Lex and Verum

The National Association of Workers' Compensation Judiciary

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NAWCJ President's Page

By Hon. Jim Szablewicz*

Happy holidays everyone! 2018 has been an enormously successful year for the NAWCJ. Starting with the new judges' "boot camp" held in Nashville in March, to the annual Judiciary College in Orlando in August, to the workers' compensation mediator's college held jointly with the IAIABC in Williamsburg in October, the Association has continued to expand its educational opportunities for the nation's workers' compensation judiciary. Many thanks to the NAWCJ officers, directors and member volunteers who made it all happen. Look for more good things to come in 2019 and beyond.

Speaking of looking forward, at a meeting held in early November the NAWCJ Board voted to make the new judges' "boot camp" an annual event to be held in Nashville beginning in the spring of 2020! Though designed for the relatively new workers' compensation adjudicator, veteran judges will find much to be gained by attending. The Board also approved conducting an additional judicial program with the IAIABC at the latter's annual Forum to be held in San Diego from April 1 to 4, 2019. Look for more details about both of these programs in future editions of the *Lex & Verum.* The Board also gave tentative approval to redesigns of this monthly newsletter as well as the NAWCJ website. With a little luck and a lot of effort on the part of our newsletter committee, chaired by Judge LuAnn Haley (AZ), and with the expertise and support of WCI staff, the new and improved *Lex & Verum* should start coming your way sometime in 2019.

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While anticipating the future version of the *Lex*, be sure to check out Thomas Robinson's excellent article in this month's edition that reviews the important developments in workers' compensation law in 2018 and suggests what may lie ahead in 2019. Also, don't miss the entertaining article from Judge Addington (TN)-deftly comparing the favorite pastime of going to the movies to our work sitting on the bench.

As always, thank you for all that you do. Please do not hesitate to contact me at any time with your comments and suggestions, or to volunteer to serve on one of the NAWCJ's committees, at james.szablewicz@workcomp.virginia.gov.

Best wishes to you, your families and loved ones for joyous holidays and a peaceful, healthy New Year. Life is short; make the most of every moment you have together.

In This Issue

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In Search of Nothing but the Truth

Hon. Brian K. Addington *

Like most people, I enjoy a good movie, and I've seen my share over the years. The way movies are marketed today with Internet and commercial teases really piques my interest at times. I like to search out and find good movies that other friends might have missed.

I've seen several movies at the theatre and at home that were based on books I've read. Sometimes they follow the book pretty closely, and sometimes not at all. I really enjoyed reading *The Shepherd of Hills*, but the 1941 movie was not that good and did not follow the book. Even John Wayne couldn't save that one. Maybe I should not have read the book before watching the movie. Conversely, I actually liked *The Firm* more in movie form than the book, but I'm no movie or literary critic. I grew up watching *Sergeant York* with Gary Cooper and loved it. I met Alvin York's son, and he said a fair amount of the movie was "real," but some was just plain old Hollywood.

Other than *The Firm*, Tennessee has seen its share of movies filmed here. I remember the filming of *The River*, which came out in 1984. It took place in and around my hometown of Kingsport, Tennessee, at a farm in Church Hill. Sissy Spacek and Mel Gibson starred in the movie about a family that could lose its farm to creditors or the river. It was interesting watching the movie and recognizing places I've been. I've fished the River−the Holston−many times, and it is a great place to relax. I think the movie is four stars out of five; again, no film critic here.

To me, one of the most enjoyable aspects of movie-watching is trying to predict the ending in my head as early as possible. Good movies often foreshadow or offer some type of clue as to what lies ahead. A good movie doesn't just entertain me; it makes me think, before, during and afterward.

This is something I've found I do on the job, too. I've been an adjudicator for years, starting as an unemployment hearing officer in 1996, a workers' compensation specialist in 2004, and then a workers' compensation judge in 2014. I've heard thousands of cases and conducted many trials. Many of the stories I've heard would make great movies. From the peaks of happiness to valleys of despair, I've heard it all: lost body parts and jobs, devastating injuries, heroic responses, lost homes and workplaces, miraculous recoveries, new jobs, and new beginnings.

Looking back to my first hearings, I was kind of gullible thinking everyone would tell the truth. To any new adjudicator reading this, they don't always. I was quick to learn that the stories I heard didn't always correlate with the documents I'd read beforehand.

Being the son of a Boy Scout leader and pastor, I was told and taught early to acknowledge and tell the truth. Now, it could be stretching the truth, a bad memory, and a different perspective or flat-out lying, but in many cases I have to make credibility determinations.

