Lex and Verum

The National Association of Workers' Compensation Judiciary

Number CX
October 2018

NAWCJ President's Page

By Hon. Jim Szablewicz*

September has been a terribly stormy month. Floodwaters still flow as the southeast continues to clean up and dry out from the effects of Hurricane Florence. Our thoughts and good wishes go out to our members, colleagues and friends in the Carolinas who have suffered the storm's ill effects.

Meanwhile a manmade storm roils in our nation's capitol over the vacancy on the U.S. Supreme Court. Regardless of political persuasion, anyone watching even a small portion of the September 27 Senate Judiciary Committee hearings could not help but ask if this how the system is supposed to work. As an adjudicator, I found the ugly tenor and tone of the proceedings greatly disturbing. What a negative impression about our courts and judicial system this grotesque show must have made on the viewing public. How could it all have gone so wrong and gotten so far off point? What can we, in our own small corner of the judicial world, do to make it better?

Pondering this, I recalled Judge Edward J. Devitt's "Ten Commandments for the New Judge," and realized that following them in our daily work – and working hard to be the best judges that we can be -- provides one answer to the latter question. While you no doubt have heard or read these Commandments many times, they bear repeating: 1. Be kind. 2. Be patient. 3. Be dignified. 4. Don't take yourself too seriously. 5. A lazy judge is a poor judge. 6. Don't fear reversal. 7. There are no unimportant cases. 8. Be prompt. 9. Use common sense. 10. Pray for divine guidance.

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The President's Page, from Page 1.

The NAWCJ has strived to help workers' compensation adjudicators be the best they can be through its programs and services. As I write this, it is just a few days until the opening of the first Mediators' College, a joint venture with the International Association of Industrial Accident Boards and Commissions (IAIABC). Looking at the agenda for that event, I am struck by the growth and continued excellence of this organization's educational outreach. What began 10 years ago as a single annual program in Florida has expanded to multiple events around the country. With your support and participation, in 2018 we presented a number of programs designed to meet the unique and specific needs of the workers' compensation adjudicator, beginning with the New Judges' "Boot Camp" held in Nashville in March through the outstanding Workers' Compensation Judiciary College in Orlando in August and now the Mediator's College in Williamsburg. NAWCJ members have served as instructors, presenters and panelists at numerous other events and conferences throughout the year.

We look to further expand these efforts and to maximize the relationships we have with the other workers' compensation organizations with which we share common membership, such as the IAIABC, the Southern Association of Workers' Compensation Administrators (SAWCA) and the College of Workers' Compensation Lawyers (CWCL). To that end, we will initiate a new committee, the "Collaboration Committee" for lack of a catchier name, the purpose of which will be to better coordinate with those other organizations for mutually beneficial education and outreach opportunities and to avoid duplication of efforts.

Other committees that will be working to further the Association's mission include:

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2018-19 NAWCJ Officers

In This Issue

Lex and Verum Committee

The President's Page, from Page 2

Conference – responsible for all logistical and practical operations of the annual Judiciary College and other events, ranging from the assembly of nametags and registration bags and organization of social activities to the handling of PowerPoint presentations and other tech issues, to the organization of social activities.

Curriculum – responsible for developing the agenda and content of the annual Judiciary College and other educational events, assisting with the recruitment of speakers and assembling written materials.

Long-range Planning – responsible for developing a long-term vision for the Association and making recommendations for the practical steps necessary to achieve it.

Moot Court – responsible for coordinating the NAWCJ's participation in the annual Earle Zhemer Moot Court competition.

Newsletter – responsible for the development and production of the *Lex & Verum*, including the writing and solicitation of articles, proofreading and layout.

Recruitment – responsible for the growth of NAWCJ membership and attendance at the annual College and other events through outreach to individual adjudicators, workers' compensation agencies and their chief executives.

Scholarship – responsible for administration of scholarships for attendance at the annual College and other educational events, including setting deadlines, reviewing applications and making recommendations to the Board.

Website and Social Media – responsible for monitoring the content and appearance of the NAWCJ's website and managing the Association's presence on other social media platforms.

If you are interested in serving on any of the above committees, please contact me at james.szablewicz@workcomp.virginia.gov. I will make sure that you become actively involved. If you prefer a less active role, your comments and suggestions are always welcome.

Thank you for all that you do for the NAWCJ, for the legal system and for the citizens of your respective jurisdictions.

2018-19 NAWCJ Board of Directors

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Judiciary College 2018

From L to R, Senior Judge Deneise Lott (MS), Chief Judge David Imahara (GA), and Chief Judge Kenneth Switzer (TN) presided over Moot Court Preliminary Rounds at the 2018 Judiciary College!

The NAWCJ Board met in Orlando at the 2018 Judiciary College (Front, L to R), Judges Neal Pitts (FL), Jim Szablewicz (VA), Michael Alvey (KY), Wesley Marshall (VA), Jennifer Hopens (TX), Melodie Belcher (GA), Sheral Kellar (LA), (Back, L to R) Judges Bob Cohen (FL), Bruce Moore (KS), Frank McKay (GA), Deneise Lott (MS), Karl Aumann (MD), Kenneth Switzer (TN), and Shannon Bruno Bishop (LA).

Inaugural NAWCJ President John Lazzara (R) pictured with an unknown party crasher at the #WCI2018, who coincidentally had no name tag.

Common Mistakes New Judges Make - and How to Avoid Them

The National Judiciary College (TNJC) asked the NJC faculty for the most common mistakes they see new judges make and advice on how to avoid them. Submissions began pouring in almost as soon as soon as the inquiries were made.

1. They shy away from making decisions.

"I have been a judge for 25 years. Over the years, I have noticed many new judges have a difficult time making decisions. New judges come from the community and hear cases with their community lawyers. They sometimes are afraid of ruling against community lawyers. They have a hard time coming to grips with a judge's responsibility to decide, as opposed to not ruling and hoping the case settles if the judge drags his/her feet too long."
Judge John Lenderman
St. Petersburg, FL

2. They accept every agreed order.

"It is very, very tempting to new judges to sign off on agreed orders. For example, the parties will present agreed trial continuances, agreed protective orders that give them carte blanche to seal and redact, agreed briefing schedules, agreed expansions of page limits, plea bargains, and more. The solution to this problem is to not be afraid to say no. Trial date certainty is crucial to justice, and it can only be achieved if the court makes it clear that only good cause will warrant a continuance, and (usually) only once. Similarly, the court has an obligation to provide transparency: sealing and redaction defeats this goal. Nor does the court want to cede control of its calendar, including burying itself in long, late-filed reading, by signing off on parties' agreement to change the court rules on briefing dates and page limits. And, of course, sentencing discretion is meaningless if the court simply signs off on plea agreements."
Judge Catherine Shaffer
President, American Judges Association
Seattle

3. They forget to complete the record.

"You have three best friends in the courtroom. They are: the record, the record, the record. Your best friends will never turn on you unless you lose your cool. The moral is, keep your cool. It is your courtroom and you get the last say. As long as you make the record, you will be fine."
Judge Lee Sinclair
Canton, OH

4. They try too hard to look dignified.

"I believe many new judges are so concerned about appearing dignified that they can seem very remote and even uncaring. The solution to this is to learn and apply the lessons of procedural fairness. In reality, there is nothing undignified about being a good listener, a person who explains the neutral principles they are applying, someone who treats each party equally, or someone who speaks in plain language."
Judge Catherine Shaffer
President, American Judges Association
Seattle

Continued, Page 6.

Common Mistakes, from Page 5.

5. They don't go to judge school, and they don't cut the cord.

"I know this will seem self-serving, but many new judges do not take advantage of judicial education programs that will help them get started with the right mindset and skills. It also helps to sever the business and social links between a new judge and his/her former law firm. I remember my presiding judge telling me to get to the NJC during my first year on the bench. I attended General Jurisdiction. After returning, I felt better informed than ever before, and the local attorneys knew I had been through courses that would benefit everyone, including their clients. The professional distance between a new judge and those with whom a law firm connection existed is an important break, and I'll never regret doing it through the NJC. I'm sure that all of the local lawyers appreciated knowing I was completely independent in my decision-making."
Judge Jess Clanton
Langley, OK

6. They place too much faith in court-appointed experts.

"Newly appointed family law judges are often afraid of making mistakes that might harm children – which is important, of course. However, before relying on expert opinions, it is important to understand whether the expert has done a thorough and sufficient job of gathering data. Too often experts seem merely like stenographers who fail to get sufficient depth/breadth in their data gathering. The experts may not have tested or considered multiple hypotheses before reaching conclusions. They may not have an adequate basis for their opinions or may be otherwise influenced by some type of cognitive or other bias(es). This is especially true when allegations of domestic violence exist in a case, in very high-conflict cases with children who refuse/resist contact with a parent, or in relocation cases."
Forensic psychologist Philip M. Stahl
Queen Creek, AZ

7. They embarrass themselves by feigning experience.
"Most new judges are assigned to court divisions where the judge has no experience as a lawyer. Some have a hard time admitting to the parties and lawyers that they don't know what they are doing. They overreact and get defensive. The lawyers know! New judges need to know that they make their lasting reputations in their first year. There is an old saying from New York: "When a new judge sneezes in Manhattan, the lawyers in Brooklyn say, 'God Bless.'"
Judge John Lenderman
St. Petersburg, Florida

