be merely an umpire at the game of litigation."

Another old rule, this one surrounding hearsay, posited, in a case involving personal injury, that statements made by the plaintiff to another concerning physical pain, made after litigation commenced, could never be admissible. Wigmore recognized that the exclusionary rule was born of a fear of creating an "incentive for people to feign afflictions," but rejected the old rule which demanded automatic disqualification. Instead, the trial judge should be able to consider the circumstances of each case.

Yet another formalist rule was that the opinion of an expert could only be challenged via cross-examination; it was not permissible for an opponent to assail such testimony via the testimony of one's own expert. (The Pennsylvania reader will recognize this approach in the many 2016 Act 46 cases, where Dr. Guidotti, for the defense, routinely assails the opinion of Dr. Singer.[2]) Wigmore was sympathetic to this rule against "extrinsic evidence," but would afford the trial judge discretion to allow such testimony on a case-by-case basis.



In this same spirit, Wigmore, concerned as he was about the consequences of rules, argued that evidence of post-accident modifications should be excluded. It is with this familiar rule, which has endured in our state (*see* Rule 407), that the Holmes/Wigmore modernist credo is so evident. Logic dictates that subsequent modifications are relevant to the issue of negligence. Yet, the consequences of allowing into evidence testimony about post-accident modifications would have a societally deleterious consequence (*i.e.*, disinclination of the defendant to correct a hazardous condition). In other words, considerations of societal consequences of a rule can trump a rule which would permit the admission of what, logically, appears to be relevant.

A helpful attribute of Porwancher's book is its excellent organization and the author's dependable contextualization of his various subjects. With these features, the book is highly accessible to all readers. The book is also flawlessly edited and produced; if a period is out of place, I did not recognize the same in the course of my two readings.

Continued, Page 8.

Wigmore and Evidence, from Page 7.

Has the treatise been of influence in the workers' compensation practice? In a key Pennsylvania workers' compensation case from the 1970's, a referee's award of benefits to a widow in a cardiac death case was supported, in part, by statements to her by her deceased husband about the discomfort he had felt in his chest ever since his work-related back surgery. (Dr. Cyril Wecht was thereafter to rely on the same in his forensic opinion.) The defense objected on the grounds of hearsay, but in establishing the "then-existing physical condition" hearsay exception in workers' compensation cases, and allowing the testimony, the Commonwealth Court resorted in part to the authority of the Wigmore treatise, which favored admissibility.[3] Thus, to paraphrase the Larson formulation, "an evidence problem in workers' compensation" was indeed the admissibility of evidence, and Wigmore's influence, so thoroughly depicted in Porwancher's fine book, helped to provide the answer.

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[*] Workers' Compensation Judge, Pennsylvania Department of Labor & Industry, Pittsburgh, PA; Adjunct Professor of Law, University of Pittsburgh School of Law. All comments are strictly those of the author and not of the Commonwealth of Pennsylvania or any of its agencies.

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[1] David B. Torrey, *The Rules of Evidence Under the Pennsylvania Workmen's Compensation Act: Sources and Theoretical Considerations*, 29 DUQUESNE LAW REVIEW 447 (1991).

[2] *See, e.g., Hutz v. WCAB (City of Philadelphia)*, 147 A.3d 35 (Pa. Commw. 2016).

[3] *House Moving & Rigging v. WCAB (Henchell)*, 391 A.2d 1105 (Pa. Commw. 1978) ("The prevailing view in other jurisdictions in non-workmen's compensation cases appears to be that statements of a declarant's then existing physical condition, such as expressions of pain, are admissible as exceptions to the hearsay rule, regardless of to whom the statements are directed. See, e. g., Fed.R.Evid. 803(3), 6 J. Wigmore, Evidence §§ 1718, 1719 (Chadbourn rev. 1976) ….").

Past President David Torrey (PA) and current President Jennifer Hopens at the 2017 NAWCJ Judiciary College in Orlando

NAWCJ

National Association of Workers' Compensation Judiciary

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2017's Top 10 Workers' Compensation Cases

By: Thomas A. Robinson, J.D.*

During September of each of the past five years, my colleague, Robin Kobayashi, and I have pulled together a volume entitled, *Workers' Compensation Emerging Issues Analysis*. Annually published by LexisNexis, it is a compendium of expert analysis and commentary highlighting current state trends, legislation, and court decisions in the field of workers' compensation law. Part II of the work includes short summaries of important recent workers' compensation decisions from around the nation. I take this occasion to highlight what I think are the 10 most important comp decisions so far in 2017. Bearing in mind that one's assessment of "importance"—like one's appreciation for beauty—is in the eye of the beholder, I recognize that your own list may differ from mine. Let me know if I've missed a crucial decision from your state.

Pennsylvania High Court Strikes Down AMA Guides Provision

In what is likely the most important workers' compensation decision during 2017, a split Supreme Court of Pennsylvania, in *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017), held that the provision of the state's Workers' Compensation Act [Section 306(a.2); 77 P.S. § 511.2(1)], requiring physicians to apply the methodology set forth in "the most recent edition" of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (*AMA Guides*), violates the state's constitutional requirement that all legislative power "be vested in a General Assembly" [Pa. Const. art. II, § 1]. The majority added that in spite of the severability clause found within the Pennsylvania Workers' Compensation Act, Section 306(a.2) was "a paradigmatic example of a law containing valid provisions that are inseparable from void provisions" [161 A.3d at 841]. Accordingly, the majority of the Court struck Section 306(a.2), in its entirety, from the Act. The decision is important in that seven other states (Alaska, Arizona, Illinois, Louisiana, New Mexico, Oklahoma, and Wyoming) have similar language requiring the most recent edition of the AMA Guides be utilized in determining medical impairment (New Mexico has an earlier *contra* decision, however).

The *Protz* decision put a four-foot hole below the water line in Pennsylvania' impairment rating evaluation process. As anticipated by many practitioners within the Keystone State, on the heals of *Protz*, the Commonwealth Court of Pennsylvania, in *Thompson v. Workers' Comp. Appeal Bd. (Exelon Corp.)*, 2017 Pa. Commw. LEXIS 596 (Aug. 16, 2017), held that without the undermining supplied by Section 306(a.2), the entire impairment rating evaluation (IRE) process set forth within the state's Workers' Compensation Act could no longer be sustained. Accordingly, it was error for the Board to affirm a decision by the workers' compensation judge that reduced claimant's benefits from full to partial based upon the unconstitutional scheme. The court indicated that no other provision of the Act allowed for the modification of benefits based upon an IRE [For additional discussion, see *Larson's Workers' Compensation Law*, § 80.07].