I sometimes feel like Tennessee trial judge Jean Stanley when she remarked in 2005 during a workers' compensation trial:

> I'm not sure if there's another [Name Deleted] supposedly roaming around or if someone simply has amnesia or if there's something about it you don't want known …… there are just, there are so many differences in the testimony you would almost think you were at *two different movies* … so there's, there's a number of just a, an enormous number of discrepancies in the proof. … Ms. [Name Deleted], I don't know if you're lying to me or I don't know if you have a horrible, horrible memory. …. but in this case the Court has to find that the medical record from July the 30th of '04 is more reliable than the witness' testimony and/or memory . . ." (Emphasis added.)

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Nothing but the Truth, from Page 3.

In Tennessee, a trial court's in-court witness credibility determinations are given strong deference by appeals courts, but no similar deference is afforded findings based on depositions. Most often the question is whether a live witness is telling the truth, so a trial court's determinations on credibility are important. I try to observe if someone is steady, forthcoming, and honest regarding his or her condition. These principles are found in *Kelly v. Kelly*, 445 S.W.3d 685 (Tenn. 2014). To me, if one person gives me more than one story, then something definitely is wrong, and I need to fully consider all he or she has to say and the manner in which he or she says it.

When listening to and observing testimony, flat-out lying is probably the easiest to catch. The story simply is not what the story used to be. Stretching the truth is pretty easy to catch as well, as from one side the issue gets bigger and bigger, whereas from the other side it shrinks and shrinks "by God." In my experience, invoking God into testimony usually means the truth has been stretched.

A person can suffer from a bad memory. This is not so hard to discover because the major facts stay the same, but the little things like days of the week or dates change, and the chronological order gets scrambled. In Tennessee, we can cut these witnesses some slack. "An injured worker should not be penalized simply for being a poor historian." *Orman v. Williams Sonoma, Inc.*, 803 S.W.2d 672. (Tenn. 1991).

A difference of perspective can be hard to spot sometimes, but it often occurs when there is a difference of control (supervisor versus regular employee), age, or background. Let me just testify here that generational differences show up all the time. What's a major event to one is a blip on the screen to the other, literally (please put down that phone and testify).

Just being in court may affect one's memory. I've observed adult employees shake when testifying if they thought that something they say might affect their jobs, whereas the same-age supervisor was calm because he or she did not have to worry about that. I've also asked injured employees if they liked their doctors and was told yes, only to be later told that they really did not care for them at all. And instead of white-coat fever, I've seen black-robe fever, where a witness was intimidated by just being in the courtroom.

So, to get back to my topic, it would be nice in every trial to sit back, relax and enjoy the trial - just like I enjoy a movie at the theatre or at home. But practice shows that more likely than not, I am going to have to be on my toes because I'll be watching two different movies at the same time by two different directors that cover the same topic, and they won't mirror the script I've read.

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* Judge Addington is a 1993 graduate of the University of Tennessee College of Law. He was in private practice for several years and later served as an Unemployment Hearing Officer and Workers' Compensation Specialist. He was appointed Workers' Compensation Judge in 2014 and serves in the TN Bureau of Worker's Compensation's Gray, Tennessee, office.

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The Quiet before the Storm?

Thomas A. Robinson, J.D.*

As we put together this year's edition of our *Workers' Compensation Emerging Issues Analysis* series, I allowed to a colleague that I felt as if 2018 might appropriately be characterized as "the quiet before the storm." That is to say that although there have been several important decisions from state appellate courts this year—e.g., see my discussion below of cases from Kansas, Oklahoma, and Maine—things actually seem to have been pretty quiet during 2018. Subjectively, for reasons that I also outline below, it leaves me wondering if the other shoe is about to drop.

At least from my perspective, the reasoning originally put forth by claimants' groups in Florida's 2014-2015 "Padgett" litigation, pushed forward in the Kansas *Johnson* litigation (among others), discussed below—that over time there has been such an erosion of injured employee rights that the original "grand bargain" is no longer in place and that claimants should, therefore, be allowed to proceed against employers in tort—is gaining steam. Of course, one Kansas decision does not momentum make. That decision may not even stand up on appeal, Nevertheless, I'm left wondering if next year we might see several more cases like *Padgett* and *Johnson*. We might even see a healthy debate regarding the level of overall benefits being paid to injured employees.

At the state level, the debate will be far from monolithic, since more is at stake in those jurisdictions within which the perceived erosion of benefits is greatest. Indemnity and medical benefits, after all, are far from uniform across American jurisdictions. States also differ in the levels of proof required by claimants to establish claims. Because of the state-by-state differences, "victories" or "losses" in one state, such as Kansas, may not necessarily be repeated elsewhere. And so, as I say, 2019 could be stormy.

Use of AMA Guides (6th Edition) Continues to be Controversial

While it has been more than a decade since the release of the 6th Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, the cacophony of criticism regarding their use remains robust. This time last year, the workers' compensation world was abuzz following Pennsylvania's *Protz* and *Thompson* decisions. The heated debate over the 6th Edition continued during 2018, with two additional decisions that warrant mention.