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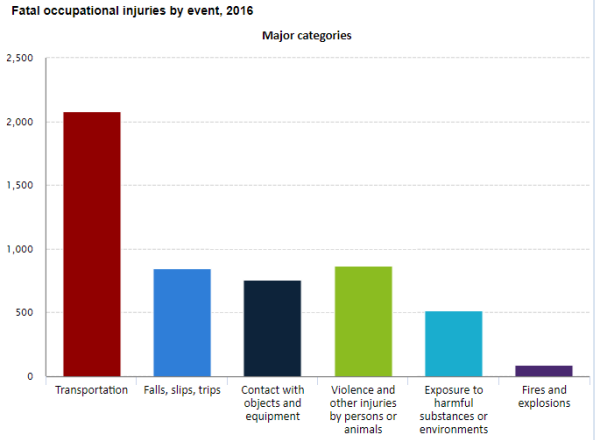
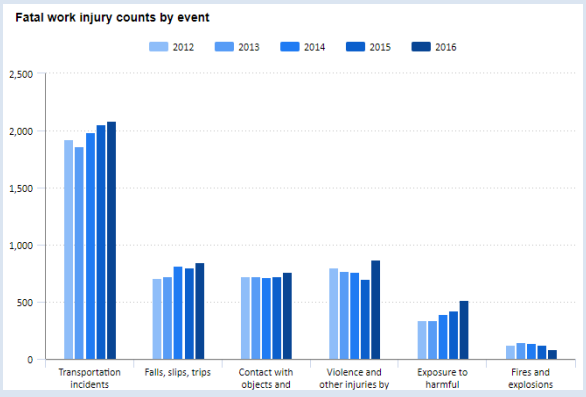
Bureau of Labor Statistics Releases 2016 Conclusions

The United States Department of Labor, Bureau of Labor Statistics (BLS) recently released their conclusions regarding workplace fatalities in 2016. Transportation accidents continue to be the overwhelming cause.



Through a series of intriguing charts, the BLS illustrates the volume, causes, and some trends. Notably, 2016 demonstrated a continued increase in transportation, fall, and exposure to substance deaths. Violence deaths also increased, but that change was notably inconsistent with the recent trend of decrease. Encouragement might be found in the moderate decrease in fire and explosion deaths



Common Mistakes, from Page 6.

8. They don't realize that…

* "It is impossible to have equally talented and prepared attorneys on each side of every case.
* There will be someone who will file a complaint against a judge, whether justified or not.
* You will have no privacy. Attorneys, as well as citizens, expect to know where you are and what you're doing IF YOU AREN'T IN THE COURTROOM.
* Depending on type of judgeship, the amount of work will be unexpected. You will be placed on committees and asked to do assignments outside the description of the job.
* There will rarely be enough time to sit and ponder the law quietly at your desk.
* There will not be enough money to take a judicial training course outside your state. You should nonetheless volunteer to teach at Continuing Legal Ed. classes. And you should know that judges are improved by taking Continuing Judicial Education courses, wherever they are held."

Judge Cynthia L. Brewer
Canton, MS

9. They forget they aren't a trial attorney anymore.

"Stepping into the advocate role is a big mistake for new judges. Another mistake is failing to understand the need to create a full record and the importance of being the 'conductor' of the proceedings. Those are just some of the issues we see."
Judge Susan L. Formaker
Los Angeles

10. They forget about … other important things.

"Make sure your robe is on before taking the bench (I've been so engaged in thought I marched right into court forgetting my robe.) If you don't have a court reporter, always double-check to make sure the recorder is on. No one likes to recreate a record."
Judge Lin Billings Vela
Cripple Creek, CO

11. They don't know the differences between attorney and judicial rules of conduct.

"Some common challenges include ex parte contact, requests for judicial letters of recommendation and support, inappropriate speaking requests, and more. It is really important that new judges read the rules of judicial conduct closely, check prior ethics opinions when a question comes up, and, most importantly, stay in touch with someone with expertise in this area. I emailed our state court administrative office's ethics liaison very often as a new judge, and she saved me from error more than once."
Judge Catherine Shaffer
President, American Judges Association
Seattle

12. They succumb to Black Robe Syndrome.

"Its symptoms are insidious and hard to detect. I'll never forget a longtime colleague reminding me when I was sworn in that I'm not any smarter, better looking or funnier than before I wore the robe. Think before you speak: a closed mouth gathers no foot. Do not rule from the bench when angry or upset; a quick break is necessary to organize your thoughts. Don't think you have all the answers; you don't. Don't hesitate to ask questions of the lawyers and/or your colleagues."
Judge Lin Billings Vela
Cripple Creek, Colorado

Continued, Page 8.

Common Mistakes, from Page 7.

13. They don't set status conferences.

"New judges often find themselves struggling to keep complex cases on track and adjudicate cases with recurring disputes over issues such as discovery. One solution to this problem is to set status conferences on difficult cases. A conference where the court simply asks what the progress of a case is against the agreed case schedule, or sits down with disputing parties to ask why one party wants certain discovery and ask the other party why the first cannot have that discovery, can often save many unnecessary motions from being brought. Never be afraid to set a status conference with the parties; they will come when you call them."

Judge Catherine Shaffer
President, American Judges Association
Seattle

14. They misunderstand their position.

"Stay away from the phrase 'In my court…' It is not your court, it belongs to the people, it will always belong to the people, and you can be replaced." So…

"Understand that the case before you is the most important case on the planet, and treat the people before you in that manner. Treat people the way you would want a family member to be treated if they were in court. Do not have 'POLICIES.' Have trust in your in-court staff. Listen more than speak. Do not rush your docket, no matter how busy it is. Take frequent breaks. Smile. Dress like a judge. Be humble. Be kind. Never show anger. Never assume anything before asking questions. Do not be afraid to say, 'I do not know.'"

Judge Louis Schiff
Deerfield Beach, FL

15. They aren't up on the latest research.

"New family law judges may not be sufficiently aware of the relevant psychological literature associated with parenting time, high-conflict parents with personality-disorder traits, critical and relevant relocation-related factors, and the various forms of domestic violence. NJC courses on managing complex family law matters and on domestic violence teach novice judges about these critical issues."

Philip M. Stahl
Forensic Psychologist
Queen Creek, Arizona

Continued, Page 9.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR ASSOCIATE MEMBERSHIP

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

NAME:_____

DATE: ____/____/____

FIRM OR BUSINESS:

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PROFESSIONAL ADDRESS:

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PROFESSIONAL E-MAIL:

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ALTERNATE E-MAIL: _____

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HOW DID YOU LEARN ABOUT NAWCJ?

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_____

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

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Common Mistakes, from Page 8.

16. They make any number of errors in sentencing.
Such as…

* Handing down an illegal sentence (exceeding maximum, ignoring mandatory minimum)
* Imposition of an "innovative" sentence not authorized by law
* Failure to exercise discretion at all (e.g., judge requires all cases of a type to have the same sentence without variation)
* Breaching of a plea agreement
* Failure to observe necessary procedural measures—ensuring fair disclosure of sentencing evidence including Pre-Sentencing Investigation and meaningful review of PSI by the defendant; ruling clearly on PSI redaction requests; providing opportunity for victim participation; providing opportunity for defendant's allocution
* Clear reliance upon unreliable hearsay/inadmissible sentencing evidence in imposing sentence
* Clear reliance upon evidence of undisclosed acquitted conduct of the defendant without ensuring notice and opportunity to respond
* Inadequate findings on departure from a presumptive sentence
* Concurrent/consecutive/credit complications and errors
* Failure to clearly state the sentence!
* Animus, bias, impermissible discriminatory basis for sentence
* Degrading, unnecessarily denigrating defendant at expense of dignity, fairness of proceeding. The message can be clearly delivered without losing decorum and dignity of justice.
* Ex Parte communications/investigation by judge re: sentence computation, correctional programming and placement options in a given case, etc.
* Basing sentence upon Judge's extensive investigation and recourse to learned treatises/journals/expert studies not adduced by parties, without notice to parties or opportunity for response or objection.
* Vindictive sentence following a defendant's appeal
* *Sua sponte* sentence reconsideration without clear basis, or on untimely basis

"How do you remedy sentencing errors? In most cases, it calls for a remand for resentencing proceeding consistent with appellate instructions. Think about the hardships to the parties and the process of reconvening a sentencing proceeding long after initial sentencing has occurred. This may cause you to take more heed of possible errors and avoid them in the first place."
Judge Walter M. Morris, Jr.
Lyndonville, Vermont

Continued, Page 10.

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
http://www.workerscompinsider.com/

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

Wisconsin Workers' Compensation Experts
http://wisworkcompexperts.com/

Common Mistakes, from Page 9.