Imposition of Prevailing Party Costs on Claimant Was Not Unconstitutional Denial to Access to Courts

Among the most contentious of Florida's recent workers' compensation "reforms" is the requirement that litigation costs be assessed against the non-prevailing party, *including the unsuccessful claimant*. Claimants have contended that the statutory provision works as a detriment to the filing of legitimate claims. Earlier this summer, in *Govea v. Starboard Cruise Serv.*, 212 So. 3d 466 (Fla. 1st DCA 2017), a state appellate court held that the provision was not an unconstitutional denial to access to the courts [For additional discussion, see *Larson's Workers' Compensation Law*, § 133.02].

Continued, Page 11.

Top Ten from Page 10.

Apportionment in California May Take Genetic Factors into Consideration

In *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)*, 11 Cal. App. 5th 109, 82 Cal. Comp. Cases 437 (April 26, 2017), the court saw no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics. Practitioners and others should remember that segregating/apportioning a workers' compensation claim based on comorbidity factors was one of several state practices criticized last year in U.S. Department of Labor's report on the adequacy of state workers' compensation programs. It is, of course, one thing to blame the worker for overeating. It's quite another to blame his or her ancestors for their contribution to the gene pool [For additional discussion, see *Larson's Workers' Compensation Law*, § 90.03].

Apportionment of Occupational Disease Claims Based on Genetics

At least when it comes to occupational disease claims, Colorado appears also to be following California's path toward division of the claim into two segments: a portion that is "caused by the workplace," and another that is "caused by personal factors." In *Hutchison v. Industrial Claim Appeals Office*, 2017 COA 79, 2017 Colo. App. LEXIS 696 (June 1, 2017), an appellate court emphasized that within the Colorado workers' compensation scheme, the employer does not necessarily take the employee as it finds him (or her)—at least when it comes to occupational disease and repetitive trauma claims. Accordingly, co-morbid factors, such as obesity, may require apportioning some percentage of permanent disability to the employee. In the instant case, a Colorado appellate court affirmed an order by the state's Industrial Claim Appeals Office that required the employer to pay no more than one-third of any medical benefits and other compensation due to the employee, since only one-third of the injured worker's bilateral knee osteoarthritis was due to work-related factors. That the job required the employee to spend half his work time over a 25-year period on his knees and on concrete floors was not the controlling factor, indicated the Court. Multiple causal factors were at play, including perhaps, the employee's genetic predisposition [For additional discussion, see *Larson's Workers' Compensation Law*, § 90.03].

Alabama Trial Judge Strikes Down State's Workers' Compensation Act as Unconstitutional.

Ordinarily, a decision by a state trial judge would not be included within a "Top 10" list. Yet one must recall the ripples set in motion following Florida's 2015 *Padgett* decision, in which a trial court judge declared unconstitutional the exclusive remedy provision of the state's Workers' Compensation Law, on the grounds that original "grand bargain" had become so eroded that injured employees should no longer be bound by it. In somewhat similar fashion, an Alabama Circuit Court judge, in *Clower v. CVS Caremark Corp.*, 01-CV–2013–904687 (Jefferson County Circuit Court, May 8, 2017), found unconstitutional two separate provisions of the Alabama Workers' Compensation Act: the $220 cap on weekly PPD benefits [Ala. Code § 25–5–68] and a 15 percent cap on attorneys' fees [Ala. Code § 25–5–90(a)].

Noting that the Alabama Legislature had inserted a non-severability statute [Ala. Code § 25–5–17] into the Act in 1984, Judge Ballard indicated the effect of his ruling was to declare the entire Act unconstitutional. With more than a nod to the Oklahoma high court's 2016 "opt out" decision in *Vasquez*, Judge Ballard stressed that Alabama's Act impermissibly established two groups of disparately treated injured workers without a rational basis. The first group—those receiving TTD benefits and PTD benefits—enjoy indexed benefits; their weekly benefits increase annually with changes in Alabama's statewide average weekly wage.

The second group—those who qualify for PPD benefits—can receive no more than $220 per week, a maximum amount that has not been increased by the Legislature in several decades. As to the attorney fee cap, the judge referenced Florida's 2016 *Castellanos* decision, finding the 15 percent cap on attorneys' fees violated the due process rights of Alabama's injured workers [For additional discussion, see *Larson's Workers' Compensation Law*, § 2.08].

Continued, Page 12.

Top Ten from Page11.

Disparate Treatment of Certain West Virginia Inmates is OK

In a bit of a departure from the recent "disparate impact" decisions (*Clower*, *Vasquez*, *Castellanos*, etc.), the Supreme Court of Appeals of West Virginia, in *Crawford v. West Va. Dep't of Corr. Work Release*, 801 S.E.2d 252 (W. Va. 2017), held that a provision in the West Virginia Workers' Compensation Act [W. Va. Code § 23–4–1e(b)] that prohibits an inmate housed at a state work release center from receiving workers' compensation benefits for injuries sustained while performing work for the state's Division of Highways (DOH) does not violate the inmate's equal protection rights, in spite of the fact that such benefits are allowed if a similarly-housed inmate sustains injuries while working for a private employer. The court noted, *inter alia*, that private employers hiring inmates would be impermissibly favored if they were shielded from the costs of workers' compensation coverage for inmate employees. The court also observed that the state paid more than $90,000 in medical expenses related to the inmate's injury [For additional discussion, see *Larson's Workers' Compensation Law*, § 64.03].

North Dakota Need Not Subordinate its Workers' Comp Death Benefits Statute to Colorado's More Liberal Provisions

The 8th Circuit Court of Appeals, in *DeCrow v. North Dak. Workforce Safety & Ins. Fund*, 2017 U.S. App. LEXIS 13877 (8th Cir., July 31, 2017), held that the widow of a Colorado resident killed in a traffic accident while working in North Dakota could not successfully challenge—on constitutional grounds—a North Dakota statute that suspended her previously awarded death benefits while she pursued supplemental benefits in Colorado, and which would have also required her to reimburse the state's Workforce Safety and Insurance Fund ("WSI") if her Colorado claim ever proved successful. Noting that the central question was one of first impression, the 8th Circuit added that the North Dakota statute satisfied rational basis review. The Court also reiterated that a State need not substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate [For additional discussion, see *Larson's Workers' Compensation Law*, § 141.04].