17. They don't watch their steps.
"You will find yourself tripping over your robe when you put the garbage out."
Judge Philip Straniere
New York City

18. They let themselves go.
"New judges are often not very good at self-care, the key to being a judge with staying power. They stop exercising and reading for pleasure, skip their sleep, eat poorly, and sometimes are tempted to medicate their stress with dangerous palliatives like alcohol. I strongly suggest that judges learn as early as possible about productive strategies for managing judicial stress and secondary trauma, to avoid the risk of burnout for themselves and their staffs. Being a judge is a wonderful job, but only if your mind, body, and spirit are tended and resilient."
Judge Catherine Shaffer
President, American Judges Association
Seattle

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Thanks Again to our Record-Setting E. Earle Zehmer Volunteer Judges!

Michael Alvey (KY)
Wilbur Anderson (FL)
Rob Arthur (FL)
Diane Beck (FL)
Scott Beck (SC)
Melodie Belcher (GA)
Deborah Blevins (VA)
Shannon Bruno-Bishop (LA)
Suzette Carlisle (MO)
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Iliana Forte (FL)
Liesa Gholson (GA)
Meg Hartin (GA)
Thomas Hedler (FL)
Bob Himmel (VA)
Ray Holley (FL)
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David Imahara (GA)
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Jeffrey Jacobs (FL)
Gregory Johnsen (FL)
Sheral Kellar (LA)
David Langham (FL)
Dan Lewis (FL)
Deneise Lott (MS)
Dwight Lovan (KY)
Brian Mallow (GA)
Wesley Marshall (VA)
Johnny Mason (GA)
Mark Massey (FL)
Warren Massey (GA)
Frank McKay (GA)
Steven Minicucci (RI)
Sylvia Medina-Shore (FL)
Bruce Moore (KS)
Jacqueline Newman (FL)
Keef Owens (FL)
Knowrasa Patrick (WA)
Neal Pitts (FL)
Dana Plunkett (VA)
Aryka Radke (AZ)
Catrice Reid (LA)
Rebecca Sanders (KS)
Richard Sapp (GA)
Thomas Sculco (FL)
Margaret Sojourner (FL)
Timothy Stanton (FL)
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THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

APPLICATION FOR MEMBERSHIP

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

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

OFFICIAL TITLE: _____

ORGANIZATION: _____

PROFESSIONAL ADDRESS: _____

_____

PROFESSIONAL E-MAIL: _____

ALTERNATE E-MAIL: _____

PROFESSIONAL TELEPHONE: _____ **FAX:** _____

YEAR FIRST APPOINTED OR ELECTED: _____

CURRENT TERM EXPIRES: _____

HOW DID YOU LEARN ABOUT NAWCJ: _____

_____

DESCRIPTION OF JOB DUTIES / QUALIFICATIONS FOR MEMBERSHIP:

_____

_____

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

_____

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Mail your application and check to: Kathy Shelton, P.O. Box 200, Tallahassee, FL 32302
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Book Note and Summary

Humans As A Service: The Promise And Perils Of Work In The Gig Economy

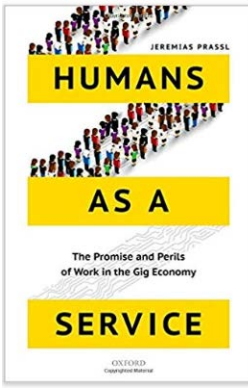
by Jeremias Prassl
Oxford University Press. 2018. 199 pp.

By Hon. David B. Torrey*

I.

In this new book, British law professor Jeremias Prassl analyzes the gig economy with a focus on the workers who actually labor in the gig workforce – and with an eye on the dignity and rights of such workers. Prassl accepts that new forms of business enterprises, like Uber, Lyft, and Taskrabbit have changed the nature of business, but he rejects the proposition that work itself needs to be examined differently. He shows that models of work in the gig economy find predecessors in the history of work relationships. As a result, caution is required in the analysis of whether the gig economy has truly changed the nature of work. Prassl, after showing that the purported innovation of platforms reflects old models of work, that enterprises like Uber retain control over its workers, and that much gig economy lingo is, in fact, "doublespeak" that clouds the critical analysis, argues that familiar Anglo-American precepts of employment law should apply to work in the gig economy.

Much is to be learned by the workers' compensation specialist from Prassl's book. He explains the nature and economics of the gig economy; how gig economy enterprises disingenuously seek to rebrand work as some innovation, the better to ward off regulators; and how laughable the idea is that most workers in the gig economy are autonomous entrepreneurs. Prassl also explains in detail that gig economy enterprises resemble the commercial labor intermediaries that have been with us since the 19th century, abetted in the present day by advanced communications. On this point, Prassl asserts that, just as other labor intermediaries are subject to employment law, so should gig workforce enterprises. Prassl concludes his book by emphasizing that the wealth of enterprises like Uber comes at a societal cost – it is fine, for example, to create fleets of independent contractors to prowl the streets *en masse* 24/7, but when unemployment or injury occurs, it is the taxpayers who will likely pay the cost.



Prassl's book is, to my knowledge, the first by an employment law scholar to comprehensively take on the issue of work in this specialized sector of the gig economy. His insights and manner of argument will be familiar to the lawyer-reader, but this book is also a manifesto at once exposing and rejecting a modern example of the unsatisfactory commodification of labor. For me, the analysis brought context and will inform my reasoning as a judge – and as a member of the public. In the sections that follow, I have tried to summarize the critical points of this essential book.

II.

The critical gig workforce issue in workers' compensation, of course, is whether the worker laboring via a commercial labor platform intermediary is an employee or an independent contractor. Invariably, the worker in these relationships is unilaterally assigned the independent contractor label. For example, if an individual desires to use the Uber app to accept trips, he must enter into a non-negotiable agreement stating that he or she is an independent contractor. Of course, this device is hardly some innovation. As Prassl correctly remarks, "Independent contractor status is nearly always the easiest way of wriggling out of responsibility."

Continued, Page 13.

Humans, from Page 12.

Prassl notes the majority rule (prevalent in Pennsylvania), that mere unilateral designation does not answer the question in most jurisdictions. Courts, he correctly points out, will examine whether the alleged employer has retained control over the worker. Prassl, in this context, addresses the new legislative schemes promoted by industry lobbies to avoid such judicial scrutiny. This is legislation (most recently enacted in Tennessee in the context of "marketplace contractors"), "that simply stipulates that employment law does not cover gig-economy workers." "[D]etails vary across jurisdictions," he remarks, "but one common goal emerges: to deny workers' employment status and insure that platforms are defined as mere intermediaries."

Control of the relationship is, in any event, key in the Pennsylvania workers' compensation analysis, and has been the subject of several non-workers' compensation gig workforce cases in the U.S. In two California cases (dealing with wage and hour laws), courts have identified control, while in a notable Pennsylvania FLSA case, dealing with Uber limousine drivers, control was not found.[1]

It is on this issue that Prassl's book is especially insightful. In explaining the gig economy, and how gig economy enterprises work, he shows that the latter do indeed retain control, often in a subtle manner. "To deliver tightly curated products and services to customers, gig-economy operators accurately shape the entire transaction by means of close control over their workforce[,] from setting terms and conditions and checking relevant qualifications, to insuring proper performance and payment. Gig-economy apps do not only make it quick and easy to find workers and tasks; user ratings also provide quality control and feedback, and digital payment systems render the entire transaction cashless." "The reality of work," Prassl thus asserts, "is often a far cry from the freedom and independence of genuine entrepreneurship."

The author observes, "most platforms contractually insist that they are not service providers, but mere marketplaces facilitating transactions between independent entrepreneurs and their customers." He rejects this proposition, though at once stressing, as do most observers, that the gig workforce is attended by a broad heterogeneity, thus making generalizations difficult. He acknowledges, for example, that if an established plumber simply uses TaskRabbit to "grow her business," such a process does resemble simple matchmaking.

Still, "when we look at platform work as a whole…, the entrepreneurship narrative is much more difficult to sustain." Pertinent to the workers' compensation analysis, "many platforms' business models are explicitly premised on tight control over their workforce, subject to constantly changing and increasingly onerous terms – the very antithesis of facilitating entrepreneurship." Indeed, Prassl rejects the proposition that gig workers are autonomous at all. He stresses, in this regard, the role of consumers' anonymous feedback following each task. He depicts this "algorithmic control" as a sort of tyranny: "Rather than merely signaling quality …, the real point of rating algorithms is to control workers – both on a day to day basis and by locking them into a particular platform's ecosystem."

Continued, Page 14.

Governor Cooper Appoints Commissioner

Effective August 16, 2018, North Carolina Governor Roy Cooper appointed A. Robinson "Robby" Hassell as a Commissioner of the North Carolina Industrial Commission on an urgent basis, pending confirmation by the General Assembly. Before his appointment as Commissioner, Hassell served as an Emergency Superior Court Judge.

Robby Hassell received his B.A. in Political Science and Economics from the University of North Carolina at Chapel Hill and his law degree from the University of North Carolina School of Law. Governor Cooper appointed Hassell to the seat of former Commissioner Tammy R. Nance.

Humans, from Page 13.