Continued, Page 13.

Interesting Workers' Compensation Blogs

Law Professor's Blog
http://www.lawprofessorblogs.com/

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

Tennessee Court of Compensation Claims
https://tncourtofwcclaims.wordpress.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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http://www.coseklaw.com/blog/

Wisconsin Workers' Compensation Experts
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Top Ten from Page 12.

Challenge to Florida's Maximum Comp Rate Limits

In *Jimenez v. UPS*, 2017 Fla. App. LEXIS 8907 (1st DCA, June 19, 2017), the Florida appellate court held a state judge of compensation claims had erred in dismissing a claimant's constitutional challenge to the state's statutory cap on weekly workers' compensation benefits [see § 440.12(2); Fla. Stat. (2014)]. The appellate court acknowledged that it was beyond the jurisdiction of the JCC to decide a constitutional issue. The appellate court indicated, however, the JCC should have taken evidence and heard arguments on the issue in order that a record could be built for appeal. The matter was returned to the trial level for further proceedings. Florida claimants have long complained that the weekly maximum caps work to the detriment of highly paid employees. Florida is beginning to supplant California as a venue for battling out important constitutional issues. We likely haven't heard the last of this case [For additional discussion, see *Larson's Workers' Compensation Law*, § 92.01].

Louisiana Court Says Choice of Pharmacy is up to Employer

In a split decision, the Supreme Court of Louisiana held that the choice of pharmacy in a workers' compensation case belongs to the employer, and not the employee [*Burgess v. Sewerage & Water Bd. of New Orleans*, 2017 La. LEXIS 1387 (June 29, 2017)]. Resolving a split in the state's circuit courts of appeal, the Court acknowledged that La. Rev. Stat. § 23:1203 obligates an employer "to furnish all necessary drugs" to the injured employee. The statute does not, however, directly address who has the right to choose the pharmacy to dispense those drugs. Nowhere in the statute did the legislature provide the employee with the right to choose a pharmaceutical provider from which to obtain the necessary prescription drugs, said the Court. By contrast, the legislature had specifically delegated to the employee the choice of physician [see La. Rev. Stat. § 23:1121(B)(1). The Court reasoned that had the legislature intended the employee to have the choice of pharmaceutical provider, it could easily have done so [For additional discussion, see *Larson's Workers' Compensation Law*, § 94.03].

Placing Injured Undocumented Worker on Unpaid Leave May Be Retaliatory Discharge

In a divided decision, the Supreme Court of Minnesota held that an injured undocumented worker had raised a genuine issue of material fact as to whether an employer had discharged him—and whether that discharge was motivated by the worker's action of seeking workers' compensation benefits—where the employer placed the worker on unpaid leave until the worker could show that his return to employment would not violate federal immigration law [*Sanchez v. Dahlke Trailer Sales*, 2017 Minn. LEXIS 372 (June 28, 2017)].

Continued, Page 14.

Elizabeth Crum Awarded Irvin Stander Memorial Award

The Pennsylvania Bar Association Workers' Compensation Law Section has announced that Director Elizabeth Crum of the Workers' Compensation Office of Adjudication will be presented with the Irvin Stander Memorial Award during the Section's annual meeting in October.

The award is named for the late Judge Irvin Stander and recognizes an attorney whose dedication to the administration of workers' compensation law, professionalism, and regard for clients and colleagues serves as an example for others.

Judge Crum has managed the Pennsylvania adjudication and mediation program since 2013. Her responsibilities extend to 23 offices throughout the state. Prior to assuming that role, she served as the Deputy Secretary for Workers' Compensation of the Pennsylvania Department of Labor and Industry for 11 years.

Judge Crum is a member of the Pennsylvania Bar Workers' Compensation Section, a Fellow of the College of Workers' Compensation Lawyers, and of the NAWCJ.

Top Ten from Page 13

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Writing for the majority, Justice Chutich indicated that, taking the facts in the light most favorable to Sanchez, there was reason to doubt whether the employer ever intended to rehire Sanchez, regardless of his change in work status. The evidence suggested that the employer had known for several years that Sanchez was undocumented. Justice Chutich said that in the end, the question of whether the employer intended Sanchez's unpaid leave to be permanent was a factual dispute, to be resolved by a fact-finder. Thus, Sanchez raised a genuine issue of material fact as to whether he was discharged. Moreover, federal immigration law did not preempt an undocumented worker's claim for retaliatory discharge under Minn. Stat. § 176.82, subd. 1 (2016) [For additional discussion, see *Larson's Workers' Compensation Law*, § 104.07].

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THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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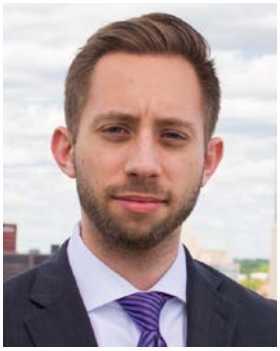
Where's the Orchestra? Employee Classification of Performing Artists



By Justin D. Beck*

Review and commentary on
Harvey S. Mars, *Performing Artists' Entitlement to Compensation under the New York Workers' Compensation Law*, 89-June NEW YORK STATE BAR JOURNAL 28 (June 2017), available at http://www.harveymarsattorney.com/articles-publications/.

I. Introduction

In a recent article, published in June 2017, Harvey S. Mars, current In-House Counsel to the Associated Musicians of Greater New York, has addressed both historical and recent developments in New York's treatment of performing artists for purposes of workers' compensation coverage.

Mr. Mars describes a period of legislative lobbying and advocacy for injured performers in the last decades of the twentieth century, ultimately culminating in the enactment of major statutory amendments in 1986.

Recounting further the 2011 injury of a high-profile Manhattan opera star, Mars reflects on the inherent tension in a system that seeks to guarantee workers' compensation for the average performer, while simultaneously attempting to create a carve-out for high-earning stars who have the advantage of significant leverage in their contractual negotiations.

Mars presents this dilemma and New York's solution with skepticism, impliedly asking, "can performers have their cake and eat it too?"

II. 1986 Amendments

Mars provides the backdrop for New York performers' workers' compensation struggles by describing the age-old battle between independent contractor and employee status. Indeed, the author indicates that, for many years, New York performing artists were precluded from workers' compensation coverage based on their categorization as independent contractors. Workers, under this regime, were required to sue in tort, and hence engage in protracted legal proceedings at substantial costs.

In 1986, following a protracted effort by advocates, the definitional section of the New York Workers' Compensation Law (WCL), § 2(4), was amended to include, as employees, professional musicians and others engaged in the performing arts and rendering services for entertainment establishments. The memorandum supporting the amendment remarks:

> musicians and performers are often required as a condition of employment, to sign a statement that they are independent contractors. Thus, these individuals are denied the basic rights afforded to other working men and women in New York State. This bill would provide basic coverage to musicians and performers who are presently excluded from many benefits and/or protections under the Labor Law.

Notably, at the same time as the New York WCL amendment, the definitional sections of both the state's Unemployment Insurance Law and State Labor Relations Act were similarly amended to include a statutory presumption of employee status for performing artists.

Continued, Page 16.

Where's the Orchestra, from Page 15.

As to the workers' compensation law, WCL § 201 now provides: "Employee" shall also mean, for purposes of this chapter, a Professional musician or a person otherwise engaged in the performing arts who performs services as such for a television or radio station or network, a film production, a theatre, hotel, restaurant, night club or similar establishment unless, by written contract, such musician or person is stipulated to be an employee of another employer covered by this chapter. "Engaged in the performing arts" shall mean performing service in connection with the production of or performance in any artistic endeavor which requires artistic or technical skill or expertise.

This proviso now creates a statutory presumption "that musicians and other performing artists are employees, rather than independent contractors." Rather than performing artists needing to prove they are employees, now "employers must prove that they are independent contractors."

And, as foreshadowed above, workers in this category are now entitled to unemployment insurance and the ability to form a union, afforded by the State Labor Relations Act.

III. The "Right of Control" Test

What forms the critical analysis in any disputes surrounding these 1986 changes? Pursuant to the National Labor Relations Act, a multi-factor "right of control" test is employed to determine whether a worker is an independent contractor or employee. If the one for whom services are being performed *retains* the right to control the manner and means by which he or she achieves the result sought, then the individual will be considered an employee. Mars points out that this test is "usually satisfied because most musicians' performances are controlled by the music director or conductor of the organization for which they are engaged…."

In a leading NLRB case involving the American Federation of Musicians, the Board held that freelance musicians, hired to make dinner theater recordings, were employees, despite the fact that they were utilized for only a few hours, with no real expectation of future employment. The Board held that, while these factors might normally weigh in favor of independent contractor status, they were outweighed by the fact that the employer's musical director "exercised complete control over the musicians, telling them when to appear, what to play, and how the music should sound." The Board concluded that the musicians were "under the continuous supervision and exercised control of the musical director and subject to his complete discretion and artistic interpretation and taste."

IV. 2011 Metropolitan Opera Incident

Since the 1986 amendments went into effect, Mars reports that performing artists' entitlement to workers' compensation, and other benefits, "remained unquestioned." However, following a high-profile accident in 2011, performing artists' coverage under the WCL has once again been called into question.

On December 17, 2011, during a performance of Gounod's "Faust" at The Metropolitan Opera (Met), veteran mezzo-soprano Wendy White suffered serious injuries when she fell from a platform hoisted eight feet above the stage. Despite escaping the fall without any broken bones, the accident nonetheless caused nerve damage, preventing Ms. White from singing sustained high notes and standing for long periods of time. In light of her inability to perform the required job duties any longer, the Met "terminated her contract and refused to pay her the remaining balance."

Presumably workers' compensation would cover these injuries. Yet, Ms. White commenced a breach of contract suit against the Met. Her motive was plain – while workers' compensation claims are limited to lost wages and medical expenses, a civil lawsuit alleging personal injuries would permit potentially greater recovery for additional forms of damages, such as pain and suffering. Financial recovery under the WCL for a claim such as Ms. White's would inhibit her from receiving this full range of damages she may be entitled to "for a career-ending accident." In any event, the employer predictably raised the exclusive remedy of the WCL. Ms. White, in turn, sought to bolster her lawsuit via advocating a legislative exception to Section 2(4) of the WCL.

Continued, Page 17.

Where's the Orchestra, from Page 16.

V. The Legislative Effort to Evade the Exclusive Remedy

During initial attempts to create a statutory exception, lobbyists secured passage of an amendment that would have permitted musicians and other performers to "opt out" of coverage before any injury. Mars characterizes such alterations as a "throwback to the pre-1986 legal landscape." Such a scheme would have had an adverse impact on those musicians who lacked any understanding of the ramifications inherent in such opt outs and loss of the protections of employee status. Further, if a worker chose to utilize such an exemption and were injured, upon their return to work, the employer could then invoke the employee's own characterization of the employment relationship and exclude the worker from future employee status.

Ultimately, the amendment failed when it was vetoed by Governor Cuomo. The governor stated that the amendment would violate the "'fundamental' bargain of the state workers' compensation system, that workers injured on the job are entitled to recover benefits for lost earnings and medical expenses while the employer is shielded from liability."

Three bills were presented to the legislature with the goal of permitting Ms. White's suit to proceed. Each of these attempts failed.

VI. Litigation of Ms. White's Case

On January 5, 2017, meanwhile, the Appellate Division, First Department, affirmed the Supreme Court of New York County's decision *denying* the Met's motion to have Ms. White's suit dismissed on the ground that it was barred by the WCL. The court found that Ms. White worked as an employee of her own company, Wendy White, Inc., and therefore, she might be exempt from Section 2(4)'s definition of an employee. If exempt, the employer's exclusive remedy would not apply.

The appellate court further determined that the legislative history indicated that "star" performers were intended to be exempt from coverage. Specifically, the court found that the statutory definition of employee sought to protect the "vast majority of performers, who are not 'stars' and that the statutory exception was designed to exclude those performers with the clout to negotiate the terms of their own engagements."

With the motion to dismiss denied, the case could now proceed, with the Met potentially pursuing a discretionary appeal before the N.Y. Court of Appeals.

Continued, Page 18.

Where's the Orchestra, from Page 17.

Mars challenges the appellate court decision and legislative efforts in their totality. He asks how the judiciary can determine which musician should be considered a "star," asserting that, if the only relevant parameter to coverage is a performer's leverage to negotiate an individual services contract, a large number of musicians may be potentially *excluded* from coverage.

VII. Recent Developments

Mars notes that, subsequent to the appellate court decision, on March 15, 2017, a new amendment to the definition section of the WCL was introduced and signed into law by Government Cuomo. That amendment, known as a "picture bill," limited the exception *only* to Ms. White's accident, permitting her civil case to proceed without disturbing the broad coverage the law currently extends. The bill's sponsor noted that the amendment does not intend to alter the beneficial impact of the 1986 amendments, but "to remedy an unfair interpretation of the law for a particular performer."