The author compares the business model of many platforms to aspects of Frederick Taylor's "Principles of Scientific Management." Taylor, of course, was the architect behind assembly lines and making them perfectly, even inhumanely, efficient: "Today, Taylorism is back in full swing, resurrected under the guise of the on-demand economy, with technology and algorithms providing a degree of control and oversight of which even Taylor himself would not have dreamed." An example is the Uber rule that drivers are compensated only when the app is in use; time in between rides is not compensated, even if the driver is in his vehicle and standing by for work.

Prassl provides further examples of control which are not widely known to the public. For example, some ride-sharing apps frequently, and intentionally, keep their drivers without information about passengers' destinations until the trip has begun. True independent contractors, on the other hand, would presumably have open access to such information and "be free not to accept unprofitable work – such as a short local ride after a long wait in an airport queue." Meanwhile, Uber tells its drivers to dress appropriately, and customers, for their part, can complain if a different route was chosen than that which they wished, and feel disadvantaged as a consequence. Taskrabbit obliges workers to wear bright green t-shirts with the company logo and also exerts control via its "general conditions of use."

Prassl claims, "Even when platforms do not set a wage rate, they still exercise significant control over how much the worker is paid. Many operators insist that no cash changes hand directly between consumers and workers in order to keep full control over all aspects of fees, invoicing and payouts." Control over wage levels, he explains, is essential to the on-demand business model.

Control is also exercised via platforms' ability to sanction workers. According to Prassl, "algorithmic ratings are backed up by a series of incentives and sanctions. Well-paid or otherwise attractive requests are reserved for those with higher ratings, while low ratings trigger a series of 'performance standard probations' with workers confined to low-value tasks – or simply fired.…" Of course, what most of us would call a firing is, in the doublespeak of the app-based intermediaries, "deactivation."

The author argues that the gig economy's promises of self-determination and freedom are false. Platforms, he says, use their superior bargaining power to force workers into signing away "some of the most basic freedoms that a genuine entrepreneur might enjoy – from sending in substitutes and soliciting new customers to bringing in disputes before a court." As to the former, TaskRabbit imposes a duty on taskers to "personally" perform any work, because taskers must go through the TaskRabbit vetting process; as to the latter, Prassl accurately identifies the mandatory arbitration clauses that are ubiquitous in gig economy agreements.

III.

The gig economy enterprises deride critics and regulators for their supposed hostility to entrepreneurship. The same derision is accorded those who presume to question the integrity of the gig enterprises' supposed innovations in work which, with their apps, they have rolled out. And, of course, it is difficult to be against entrepreneurship and innovation. Who, after all, wants to be a Luddite?

As foreshadowed at the outset, however, Prassl identifies earlier models of business and work that, he says, are precursors to platform intermediaries in the gig economy. He characterizes as myth the idea that the gig economy is all innovation. Prassl declares, "the innovation claim is essential to sharing-economy doublespeak. It is designed to keep regulators in general, and employment law in particular, at bay." While *modes of communication* are innovative, he explains, the labor undergirding the work that is ultimately undertaken is not innovative at all. To reiterate, "the very business model of the gig-economy – matching a large supply of on-demand workers with ever waxing and waning demands for work – can be traced back for centuries….":

Low-skilled tasks instead of complex jobs; powerful intermediaries controlling a large workforce; hybrid arrangements between open market and closed hierarchies: The gig economy is just the latest (and perhaps the most extreme) example of labor-market practices that have been around for centuries.

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The first precursor should be of special interest to the Pennsylvania lawyer. Our statute has, in this regard, from 1915, always excluded from the definition of "employee" homeworkers who undertake piece work in the assembly of "articles or materials" – usually clothes and similar items.[2] Prassl identifies as a precursor to gig work such processes (also called "outwork" and the "sweated trades"), noting that the practice "involves an entrepreneur organizing the production of a wide variety of goods [like clothing and lace] by breaking down the manufacturing process into individual steps…." The author states that such work arrangements were common during the last two centuries in most industrialized countries. The model, notably, was not limited to manufacturing: "Early service industries, such as dockworkers unloading ships … were often organized along similar lines."[3]

The second precursor is the "labor broker," a term – and an occupation – that has existed for over a century. Prassl draws similarities between current platforms and such early "labor broking" intermediaries. Prassl identifies a whole series of labor recruiters in England a century ago. The author states, "technology apart, the essential features of most intermediaries' business model were identical to platforms' and apps' digital work intermediations in the on-demand economy: They acted as a broker for a set of tasks, exercised tight control, and took a cut of workers' earnings."

In the past, notably, those undertaking homework, and waiting to unload ships, would not be paid for their time unless they were in the midst of their labor. Uber drivers of the present day are similarly not paid for their time between rides. Uber and the commercial labor intermediaries of the past both relied on the labor of crowds.

The author asserts that these early business models "debunk the on-demand economy's claim to innovation, at least as far as work is concerned. Employers have long experimented with each of the elements we saw, from putting out work to powerful intermediaries to recourse to casual labor."

Prassl, as he concludes his reflection on this historical phenomenon, ventures that these workers, past and present, should not be referred to as gig workforce members at all but, instead, "taskforce" members.

IV.

Prassl also deals with the oft-discussed issue of how to *identify* the employer in the gig economy. This is an issue quite critical to the author because, as foreshadowed above, he believes that traditional tenets of employment law should apply to these new relationships: "on-demand work [should be brought] back into the scope of existing employment law rules, ignoring platforms' attempts to misclassify workers as entrepreneurs and accurately ascribing employer responsibility."

The author recognizes the reality that more than one employer may exist for a gig workforce laborer. "The solution," he states, "lies in adopting a more flexible approach to determining who should be responsible…. In legal terms, we can analyze employers' powers – and the law's control over them – as 'functions of the employer.'" A solution "could be to decree that the platform is responsible as the employer under all circumstances, as is the case with labor-outsourcing agencies in some jurisdictions."

Ride-sharing platforms are a good example of "on-demand business models where the functional concept of the employer clearly identifies the platform as the employer." In certain scenarios, however, he admits that the employer-assignment task is more problematic: "what if a generally independent tradesperson wants to advertise her services through Taskrabbit?"

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In any event, Prassl asserts, "we should be more flexible and adopt a functional concept of the employer. Those responsible for controlling one or more employer functions will have to comply with the regulations applicable to their options."

V.

In the final parts of his book, Prassl seeks to answer the question, "what are the implications of the on-demand economy for consumers and markets?" He asserts that society bears a cost: "Both as consumers and as taxpayers, we are all potentially liable for the real cost of on-demand services." The modest prices, and the labor conditions, that make them possible have a price-tag.

The social costs are broad ranging. As examples only:

- Taskrabbit, at least at one time, had clients agree to indemnify it for almost every eventuality. For example, if a worker laboring through Taskrabbit is found to be an employee, the client, that is, the consumer, agrees to indemnify Taskrabbit for things like workers' compensation benefits.[4]
- Platforms frequently disavow responsibility in tort, and hence costs are spread to its drivers, victims, and the public. Uber, for its part, in one death case, declared that it was a "mere online platform," and that it had no responsibility in a case where its driver, between jobs, ran over and killed a toddler.
- Without the applicability of anti-discrimination laws, minority passengers are without protections and have reported instances of mistreatment. Platform intermediaries in the ride-sharing business in response have suggested that they are not in the transportation business, and its drivers are contractors whose fidelity to equal treatment laws and regulations is outside their control.

Social costs also include those imposed directly on workers, items which are often off the radar screen. The author explains that, in addition to direct losses, like tax revenues and social security contributions, "taxpayers are also subsidizing gig-economy platforms indirectly. Traditional employers have a number of legal obligations towards their workers even when they are not economically active. In addition to paying an employee's salary, companies usually have to provide a host of benefits, such as sick pay or parental leave. In the gig economy, these costs are borne by the workers themselves – which, in reality, often means that they have to fall back on the welfare state."

VI.

Prassl makes a convincing case that the growth (and seemingly out-of-proportion valuation) of platform-based commercial labor intermediaries has come not so much from innovation, but from familiar strategies and phenomena. These include:

1. Arranging workers as independent contractors, a hoary and often facile cost-saving device;
2. Avoiding regulation (often illegally, as with Uber's epic confrontation with and fining by the Pennsylvania Public Utility Commission); and, in general,
3. Taking advantage of the general phenomenon of the "fissured workplace," under which tasks that used to be handled within a single firm are fragmented into units, often to the disadvantage of workers at the bottom of the economic hierarchy.[5]

Those of us who work as workers' compensation lawyers can easily appreciate these aspects of the gig economy.

Practically, it is important for the Pennsylvania lawyer to recall that each litigated case (not many have surfaced so far), must be assessed on its own facts. As Prassl notes, gig work is attended by "heterogeneity" (many systems and conditions exist) and the business model of many platform-based commercial labor intermediaries change overnight. In any event, whatever agreement has been unilaterally imposed on the worker must, in the pivotal analysis of control, always be compared to the actual conditions of his or her labor.

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Prassl also makes his case that, while the digital age has revolutionized communications, work itself has not changed. Is this not intuitive? As a professor, I still have occasion to give an F to a student who has lightning-quick access to unlimited resources but who has still refused to do the *work* of study. As a judge, I encounter lawyers in court who have every innovative scheduling and research digital resource, but who have failed, inscrutably, to do the *work* of case preparation.