VIII. Classification of Performers under Pennsylvania Law

Under Pennsylvania law, the leading precedent for determining employee status remains *Hammermill Paper Co. v. Rust Engineering Co.*[1] There, the Supreme Court of Pennsylvania established various factors to be considered in the determination of whether a worker is an employee, including the control of manner the work is to be done; the skill required for performance; whether one employed is engaged in a distinct occupation or business; and which party supplies the tools. (Other subsidiary criteria are also often listed in the case law.)

As every Pennsylvania workers' compensation practitioner knows, "control is king" in the Commonwealth. To this end, the Pennsylvania analysis closely mirrors the NLRB's "right to control" test (discussed above) – seeking to determine which party retained the right to control the work performed.

Given this fact-intensive analysis, no express rule exists in Pennsylvania, as in New York, establishing whether performing artists are employees or independent contractors. Each case must be judged by its particular facts and context.

The author of this note is an experienced vocal and piano artist, having performed more than 1000 thousand shows throughout Western Pennsylvania. From his perspective, individuals and bands, hired to perform one evening of entertainment for a business or social event, would not be considered employees under Pennsylvania law. While the business or event coordinator instructs the performers on arrival time and physical location for setup of instruments and equipment, the entirety of the performance is generally controlled by the musicians. The author typically determines what songs he will play, how he will perform them, and when the band will engage in breaks. Applying *Hammermill Paper Co.*, almost no control by the "employer" is retained over the performance of the music, a specialized skillset is required of the performer, and the performer provides most, if not all, of the required equipment necessary to perform the job.

Based on these factors, it is submitted that most bands and entertainers, falling under similar fact patterns, are deemed independent contractors in Pennsylvania. This starkly contrasts with the New York statute, which indicates that *any* person engaged in the performing arts – performing services for a hotel, restaurant, or night club – is presumptively considered an employee and covered by the WCL. Further, New York case law has held that, despite "employment" of only a few hours and no expectation of future employment, musicians are still considered employees if the musical director exercises enough control over the performance. Such individuals would *not* fall within the definition of employee under the Pennsylvania Workers' Compensation Act.

IX. Insurance Coverage for Performers, beyond Workers' Compensation: The CGL

As the author submits that the typical performer is not going to qualify as an employee, what insurance coverage exists for such individual when he or she enters the performance venue and an unfortunate accident, featuring personal injury, occurs?

Often, businesses will insure against liability and loss through the purchase of comprehensive general liability (CGL) policies. These policies typically provide both defense in any suit brought against the insured, and coverage for any monies that are ultimately awarded.

Continued, Page 19.

Where's the Orchestra, from Page 18.

However, a common exclusion to coverage, known as the "Entertainment Industry Exclusion" (EIE) exists in many CGL policies. These provisions often exclude from coverage any bodily injury suffered by an individual, "arising out of" certain activities, such as film, stage plays, radio, and music.[2]

These provisions have impacted both entertainers and businesses; while businesses find themselves exposed to unforeseen liability due to such clauses in their CGL policies, entertainers have also found themselves the victims of oversight in their own policy purchases.

Particularly in locations such as California, recent litigation has developed where entertainers, with their own CGL business policies, were denied coverage after being injured in the course of their performances. Thanks to an imbedded EIE provision in their policy, the insurers construed the injuries occurring during the performance as arising out of the *music* rather than the *business itself*.

Judicial treatment of these provisions has varied, with some courts striking the language as illusory, while others have avoided the question altogether – choosing instead to decide the dispute on entirely different grounds.

Despite recent scrutiny regarding these provisions, insurers continue to regularly utilize them in standard CGL policies. Business owners and entertainers alike are advised to remain mindful of the pitfalls of these exclusions.

X. Postscript: Case of *Russell v. Torch Club*

In considering Mars' critique, one is reminded of a legendary 1953 New Jersey case, where a night club singer, pursuing a workers' compensation claim, was found to be an employee, rather than an independent contractor. This result followed despite the terms of her contract.[3] There, the claimant was "an entertainer in the art of song," performing four nights per week. Claimant was injured when, "following an appearance on stage, her dress caught fire from the open flame of a gas heater and she was severely burned."

As would a New York or Pennsylvania tribunal, the New Jersey court analyzed the degree of control the night club retained over the performer. Noting that "a complete dominance by [employer's] 'master of the revels,'" the piano accompanist, existed over Ms. Russell, the court found that the night club exercised total control over the "direction of [claimant's] performing in very positive ways." This control included selecting the specific songs to be performed, instructing the performer to mingle with the crowds during breaks, and expecting the performer to sit and drink with patrons at the bar.

Based on these facts, the court concluded that the night club exercised such a degree of control so as to create an employer-employee relationship, thereby rendering the performer entitled to workers' compensation benefits.

Continued, Page 20.

Governor Rauner Reappoints Five Arbitrators and Appoints Five

Illinois Governor Rauner has reappointed the following Arbitrators for the Illinois Workers' Compensation Commission: Anthony C. Erbacci, Steven J. Fruth, David A. Kane, Michael K. Nowak, and Ketki Shroff Steffen.

The newly appointed Arbitrators are Thomas Ciecko, Robert M. Harris, Robert E. Luedke, Tiffany Kay and Charlie Watts.

Arbitrator Ciecko previously served as an assistant attorney general and State's Attorney. Arbitrator Harris practiced workers' compensation defense. Arbitrator Luedke previously defended workers' compensation claims for 25 years. Arbitrator Kay served as general counsel to the Workers' Compensation Commission. Arbitrator Watts served as an attorney for the Illinois House of Representatives.

Notably, under Pennsylvania law, the *Torch Club* performer may well have also been considered an employee. Under typical circumstances, night-club entertainers provide their own equipment, choose which songs they play, and perform the material as they see fit. At the Torch Club, the "master of the revels" dictated many aspects of the work performance; by choosing which songs the performer would sing and instructing her exactly how to interact with the crowd, the "employer" exercised an extensive degree of control over the performer not normally found in the independent contractor relationship. Further, considering that the entertainer was contracted to perform four nights per week, the existence of a regular work schedule serves as additional evidence of a typical job structure – and corresponding control – present in the traditional employer-employee context.

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* Mr. Justin D. Beck is a 2017 graduate of the University of Pittsburgh School of Law and law clerk at Thomas, Thomas & Hafer LLP in Pittsburgh, Pennsylvania. He concentrates his research and work in the area of workers' compensation and employers' defense. Since 2016, Mr. Beck has also served as academic research assistant to Hon. David B. Torrey. Mr. Beck was born and raised in Latrobe, Pennsylvania, obtaining his undergraduate degree in Politics from Saint Vincent College in 2013. During the first quarter of 2017, Mr. Beck completed an internship with the Pennsylvania Department of Labor & Industry, Workers' Compensation Office of Adjudication. There, he had the unique opportunity to experience and participate in the Commonwealth's workers' compensation adjudicative process. Mr. Beck has published various articles related to the field of workers' compensation, many in collaboration with Judge David B. Torrey. In March 2017, Mr. Beck co-authored *Foreign and Undocumented Workers: Eligibility, Law Addressing Return to Work, and Related Issues*, presented at the ABA Workers' Compensation Midwinter Seminar and Conference in Phoenix, Arizona. In May 2017, Mr. Beck published *From the Glass Lined Tanks of Old Latrobe: 30 Years of Pawlosky*, a comprehensive documentary and analysis of Pennsylvania's seminal 1987 precedent, *Pawlosky v. W.C.A.B. (Latrobe Brewing Co.)*. In that case, the Pennsylvania Supreme Court expanded the definition of "injury" under the Workers' Compensation Act, establishing compensability for any "adverse and hurtful change." Mr. Beck continues to remain engaged in his community, serving on the Latrobe Union Mission Board of Directors since 2012.

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[1] *Hammermill Paper Co. v. Rust Engineering Co.*, 243 A.2d 389 (Pa. 1968). For a workers' compensation precedent of late which cites *Hammermill*, see *Dep't of Labor and Indus. v. WCAB (Lin and Eastern Taste)*, 155 A.3d 103 (Pa. Commw. 2017).

[2] Edwin F. McPherson, *Entertainers Beware – You May Have Less Insurance Coverage Than You Think*, 45 SW. U. L. REV. (2015).

[3] *Russell v. Torch Club*, 97 A.2d 196 (Hudson County Ct. 1953).

From the Pages of workcompcentral®

Medication-Assisted Treatment for Addiction Raises Questions

By Elaine Goodman
Thursday, September 21, 2017

As treatment of injured workers' opioid addiction is finding its way into more workers' comp claims, the industry's next debate could turn out to be over what type of addiction treatment is best. Medication-assisted treatment is an option that uses milder forms of opioids to keep patients off of more potent drugs. In addition to methadone, which has been used for decades to treat opioid addiction, there is buprenorphine, which was approved for clinical use in 2002.

Medication-assisted treatment can help reduce recidivism and may help speed the detoxification process, according to Mark Pew, senior vice president with Prium. The downside is that the drug the patient is addicted to is being replaced by a medication for treatment. "From a payer standpoint, you're trading one opioid for the other, for the rest of their lives," Pew said. Pew recommended that non-medication-assisted treatment be tried first for opioid addiction, using gradual tapering of the drugs and therapies to help the patient cope. If that's not successful, medication-assisted treatment is another option.

In medication-assisted treatment, drug treatment is typically offered in conjunction with counseling and behavioral therapies. Addiction treatment for injured workers is gaining acceptance in workers' compensation, as some are realizing the long-term benefit of getting the worker off opioids — and drugs that may be needed to treat the side effects of opioids.

In Ohio, the Bureau of Workers' Compensation now provides treatment for opioid dependence that arises from the use of opioid medications covered by BWC. Treatment for dependence could include psychological counseling, medication assistance or in-patient detoxification. The treatment can last as long as 18 months and include two failed attempts at recovery. Some payers are sending claimants to a bundled-payment addiction program at the University of California, Los Angeles, in a program offered in partnership with R&Q Healthcare Interests. The outpatient program offers addiction treatment that includes the buprenorphine, a representative of the program said during a webinar this month.

In contrast to methadone treatment, which must be performed in a highly structured clinic, buprenorphine may be prescribed or dispensed in physician offices, significantly increasing treatment access, according to the federal Substance Abuse and Mental Health Services Administration. Buprenorphine is first administered about 12 to 24 hours after the patient stops taking other opioids and is starting to experience withdrawal symptoms, SAMHSA said. The medication helps relieve withdrawal symptoms and reduce opioid cravings. A stabilization phase follows, when the patient has greatly decreased or stopped taking the drugs of abuse, and the buprenorphine dose is fine-tuned. During the next step, the maintenance phase, the patient continues taking buprenorphine. "The length of time of the maintenance phase is tailored to each patient and could be indefinite," SAMHSA said.

Continued, Page 22.

Addiction from Page 21.

Alternatively, the patient can go through a medically supervised withdrawal from buprenorphine and take part in further rehabilitation efforts, the agency said. Diversion and misuse of buprenorphine is another concern. The problem has been pronounced in some areas, such as southwestern Virginia. In response, the Virginia Board of Medicine issued an emergency regulation in March that restricts prescribing of buprenorphine products that don't contain naloxone, also called buprenorphine mono-product. Addition of naloxone, an opioid-overdose antidote, reduces abuse potential of the drug.

The Board of Medicine included exceptions that allow use of the mono-product in pregnant patients or those who have a sensitivity to naloxone, and when a non-tablet form of buprenorphine is used. Clinicians must receive a federal waiver in order to prescribe buprenorphine. Under recent federal regulations, physicians who have prescribed buprenorphine to 100 patients for at least one year can now apply to increase their patient limits to 275, SAMHSA said.

Medicaid Can Pursue Full Settlement Amounts Starting October First

By Elaine Goodman
September 20, 2017

State Medicaid systems are expected to become much more aggressive in trying to collect money they're owed from workers' comp settlements, as the result of a federal law that takes effect on Oct. 1. Currently, Medicaid can go after only a portion of a settlement, following a 2006 U.S. Supreme Court case, *Arkansas Department of Human Services v. Ahlborn*.

The court ruled unanimously that states could claim only the portion of a settlement that represented payment for past medical expenses. The court said a federal statutory prohibition against liens on personal property to recover Medicaid expenditures applied to settlements. But a provision in the federal Bipartisan Budget Act of 2013 negated the Supreme Court decision and gives states the ability to recover Medicaid costs from the full amount of a settlement.