VII.

Those who perform work in the gig economy should not be left to share the scraps generated out of the machinations of 21st century commercial labor intermediaries. To the contrary, as Prassl correctly advocates, the scales should be rebalanced and "specific standards should be established to address unequal bargaining power in [our] world of flexible work." One aspect of that rebalancing is to ensure a worker's *disability support* and *medical care* in the event of work injury. Those injured in gig work should not be inhumanely jettisoned – as if their labor is just some mere commodity, to wit, "humans as a service."

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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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Mark your calendars now!

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Reflections from Team Baylor's Win at the 2018 Zehmer Moot Court Competition in Orlando

By Ryan Owen*

Ed. Note: The NAWCJ appreciates the efforts of the judges who volunteered at the Moot Court Competition in Orlando this past August and believes it is important for those judges to hear from the student participants about their experience. Most of you will recall from last month that the team from the Baylor Law School captured the crown. Below you will find comments from one of the Baylor team members regarding his experience in Orlando.

My name is Ryan Owen, and I'm a second-year student at Baylor Law. My partner Blaine Hill and I first became involved with appellate advocacy last spring, when Baylor hosted an intra-scholastic moot court competition. After that competition, I was selected by Professor Patricia Wilson to be part of her summer moot court team, along with my partner Blaine and another team from the same competition that included Carson May and Kimberly Trimble.

Blaine Hill

The moot court problem boiled down to whether Miami or Lemon City (a fictitious city in Florida) was responsible for paying Detective Joe Friday's medical expenses after being diagnosed with PTSD in Miami, but not needing to miss work until he was employed by Lemon City.

After our brief was submitted, we spent about three days a week practicing for the competition until we left for Orlando in late August. Professor Wilson stressed the importance of balancing our new expertise in workers' compensation lingo and case law with the need to persuade the judges to see the law our way, whichever side we were on, as we argued this newly enacted statute.

We had a blast at the competition in Orlando. It was the weekend before our 2L classes began, so we were all soaking up as much fun before the next round of classes started. But once the competition began, we put our heads down and figured out ways to press our strengths and address our weaknesses in our argument from round to round. We took the judges' recommendations to heart and we appreciated their feedback.

We were fortunate to advance to the final round and to have the opportunity to argue before three judges of the Florida First District Court of Appeals. We faced the University of Florida College of Law team, Amy Nicotra and Tim O'Leary, who were coached by Gina Gonzalez. Blaine and I were anxious to get started, but once we did, the final round felt similar to previous rounds. The judges asked more specific and challenging questions than in previous rounds, but we were prepared.

After the final round, we had the opportunity to meet the three appellate judges, and they were all extremely encouraging in their feedback. Professor Wilson, Blaine, and myself, are thankful for the opportunity to travel to Florida and be part of this competition. The committee and the volunteer judges in the early rounds did a fantastic job of hosting the event and providing helpful comments. Each committee member made a stressful process very easy and kept us in the loop every step of the way. I'm not sure if I'll end up practicing Florida Workers' Compensation law, but if I do, I've got a great start.

---

* Ryan Owen is a 2L law student at Baylor Law School and is a J.D. Candidate in 2020. Ryan grew up in Arlington, Texas and graduated for the University of Texas at Arlington in 2011. He worked for Fidelity Investments for 5 years before pursuing his lifelong dream of attending law school to become a lawyer.

FDA Seeks Opioid Guidelines Tailored to Specific Conditions

By Elaine Goodman
Friday, August 24, 2018

Current federal guidelines discourage the use of opioids for treating acute pain beyond three to seven days. But what if the guidelines were more specific, with prescribing recommendations for pain resulting from a bone fracture, a knee surgery or a spinal fusion — all based on medical evidence for those conditions? That seems to be the idea behind an announcement Wednesday by U.S. Food and Drug Administration Commissioner Scott Gottlieb.

Gottlieb said the FDA had awarded a contract to the National Academies of Sciences, Engineering and Medicine to "help advance the development of evidence-based guidelines for appropriate opioid analgesic prescribing for acute pain resulting from specific conditions or procedures." He said he wants to develop a "framework" that medical specialty societies can use to create evidence-based guidelines on appropriate opioid prescribing. He said NASEM would start by identifying painful procedures and conditions for which opioids are commonly prescribed and where evidence-based guidelines could help shape prescribing practices.

Many people who become addicted to opioids first receive the drugs through a legitimate prescription, Gottlieb said. "The fact remains that there are still too many prescriptions being written for opioids," Gottlieb said. "And too many prescriptions are written for longer durations of use than are appropriate for the medical need being addressed."

Phil LeFevre, managing director of ODG from MCG Health, said opioid prescribing can be complex, with such factors as patient health history, drug formulation and contraindications playing a role in addition to the diagnosis. ODG is the Official Disability Guidelines used as workers' comp treatment guidelines in several states. "While one guideline per ICD-10 diagnosis (of which there are over 90,000) will never be necessary, nature and severity of injury are important components to patient selection criteria found in evidence-based care guidelines like ODG," LeFevre said.

Some view Gottlieb's statement as taking a swipe at the Centers for Disease Control's opioid prescribing guidelines, released in March 2016. Dr. Jeffrey Singer, a senior fellow at the Cato Institute, noted that Gottlieb acknowledges the CDC for taking "an initial step in developing federal guidelines." He described the CDC guidelines as being "based on expert opinion." Gottlieb said the FDA initiative would "build on that work by generating evidence-based guidelines where needed."

Critics of the CDC guidelines, including some addiction and pain medicine specialists, claim that the guidelines are not evidence-based, Singer said. Still, prescribing regulations in various states are based on the CDC guidelines, he added. "While the (FDA's) press release language was diplomatic and avoided any notion of disrespect for the CDC's efforts, it is difficult not to infer that the commissioner agrees with many who have been criticizing the CDC guidelines over the past couple of years," Singer wrote in blog post on Thursday.

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Opioid Guidelines, from Page 19.

The Cato Institute is a think tank that describes itself as dedicated to individual liberty, limited government, free markets and peace. Although the focus of the CDC opioid guideline is chronic pain, it also includes recommendations regarding acute pain. "Long-term opioid use often begins with treatment of acute pain," the CDC states. "When opioids are used for acute pain, clinicians should prescribe the lowest effective dose of immediate-release opioids and should prescribe no greater quantity than needed. ... Three days or less will often be sufficient; more than seven days will rarely be needed."

A new Opioid Policy Inventory that looks at opioid strategies used in different states, including workers' comp-specific policies, lists 23 states in which the number of days supply of initial opioid prescriptions for acute pain is limited from three to 30. In addition, some states are setting voluntary or mandatory limits on daily opioid dosage, ranging from 30 to100 morphine milligram equivalents for acute pain. The International Association of Industrial Accident Boards and Commissions, or IAIABC, unveiled the Opioid Policy Inventory this week.

Meanwhile, researchers from Emory University have looked at what strategies are effective for reducing the amount of opioids prescribed for post-surgical pain. They analyzed eight previous studies published since 2000; their work was published online last week in JAMA Surgery. One study found that disseminating practice guidelines to clinicians decreased the number of opioid pills prescribed, by 53%, without an increase in refill requests.

In another study, patients who were educated about the opioid epidemic and encouraged to use non-opioid medications for pain relief took 1.4 opioid pills after surgery on average, compared to 4.2 pills for those who didn't receive counseling. One of the studies included comprehensive monitoring of pain control when opioid-reduction strategies were in place. Telephone calls from nurses in the week after surgery found inadequately controlled pain in 13 of 240 patients, or 5.4%, leading to a narcotic prescription. Another 5.4% visited an urgent care center or other clinic to get a narcotic prescription for pain.

New App Brings BioPsychoSocial Approaches to Chronic-Pain Patients

By Elaine Goodman
Monday, September 17, 2018

As interest grows in biopsychosocial approaches to managing chronic pain, there's now an app that introduces techniques such as mindfulness to patients with painful conditions. Called Curable, the app provides users with pain education and evidence-based therapies, including guided meditation, visualization, cognitive behavioral therapy techniques and expressive writing. A virtual coach, named Clara, guides users to particular lessons and exercises.

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BioPsychoSocial, from Page 20.

After a free introductory period, users pay $15 a month, $96 a year, or $300 for a lifetime subscription. The app was created by Curable, a Denver-based startup launched in 2016. Laura Seago, Curable's head of content, said Curable is offered only directly to consumers and is not covered by insurance. But that could eventually change. "We certainly see a lot of upside potential for insurance companies and employers to offer Curable to their employees as a first line of defense against chronic pain," Seago said Friday in an email.

In fact, some injured workers may already be using Curable. Geralyn Datz, a licensed clinical health psychologist with Southern Behavioral Medicine Associates in Hattiesburg, Mississippi, said she recommends the app to patients as an adjunct to cognitive behavioral therapy. Datz's practice includes treatment of work-related injuries. Curable can be used as a "homework assignment" between CBT sessions, which might take place twice a month, Datz said. The app is also useful as maintenance therapy after a functional restoration program is completed.

Patients pay for the app themselves. "It is based on very good science," Datz said. The app introduces patients to the biopsychosocial model, which emphasizes the body-mind connection in pain. It also encourages patients to take an active approach to their pain, Datz said. A potential downside to recommending an app is that a patient might feel that the provider is brushing him off, she noted.

Curable is one of several apps that Datz might recommend, including some free resources such as YouTube videos. One of the concepts woven throughout Curable is mindfulness, which involves being aware of one's thoughts and physical sensations in a dispassionate manner. Mindfulness is also featured in several of the app's exercises. Seago said Curable uses mindfulness concepts to reinforce what a user is learning about the physiology of pain, rather than simply as a stress-reduction technique. "We've found that this often amplifies the success our users have with Curable's approach in comparison to mindfulness techniques they have tried in the past," she said.

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Georgia Chair Frank McKay Reelected to Leadership Roles

Georgia State Board of Workers' Compensation Chair Frank McKay was reelected to again serve as the President of the Southern Association of Workers' Compensation Administrators for 2018-19. He was also recently reelected to the Board of the International Association of Accident Boards and Commissions. He also continues to serve on the Board of Kids' Chance of Georgia.

Chair McKay was appointed by Governor Nathan Deal. He came to the Board from private practice where he was a partner in the Stewart, Melvin & Frost law firm in Gainesville, Georgia. His practice was concentrated in workers' compensation, and he tried and presented many cases before the Administrative Law Courts and the Georgia Court of Appeals.

Chair McKay is a former Special Assistant Attorney General handling workers' compensation claims for the State of Georgia. He obtained his law degree (J.D.) from Walter F. George School of Law, Mercer University, and his undergraduate degree (B.A. Economics) from Clemson University. He was on the State Board's Advisory Council prior to being appointed the Chair.

BioPsychoSocial, from Page 21.

Mindfulness is piquing interest in workers' comp and was the topic of a panel discussion during the Workers' Compensation Institute's national conference last month in Orlando, Florida. The panelists reprised their discussion in a webinar Friday hosted by Brigham & Associates. Panelists defined mindfulness as "paying attention to the present moment on purpose, in a particular way, and non-judgmentally."

Panelist Dr. Brittany Busse, Medical Director of Telehealth for Kura MD, noted that pain may be "magnified exponentially" by stress. And while injured workers may at first feel they're being dismissed when the potential role of mental factors in their condition is brought up, she said education is the key. "We need to stop separating mental health from physical health. This is health," Busse said.

However, mindfulness is likely to be just one piece of a treatment strategy for complex conditions, panelists noted. For example, if someone is not sleeping well, that also needs to be addressed. One of the webinar panelists was a Seattle orthopedic surgeon, Dr. David Hanscom, a member of Curable Health's nine-member scientific advisory team that the company announced in January.

The articles on pages 19-22 *FDA Seeks Opioid Guidelines Tailored to Specific Conditions* and *New App Brings BioPsychoSocial Approaches to Chronic-Pain Patients* 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.

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California Supreme Court Reverses *King v. CompPartners* – Cites Exclusive Remedy

By Richard (Jake) M. Jacobsmeyer*

In one of the most anticipated appellate decisions of 2018, the California Supreme Court has reversed the Court of Appeal decision in *King v CompPartners*. The Court determined the Labor Code's exclusive remedy provisions limit an employee's ability to proceed outside the W.C.A.B for injuries alleged to have occurred as a result of the utilization review process. In doing so, the Court extended the employer's exclusive remedy protections to entities providing statutorily required services on behalf of the employer.

This case arises out of a civil action filed by a workers' compensation Applicant, Kirk King, whose medication (Klonopin) was not certified for continued use by a UR physician. The medication, which had previously been authorized, was terminated abruptly and King suffered four seizures with significant ongoing difficulties. King filed a civil action against the UR vendor, CompPartners and the UR physician, Dr. Sharma. King asserted the abrupt termination of Klonopin, without a warning that weaning of the medication was medically indicated, was negligent. He alleged the failure to provide weaning of the medication resulted in his seizures. King pleaded claims of negligence, professional negligence and intentional and negligent infliction of emotional distress as well as loss of consortium.

The trial court sustained defendants' demurrer[1] on the basis of exclusive remedy for both defendants and lack of a duty of care on the part of Dr. Sharma and further denied plaintiffs' leave to amend.

The Court of Appeal affirmed the order sustaining the demurrer, agreeing the exclusive remedy protected defendants' conduct in decertifying the medication. However, the appellate court viewed the failure to provide a warning as to the risks of abrupt termination of the medication as a separate act and not part of the UR process. That Court further concluded Dr. Sharma owed a duty of care to applicant but the scope of the duty of care could not be determined based on the information provided. The lower court noted the existence of a duty of care does not mean a physician is required to exercise the same degree of skill in every circumstance. The Court therefore suggested a case by case approach to evaluation of the physician's obligation to exercise due care. The Appellate Court therefore upheld the demurrer to the complaint as filed, but granted leave to amend the complaint to establish a basis for breach of Dr. Sharma's duty of care.

The Supreme Court however viewed the entire process for review of medical necessity as being part of the same continuum. Citing *Vacanti v SCIF*, the Court indicated even collateral matters, which were derivative of workers' compensation claims, fell under the exclusive remedy provisions of Labor Code 3600. The Court pointed out:

> And where the remedy is available as an element of the compensation bargain it is exclusive of any other remedy to which the worker might otherwise be entitled from the employer: "The employer's compensation obligation is 'in lieu of any other liability whatsoever to any person.'"[citations omitted]
>
> These established principles lead to a straightforward answer here. The Kings seek to recover for injuries that arose during the treatment of King's industrial injury and in the course of the workers' compensation claims process. Because the Kings allege injuries that are derivative of a compensable workplace injury, their claims fall within the scope of the workers' compensation bargain and are therefore compensable within the workers' compensation system.

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Turning to the lower court's analysis of Dr. Sharma's liability based on the failure to warn, the Supreme Court found the reliance on *Vacanti's* discussion of injuries arising outside the employment relationship was misplaced. The Supreme Court found the ability to proceed outside the workers' compensation act as more restrictive where there is a direct relationship between the conduct alleged to be causative of the injury and the employment relationship:

> This case presents no comparable circumstances. Certainly King, like the plaintiff in Weinstein, seeks recovery for injuries following his initial industrial injury. But unlike the injuries at issue in Weinstein, King's injuries occurred within the scope of the employment relationship: King alleges the injuries resulted from errors in the utilization review process—a process that King's employer, in its capacity as an employer, was required to establish for the review of the treatment recommended for King's prior industrial injury. (See Lab. Code, § 4610.)

The Supreme Court also rejected plaintiffs' arguments that the UR vendor was not entitled to same protection under Labor Code 3600 as the employer.

> But as the Kings acknowledge, it has long been held that workers' compensation exclusivity preempts tort claims against certain other persons and entities as well: insurers, as "the 'alter ego' of the employer" (see Unruh v. Truck Insurance Exchange (1972) 7 Cal.3d 616, 625 (Unruh)) and independent claims administrators and adjusters hired by self-insured employers to handle workers' compensation claims (Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal.3d 1, 4 (Marsh)). The question is whether the WCA, properly interpreted, also preempts tort claims against utilization reviewers hired by employers to carry out their statutory claims processing functions. Viewing the question against the backdrop of our precedents, we conclude the answer is yes.
>
> …
>
> Perhaps most importantly, in performing their statutory functions, utilization reviewers, much like independent claims administrators, effectively stand in the shoes of employers: they perform utilization review on behalf of employers, to discharge the employers' own responsibilities to their employees. Indeed, as the statute acknowledges, the utilization review function can be performed by the employer itself, as well as by the insurer or by an independent entity with which the employer or insurer contracts. (Lab. Code, § 4610, former subd. (b), now subd. (g).) The statute contains no suggestion that claims arising from the utilization review process should be treated differently depending on whether the employer conducts the review in-house or instead contracts with an independent utilization review organization. To the contrary, Labor Code section 4610.5—which sets out the procedures for resolving "[a]ny dispute over a utilization review decision" (id., § 4610.5, subd. (a))—expressly defines the term "employer" for that purpose to include the "employer, the insurer of an insured employer, a claims administrator, or a utilization review organization, or other entity acting on behalf of any of them." (Id., § 4610.5, subd. (c)(4), italics added.) This special definitional provision tends to reinforce the conclusion that the Legislature regards utilization review organizations, like claims administrators, as acting on behalf of the employers that contracted for their services.

The Court upheld the demurrer indicating the complaint failed to state a cause of action. It also reversed the lower appellate court ruling allowing leave to amend, finding it was not possible to state additional facts which would allow the matter to proceed in the face of the exclusive remedy provisions of Labor Code 3600.

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There were two concurring opinions which were published in this case; both agreeing with the unanimous decision of the Court but both expressing concerns that Utilization Review might not be "working as the legislature intended". Justice Liu suggested the legislature might wish to revisit the issue of whether existing safeguards (essentially the IMR and Audit processes) provided sufficient incentives for competent and careful UR. Justice Cuellar pointed out common law remedies are in place to provide protection to the public and remedy for wrongs.