It was originally scheduled to take effect on Oct. 1, 2014, but the effective date was delayed until Oct. 1 of this year. "Just like Medicare, Medicaid recovers (up to) 100% with no reductions," said Roy Franco, chief client officer of Franco Signor. "In cases where the Medicaid lien is greater than the settlement value, then Medicaid — just like Medicare — gets all of it, less attorneys' fees."

But whether the change will take effect on Oct. 1 or again be delayed remains to be seen. The Medicare Advocacy Recovery Coalition, or MARC, is working with lawmakers to further postpone the provision. The current extension is included in Section 220 of MACRA, the Medicare Access and CHIP Reauthorization Act.

Continued, Page 23.

Medicaid from Page 22.

"We're optimistic that we'll be able to get an additional extension," said attorney David Farber, counsel for the coalition. Even if the extension isn't approved by the end of this month, the idea would be to make it retroactive to Oct. 1, Farber said.

Jennifer Jordan, chief legal officer for MedVal, said there hasn't been much information from the state systems regarding the impending changes. "We haven't seen anything concrete," Jordan said. "We're still playing wait-and-see." Like federal Medicare, state Medicaid systems are cash-strapped and don't want to pay for medical treatment for which another is responsible. But Medicaid systems thus far haven't seemed that focused on going after other payers, Jordan said.

Rafael Gonzalez, president of Flagship Services Group, said that could now change if Medicaid is allowed to pursue full settlement amounts. "We're going to start seeing some really aggressive behavior from state Medicaid systems," Gonzalez said. "It is definitely going to have an effect on workers' compensation claims."

Some states are preparing to go after the larger potential recoveries from settlements. Rhode Island has implemented an "Intercept" program that requires parties to report settlements to the state for secondary payer collection purposes, according to MARC.

Gonzalez said Kentucky recently began putting Medicaid beneficiaries on notice about recovery efforts.

In years past, not many workers' compensation claimants were also Medicaid beneficiaries, due to the low income limits set by the state systems. But under the Affordable Care Act, 31 states and the District of Columbia have expanded Medicaid so that the medical coverage is available to those with higher incomes, up to 138% of the federal poverty level.

This year, the federal poverty level is $24,600 for a family of four; 138% of that is $33,948. As of last year, 76 million people were enrolled in Medicaid nationwide. Gonzalez noted that a family of four where the only income is an injured worker's $500 per week indemnity benefit would qualify for Medicaid in the expansion states. Further complicating the situation is that Medicaid systems are different in each state. "Every state has a different Medicaid law," Gonzalez said. "That's one of the big headaches."

The articles on pages 21-23, *Medication-Assisted Treatment for Addiction Raises Questions* and *Medicaid Can Pursue Full Settlement Amounts Starting October First* 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.

Save The Date:

Plan To Attend The 1st New Judges' College March 1-2, 2018!

In response to requests that the NAWCJ offer a specific program for new workers' compensation adjudicators, the Board is currently working on a "boot camp" for new judges to take place on March 1st and 2nd in Nashville, Tennessee. Details of the curriculum will follow; however, the NAWCJ would ask that you mark your calendars now to attend this program, to be held in Nashville at the same time as the College of Workers' Compensation Lawyer (CWCL) Annual Meeting. Included with registration for the program will be an opportunity for all participants to stay at a nearby hotel with a special group rate. Watch for further details in future NAWCJ Newsletters!

Farewell Irma, I Never Liked You

By: David Langham*

As Tuesday dawns on the east coast, we begin the task of cleaning up after a massive storm. It will be a long road home for many, and they will appreciate a kind word in days to come.

This storm was astounding in several ways, and this morning I try to capture some of that. One of the first things that comes to mind is the preparation. Florida's emergency preparedness team began hitting us with information a week ago. There were Tweets, broadcasts, and press conferences. This was one of the best publicized storm evacuations and preparations I have ever seen.

I lost count of the places that Governor Scott was prior to the storm, including emergency operation centers, shelters, and more. All through the storm, the tweets just kept coming from the Governor. He was reassuring and inspiring. Another Tweeter that deserves mention is Dan Daley. He is the Vice Mayor in Coral Springs, and his efforts to keep the public informed were upbeat, timely, professional, and sometimes even humorous. I am certain there are many others out there that did a great job, but these two caught my attention repeatedly.

The resource massing was inspiring. A video of power trucks was popular on social media. There was also video of fuel trucks being escorted by the Florida Highway Patrol, part of the effort to make sure there was fuel for evacuation.

The National Hurricane Center and others had a difficult time predicting the track of Irma. We had much conjecture and explanation, but there was much uncertainty until Sunday. There were storm-track predictions (these are published in what they call "spaghetti models") over various portions of Florida through the week last week. The difficulties in prediction raised anxiety and fear. I spoke with a Pensacolan (not a real word, I know) on Saturday who was convinced that Irma would "head into the Gulf and then all bets are off."

The rain. Florida got a great deal of rain. Data has been published by the National Weather Service (this is their photo) showing the volume. Along with storm surge in various locations, the flooding has been horrible.

However, in other locations, the predicted storm surge did not materialize. Some meteorologists have opined that the storm having a "weak" back side contributed to that phenomena. They describe how the front of the storm drove water away from shore on the west coast and into the Gulf of Mexico, but the "weak" side failed to return that water at flood levels on the back. That is simply amazing. As amazing was the way the far-reaching "strong side" pulled the Atlantic into Jacksonville, St. Augustine, and Daytona as the storm moved north.

The results we saw included people walking into the bay in Tampa, there was no water for hundreds of feet out. Similar pictures were posted of the Bahamas. But, to lend some respect to the size of this storm, there were also pictures posted of Mobile Bay, Alabama. That photo made the rounds on social media. And there is some truth to the proposition that Irma winds pushed water out of that bay 300 miles west of the eye wall. But there is also truth that Mobile Bay is very shallow and almost any southern wind will effect mudflats there, particularly during low tide.

Social media was alive with Irma. Twitter provided us with photos and video. One south Florida video was of a Miami construction crane collapsing. Another Miami video showed the roof being torn from a structure by high winds. The flooding videos were compelling. One from Miami was seen repeatedly on social media, showing Brickel Avenue. The photos of flooding in Jacksonville are heartbreaking.

Social media also picked up on people allegedly liberating some shoes from a store in Miami. Yet another shoe store video from Ft. Lauderdale made the social media rounds as well. These reminded me of the news story two weeks ago in Houston. There a reporter contacted authorities and alerted them to a store being emptied. Social media erupted, not with praise for the reporter, but scorn. Many took issue to the reporter calling that looting. Some commented on those stories suggesting that people stealing food or necessaries during an emergency are not "looting."