COMMENTS AND CONCLUSIONS:

While making it clear the majority opinion properly determines such common law remedies do not apply in the exclusive remedy arena, the importance of the preventative and remedial purposes of common law remedies is suggested as a potential reason for the legislature to review whether the current statutory and regulatory safeguards, incentives and remedies are "set at optimal levels"

Needless to say, the initial Court of Appeal opinion caused a significant level of anxiety in the employer/carrier/UR communities. More than just the potential for civil liability for UR vendors and physicians, the potential for opening the door to further erosion of the exclusive remedy was also a concern. The impact on availability of quality physicians to provide UR services was also very much a concern. The Supreme Court's unanimous decision validating the exclusive remedy is certainly a welcome relief on those issues.

However, as noted by Justice Liu, there is a reason for common law remedies; one of which is to provide incentives for change in conduct where there is a potential for causing harm. The Court of Appeal decision, even though there had been a Supreme Court grant, did have a significant beneficial effect for the reason expressed in that concurring opinion. Virtually every UR vendor with whom I am familiar, including several to whom I provide consulting services, initiated changes in their procedures for medication denials. The UR vendors took steps to require consideration of weaning where there was a potential for withdrawal symptoms or consequences. Many implemented special procedures for communicating with treating physicians to establish a weaning protocol before terminating medication. In this respect the decision, even though now reversed, has already had the beneficial impact suggested by Justice Liu.

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* Richard (Jake) M. Jacobsmeyer is a partner of the Law firm of Shaw Jacobsmeyer Crain and Claffey, a statewide workers' compensation defense firm with seven offices in California. A certified specialist in workers' compensation since 1981, he has experience as both a representative of the injured workers for 18 years and now representing employers and insurance carriers before the Workers' Compensation Appeals Board for over 24 years. Jake served multiple terms on the Board of Governors of the California Applicant Attorneys Association (CAAA) including stints as Education Chair and Amicus Committee Co-Chair. He serves as amicus counsel for the CWCI and is a regular panelist for CWCI programs including their annual Legal Update Seminar. He is a frequent panelist on education panels for many organizations including CSIA, CCWC, CAAA, CWCDAA, CSIMS, ICA, DVICA, State Bar of California Workers' Compensation Section and DWC Educational Conference. In June of 2010, he was selected as one of the "50 Most Influential People in Workers' Comp for 2010" by Workers' Comp Executive Magazine. He is, along with Julius Young of Boxer & Gerson and Barry Bloom, a well-respected claims consultant, and he is the Co-editor in chief of the "Herlick Handbook on Workers' Compensation" published annually by Lexis. He also a member of the LexisNexis California Workers' Compensation Editorial Board.

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The Hot Seat and Impairment

By Hon. David Langham

On September 20, 2018 the Worker's Compensation Hot Seat hosted by Bob Wilson welcomed Dr. Christopher Brigham and Alan Pierce, Esquire. It was a lively discussion of the implications of the *American Medical Association Guides to Permanent Impairment*, with particular emphasis on the *Sixth Edition*.

After dealing with a few minor technical issues, there was an informative discussion. Mr. Pierce focused upon recent appellate decisions finding constitutional fault with the *Sixth Edition* impairment ratings. He focused first upon *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, and the perception that *Protz* finds constitutional fault with the *Guides*. That may overstate the case, as the *Protz* courts (both the Pennsylvania Supreme Court and the Commonwealth Court found fault) are focused in their analysis not on the substance of the *Sixth Edition*, but upon the procedure by which they were administratively adopted. These analyses were of the delegation of legislative authority.

Mr. Pierce's references to recent Kansas decisions appeared more relevant to the complaint of diminution of benefits as a result of the shift in the impairment ratings. Mr. Pierce enunciated multiple examples which illustrated significant decreases in impairment ratings for particular maladies or injuries. See *Kansas Appeals Court Overturns 2013 Law*, involving a calculation of permanent partial disability under the *Guides*, a dispute that for now remains ongoing. Whether the Kansas Supreme Court will alter the Appeals Court determinations remains to be seen. In the example of *Protz*, some may see the potential for the Kansas Court to affirm or reverse the Appeals Court, to alter the decision, maintain the analysis, or to take an entirely different approach.

Dr. Brigham noted that "impairment" is distinct from "disability," seemingly concurring with the theme of a recent post here regarding *Fixing the Wrong Problem*. I was left with the impression that Mr. Pierce does not disagree with the distinction of "impairment" versus "disability." However, he noted that multiple jurisdictions have based their entitlement standards for permanent partial disability upon these impairment ratings. As such, those ratings are being applied, in his perspective, as an indemnity tool rather than medical tool. Similarly, I did not sense that Dr. Brigham really disagreed with that application contention.

I was somewhat surprised that both speakers seemed willing to acquiesce in some legislative effort to make this inappropriate reliance more equitable or "fair." While both seem to accept that using impairment ratings to calculate disability benefits is inappropriate, both seemed willing to see legislatures continue to misuse the *Guides*, and impairment ratings generally, but to also adopt methodologies to increase disability benefits. One suggestion is to multiply those impairment ratings by some legislatively selected rate (times two, or times one and one-half, etc). But, there seems consensus that impairment is not appropriate for determining disability. I struggle with how that becomes appropriate if the associated dollar values change. This seems incongruent.

According to the United Stated Department of Labor:

> The American Medical Association (AMA) has periodically issued new editions of the Guides in order to keep pace with advances in medical treatment, diagnoses and philosophy. The stated goal of each new edition is to provide a fair and authoritative impairment guide based on the most recent medical advances.

The focus of the *Guides* is medical in nature, regarding both the science ("advances") and the art ("philosophy") of assigning some numerical value to the effects of injury or illness. That is not an imperative of medicine, and never has been. Medical science has never been dependent upon impairment specifically, nor inability or ability generally. Medical science is dependent upon and interested in diagnosis, treatment, and recovery. It is the legal system that has dragged the medical experts into the debates of maximum medical improvement and impairment ratings. See *MMI and other Artificial Distinctions*.

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Both speakers agreed that the *Sixth Edition* clearly sets forth an admonishment or warning that there are imperative reasons why these ratings should not be the sole foundation for determination of permanent partial disability benefits. It appears that Dr. Brigham's position is that the medical process of the *Sixth Edition* is an improvement, and should therefore be respected. It is Mr. Pierce's position that the AMA's knowledge that the legislative or regulatory bodies are inappropriately employing the *Guides* should render it incumbent upon the AMA to seek out those mis-users and actively advocate the mending of their ways.

Listening to the discussion, I was reminded of a chisel that I purchased some years ago. It was intended for mortar or concrete, and therefore had a very specific warning label that it "should not be used for cutting metal." That suggests the manufacturer might have suspected people were using their product to cut metal. Though I have owned it for years, no representative of the manufacturer has ever stopped by to evaluate my use of their tool or to suggest how I might use it better. It may similarly be asking too much to think that a publisher of a book is any more obligated to correct those who might misuse it (despite an explicit statement as to how to use, printed in the book itself).

As a society, America has become accustomed to warning labels. As I have repeatedly discussed such warnings in college classes, the feedback I perceive supports that a fair volume of Americans have been over-warned. They are so accustomed to such warnings that labels and warnings are now often ignored. The cacophony of warnings has rendered us snow-blind. That effect, our collective conditioning to be less than impressed by warnings, results from the sheer volume of warnings and the processes that have led to them. Who is responsible for this cascade, this avalanche, of warnings and labels? Who is responsible for our collectively ignoring them now?

An example Dr. Brigham cited under the *AMA Fifth*, involves a cervical spine condition, which includes a presentation of symptoms and complaints in an upper extremity. He explained that under the accepted medical science, there is a surgery that is appropriate for treatment of this malady, a treatment which is seen as generally effective in ameliorating its symptoms. Despite this, he explained, the *Fifth Edition* calls for a higher impairment rating post-surgical repair than it lists for the malady if left untreated by surgical intervention. He explains that results like this are counter-intuitive and inconsistent medically.

Dr. Brigham described a process which he has undertaken to study the variation in impairment rating, comparing the *Fourth Edition* to the *Fifth*, and to the *Sixth*. His conclusion is that the *Fourth* and *Sixth* are reasonably similar as regards a variety of studied maladies. However, the *Sixth Edition*, he notes, makes significant departures from the *Fifth*. In that regard, the question not asked was whether the various jurisdictions' reliance upon the *AMA Guides' Fifth Edition* was unconstitutional because the ratings expressed therein increased payments to injured workers to the detriment of those jurisdictions' employers. If changes in benefits to a party's detriment alone can tip the constitutional scales, then does it matter which party?

In that vein, it might perhaps be difficult to quantify how a *Sixth Edition* retreat to the *Fourth Edition* impairment levels is a significant diminution in benefit entitlement. In fairness, acting as co-host of the Hot Seat, I was focused upon the speakers' points and arguments. It is entirely possible that I misconstrued or mis-remember this *Fourth*, *Fifth*, and *Sixth* discussion of distinctions and overall impacts. However, in the interest of stimulating conversation, my recollections are re-stated here.

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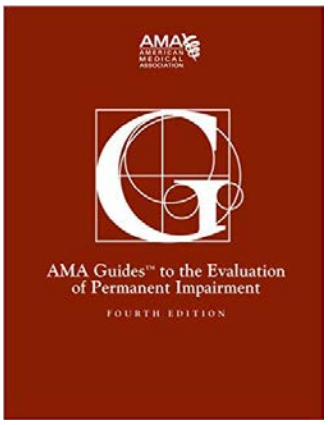
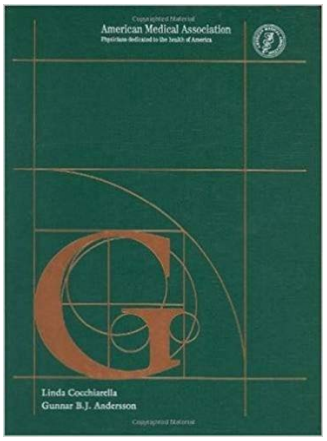


Dr. Brigham similarly explained that the process for determining impairment ratings in prior editions was inconsistent in terms of the upper versus lower extremities. He explained that, therefore, the *Sixth Edition* was intended to provide methodological consistency, which may explain some of the deviation or difference in specific impairment ratings. I inferred that advances in medical treatment and success rates might also have influenced those changes.

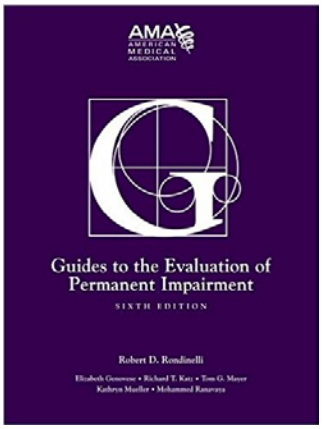
I was struck by the comments of both guests, from the standpoint of application of expertise. I have written in the past regarding the insistence of laws and lawmakers to require non-medical opinions of medical experts. This almost certainly includes the opinions regarding maximum medical improvement (See *MMI and other Artificial Distinctions*), and following the seminar, is perhaps as applicable to the concept of impairment rating.

There appears to be some agreement from both perspectives that disability is a concept that includes more than simply medical assessment. While physicians may be best qualified to make determinations or form opinions regarding a patient's ability to perform various movements, functions, or tasks, there seems agreement that the physicians are equally unqualified to render functional or vocational opinions regarding how those physical abilities either qualify or disqualify a given individual from a particular employment, or other activity.



Mr. Pierce focused several times upon the fairness of outcomes. He noted that a particular person's ability to find, secure, and maintain employment might be affected by more than "impairment." It seems his concerns are primarily that states have elected to use these impairment ratings as the singular, or at least primary, determining factor in calculating permanent partial disability benefits. That is likely inappropriate based upon the consensus that "impairment" and "disability" are not the same thing.

He was also focused on the admittedly difficult concept of "fair." The application of the impairment guides, without consideration of the impacts and contributions of vocational background, age, education, and more may produce inequitable, or "unfair" outcomes when they are applied to a spectrum of individuals suffering similar physical symptomatology. His comments in this regard were seemingly supportive of permanent partial disability benefits based upon a broader population of factors than merely impairment ratings, regardless of the standard or edition selected.



It occurs to me that the perceived strength of impairment ratings, guides, and statutes that rely upon them is that they bring consistency and simplicity to what might otherwise be difficult and perhaps fact-intensive decisions. I recall few cases I adjudicated that involved impairment rating disputes. That may suggest that their use as a tool creates consistency and increases simplicity. But, the same could be said for using a tape measure, and awarding a volume of weeks of permanent partial to each patient based upon their height or waist measurement. Either would be objective and replication would be simple. But, would height be a reasonable tool for measuring disability, even if it would be admittedly easier, objective, and consistent?

At the conclusion of the September 20, 2018 Hot Seat Seminar, host Bob Wilson opined that this was the best Hot Seat yet, despite the brief initial technical challenges. Having had several days to reflect upon the quality of discussion, the integrity of both guests' opinions and inquiries, I concur with that assessment. This discussion was enlightening, challenging, and helpful. And, lucky for you, the entire program is available to be replayed at your convenience, just click above.

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In the end, however, the discussion did not solve the disputes or remedy the respective issues associated with the *Guides*. But, the discussion did perhaps continue to help build dialogue and discussion, which are crucial to progress in workers' compensation. As we share perspectives and ideas, the result will be positive; positive in the sense of us all being better informed and educated regarding the difficult concepts that underpin these systems. Armed with our understanding and respectful of differing views and perspectives, conversation can raise awareness, stimulate thought, and in the end may help the legislative leaders improve these systems for both employees and employers.

I encourage you to visit www.WCHotSeat.com and listen to the recording of the webinar. You can sign up for our next program, which will focus on the broader effects of a workplace injury. In fact, you can sign up to be automatically registered for our future events. I find value in the perspective gained from the outstanding experts that have appeared on the programming, and thank them all for their contributions to my understanding and knowledge.

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* David Langham is the Florida Deputy Chief Judge of Compensation. He has published hundreds of blog posts on the challenges of legal analysis, the constitution, professionalism, and workers' compensation.

Three Judges Retire in Rhode Island

Rhode Island is working towards nominations to replace three judges that retired in 2018.

Judge Janette Bertness retired effective July 6, 2018. She served as an Associate Judge of the Rhode Island Workers' Compensation Court since 1993. She earned her B.A. in chemistry from Clark University in 1979, her M.S. in organic chemistry from Brown University in 1981, and her J.D. from Suffolk University Law School in 1986. Prior to her appointment, she worked as a clerk for Rhode Island Supreme Court Justice Florence K. Murray after graduating from law school. She then worked in private practice for Roberts, Carroll, Feldstein and Pierce as a litigation associate.

Judge Debra L. Olsson retired effective December 31, 2017. She was also an Associate Judge, first appointed in 1991. Judge Olsson earned her B.A. in political science from Wellesley College in 1979 and her J.D. from Suffolk University Law School in 1982. Prior to her judicial appointment in 1991, Olsson was chief legal counsel for the Department of Workers' Compensation for the State of Rhode Island from 1983 to 1985. She also worked as acting deputy director for the Department of Workers' Compensation of the State of Rhode Island from 1985 to 1988 and again in 1991.

Judge Hugo Ricci, Jr. was also an Associate Judge. He retired May 29. He was appointed to the court in 2003. Judge Ricci graduated from the University of New England's St. Francis College in 1966 and received his J.D. from Western New England School of Law in 1974. Prior to his judicial appointment in 2003, Ricci worked in general practice for eight years. He also worked as legal counsel for the Rhode Island Department of Labor and Training's Workers' Compensation Unit.

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Endnotes from Humans as a Service: The Promise and Perils of Work In the Gig Economy, pages 12-17.

.[1] *See* David B. Torrey, *Nonstandard Work and Workers in the Gig Workforce: An Introduction and Pennsylvania Workers' Compensation Doctrine – Part I*, Seminar Paper, Penna. Dept. of Labor & Industry Annual Workers' Compensation Conference (Hershey, PA, June 7, 2018); and David B. Torrey, *Nonstandard Work and Workers in the Gig Workforce: An Introduction and Pennsylvania Workers' Compensation Doctrine – Part II*, Seminar Paper, Penna. Dept. of Labor & Industry Annual Workers' Compensation Conference (Hershey, PA, June 7, 2018). These items are posted at www.davetorrey.info.

[2] Section 104 of the Act, 77 P.S. § 24 ("The term 'employe,' as used in this Act is declared to be synonymous with servant … [but is] exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer.").

[3] An irony is that business interests over a century ago successfully acted to encourage the Pennsylvania legislature to exclude from the definition of employee this example of a gig economy worker of the past.

[4] Indemnity is one thing but, under Pennsylvania workers' compensation law, a homeowner that obtains a handyman or other such worker through an app would never be liable for workers' compensation. Such labor, vis-à-vis the homeowner, would reflect excluded casual employment. On the other hand, a commercial enterprise that obtains such a worker through an app, particularly a worker performing tasks usually undertaken by an employee, would likely have workers' compensation liability. Stated another way, a commercial enterprise that uses an app in place of a temporary service or staffing company for its manpower needs will likely encounter workers' compensation liability in the event of a worker's injury or death. Presumably that entity's workers' compensation insurance carrier will be none too pleased at paying – as it must – such a claim.

[5] *See* DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014), http://www.fissuredworkplace.net/.

Endnotes from California Supreme Court Reverses King v. CompPartners, pages 23-25.

[1] For those not familiar with civil proceedings, a demurrer is a response to a complaint which raises the issue of whether there is a proper cause of action stated in the pleading. In that proceeding, defendant argues even if all of the facts alleged by plaintiff were true, the complaint did not state a cause of action. In appellate proceedings, the Court will assume all of the facts in the complaint are true in deciding if there is a properly stated cause of action. This case, like many appellate cases, was argued on just whether the pleadings were sufficient to proceed. No actual evidence was presented and no showing of negligence had yet been made.

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