Continued, Page 25.

Farewell Irma, from Page 24.

We had a scam story out of Jacksonville yesterday. Supposedly people were impersonating utility employees and robbing folks. That has now been debunked. Floridians will do well to be wary of scams in days to come however. Unfortunately, there are some people who thrive on taking advantage of situations like Irma, and they could come to your town. Watch for them and report them. After Ivan, I learned of a group that charged a 90 year old home-bound lady $1,000 to remove a "tree" from her home. In truth, a large branch had landed there and these hooligans merely threw it from her roof to the yard. Some people have no shame.

There was great coverage on Irma social media of the heroes coming to our aid. I liked the video of a Los Angeles Fire Department truck driving into Florida in preparation for search and rescue. There were inspiring moments. Some Manatees were grounded by the falling tide, but were rescued. Two gentlemen in Marco Island struggled to rescue a dolphin. A first-responder even rescued a flag.

People were rescued from boats, from homes, and cars. It seems that there was no shortage of people who needed help. Fortunately, there were a great many there to provide help. But the storm has produced fatalities. ABC News reported two law enforcement officers died in a car accident. Other Irma fatalities have been attributed to wind, electrocution, and carbon monoxide (generators can be very dangerous).

I am proud of the job our OJCC team did in preparing for this storm. As of September 12, we believe that 11 of our 17 offices have electrical power and are ready to open Wednesday. Two offices in the panhandle are already open today. Although there were outages in other court systems, the OJCC electronic filing system remained up and functional all weekend. And, believe it or not, people were out there e-filing throughout.

On September 8, 2017, we had 625 documents e-filed (compared to the Friday two weeks prior, which had 2,496). On Saturday, September 9, 2017, we had 23 documents e-filed (compared to 69 on Saturday, August 26). Sunday, September 10, 2017 brought us 20 e-filed documents (compared to 52 on August 27). And yesterday, September 11, 2017 we had 71 filings (compared to 2,322 on August 28). I am proud that our system was available for people to file. Many people were without power and were dealing with important issues of home and family. But, it is good to know our system was there for those that did want and need it.

There will be much news in coming days. News of damage, tragedy, recovery, heroism, and love. The nation's eyes will focus on Florida and the thousands of people that come here to genuinely and selflessly help. Then the media will likely be distracted by some new and shiny story elsewhere, but the work here will continue. Long after the news crews cease to be interested, Floridians will be rebuilding. That is just the way it is.

Long after the spotlight shifts, we as Floridians will remain true to our friends, neighbors and communities. We must not forget those who have lost and those who are recovering, no matter how long that takes.

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* David Langham is the Florida Deputy Chief Judge of Compensation Claims. The foregoing was originally published on his blog, Florida Workers' Compensations Adjudication, http://flojcc.blogspot.com/ September 12, 2017, and is reprinted here with permission.

Ten Minutes with
Hon. T. Scott Beck

L&V: What is your formal title?
Chairman, South Carolina Workers' Compensation Commission.

L&V: How long have you been in your current position?
I was appointed to the Commission in 2008 and have served as Chairman since June 2010.

L&V: Where is your office?
Our office is located at 1333 Main Street Columbia, South Carolina.

L&V: How many judges are in your office?
We have a total of seven commissioners in our Columbia Office and it is our only office. The State is divided into seven districts and the commissioners rotate districts every two months.

L&V: How many workers' compensation judges are there in your state?
We have seven commissioners for the entire state.

L&V: What is your caseload?
Among the seven commissioners, we docket between 10,000 and 11,000 cases per year. Some districts are heavier than others; however the range of cases per month is between 100-200 per judge. We have an issues-based docket system so commissioners do not have a file from inception to completion.

Our commissioners also sit on panels of three as the first level of appeal. Last year the panels heard 131 appeals.

L&V: Are you required to apply the Rules of Evidence in your hearings and decisions?
We are not bound to the rules of evidence with the exception of hearsay.

L&V: Do you rule from the bench?
I seldom rule from the bench with the exception of motion hearings.

L&V: What did you do before you became a judge?
I've been very fortunate to have a number of interesting jobs prior to joining the Commission. I worked as a police officer in a small town in Pennsylvania for five years and then worked as a SWAT team instructor for a civilian contractor with the Department of Energy for 13 years. I decided to give politics a try and was elected as a city councilman from 1993-1997 and then to the South Carolina House of Representatives from 1996-2000. I went back to law school at the age of 39 and upon graduation accepted a position with the South Carolina Attorney General's Office where I prosecuted health care provider fraud cases. In 2008, I was appointed to the Workers' Compensation Commission.

Continued, Page 27.

Ten Minutes, from Page 26.

L&V: What do you like most about judging?
I love putting the pieces of a puzzle together. The job is not unlike that of police work in that I have the opportunity to evaluate evidence, analyze how those facts fit the legal parameters and then make a decision. My biggest fear in leaving a predominantly criminal arena was that I might be bored…I have not!

L&V: What do you do to relieve the stress of judging?
I used to spend a lot of time motorcycling, predominantly cross country touring. I have recently given that up and spend most of my spare time at our lake house on Luke Murray and our cabin in north Georgia.

L&V: Are you active in the legal community?
As Chairman of the Commission, I spend a great deal of time with our stakeholders. Many of those consist of associations consisting of lawyers from both sides of the bar. I also routinely speak at legal seminars throughout the year. I am also actively involved with the NAWJC as a board member and presenter, and currently serve as the Vice President of SAWCA.

L&V: Are you active in your community?
Most of my spare time is consumed with professional associations related to my work.

L&V: Tell us about your family?
Marilyn and I have been married for 16 years and between us we have 10 grandchildren that keep us extremely busy. We also have two King Charles Spaniels, Raggs and Reagan, that prevent us from being empty nesters.

L&V: What are your hobbies?
I like to go to the gym regularly (not for the health benefit, I just like to eat), and I love to shoot weapons. I also have a passion for finding and collecting allocated bourbons.

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

Primarily, the educational aspect. It's the only organization I have found that actually focuses on judges. The quality of the experience is unrivaled and it provides a much needed training experience.

L&V: Do you have any words of wisdom you would like to share?
Do the right thing. Obstacles will always confront us and I've found that hitting them head-on and sticking with your principles will always serve you well.

2017 *Comp Laude*
Award Winners to be Announced
October 31, 2017 in San Diego!

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