Oklahoma High Court OKs Use of "Current Edition" of AMA Guides

The first, from Oklahoma, *Hill v. American Medical Response*, 2018 OK 57 (June 26, 2018), held that those sections of Oklahoma's Administrative Workers' Compensation Act (AWCA) that require use of the "current edition" of the AMA's Guides to determine PPD do *not* violate the Constitution. As I mentioned in my blog (workcompwriter.com) a few days after the opinion came down, the *Hill* decision would appear, at least at first blush, to be in total conflict with the Pennsylvania Supreme Court's ruling *Protz*, which generally held that the use of similar language in the Keystone State's Act constituted an unconstitutional delegation of legislative authority to the AMA.

A close reading of the majority opinion in *Hill* shows otherwise. As the Oklahoma court stressed, Pennsylvania's statute requiring use of the "most recent" edition of the guides became law when "the most recent" edition was the 4th, not the 6th Edition. It was entirely appropriate, therefore, for the Pennsylvania court to conclude that requiring use of the 6th Edition, without additional legislation, amounted to turning things over to the AMA. The people of the Keystone state had elected legislators, not the AMA, to set its rules.

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Oklahoma's "current edition" language was enacted *after* the publication of the 6th Edition. If the AMA were to come out with a 7th Edition, that edition would *not* be the edition used in Oklahoma; the 6th would remain authoritative, since that edition was "the current" edition at the time the statute became law.

Kansas Court Strikes Down Use of AMA Guides 6th Ed.

In the second important 2017 decision on use of the 6th Edition, *Johnson v. U.S. Food Serv.*, 2018 Kan. App. LEXIS 44 (Aug. 3, 2018), the injured employee did not base his argument upon an alleged unconstitutional delegation of power to the AMA, as had been the argument in *Protz* and *Hill*. Instead, his was a "Padgett-like" argument: that with the original passage of the Kansas Workers' Compensation Act, a bargain had been struck between the various contingencies, but that the original "grand bargain" had been so eroded over the years that, following the adoption of the 6th Edition, the scales had permanently tipped in favor of the employer. In other words, there no longer was any meaningful "grand bargain."

The Kansas Court of Appeals agreed and struck down use of the 6th Edition. At least until such time as an appeal is heard by the Supreme Court of Kansas, the 4th Edition of the Guides must be utilized. It is important to note that the Court of Appeals here did not find the entire Act unconstitutional—only the use of the 6th Edition. This raises the obvious question of whether any other current provisions of the Kansas Act would fail to pass muster if challenged.

Is the "Padgett" Argument as Strong as it Appears?

A bit more than a year ago, I participated in a roundtable in which the panel discussed current trends in "the comp world." The discussion took place eight or ten months after the U.S. Department of Labor released its now well-known report on the adequacy of state-based workers' compensation programs. To get things started, one participant asked the group the following question: "Indeed, hadn't the original 'grand bargain' been abrogated within a number of jurisdictions by legislative slashing/tinkering over the years?"

The always-provocative Bob Wilson, a panel member, retorted (my recollection, not necessarily his exact words), "Did the 'grand bargain' originally contain benefits for occupational diseases? Were the original schedules of injuries, for which loss of wages need not be proved, as broad as they currently are? Were mental injury claims originally allowed in many states? Was there broad general medical coverage for palliative care?"

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Bob could, of course, have gone on. Bob's point: a proper "Padgett-like" examination of what's happened within a specific state should include not just the "erosion" of benefits, but also some discussion of instances in which current coverage is broader than originally anticipated.

Utah Court Rejects "Padgett" Argument in Two Cases

That sort of examination occurred in two Utah cases decided in late 2017, after our production deadline for last year's *Workers' Compensation Emerging Issues Analysis* edition. In *Petersen v. Utah Labor Comm'n*, 2017 UT 87, 416 P.3d 583 (Dec. 1, 2017), the technical issue was whether the Utah temporary total disability compensation statute, Utah Code Ann. § 35-1-65 (1982) (current version at Utah Code § 34A-2-410 (2016)), operated as an unconstitutional statute of repose under the Open Courts Clause of the Utah Constitution. The Court held that it did not. The Court added, however, that the only plausible challenge that the claimant could have raised was that § 35-1-65 was an "inadequate substitute remedy" for the loss of an injured employee's common law tort claim (i.e., a "Padgett-like" argument).

Echoing Bob Wilson's set of queries, the Court indicated that positives had to be examined along with the negatives. The issue was not simply whether a particular claimant might enjoy greater rights under common law; the overall effect of the Act must be considered. The Court concluded that the Utah Workers' Compensation Act, as a whole, was an adequate substitute remedy for the loss of such a tort claim. In the second decision, *Waite v. Utah Labor Comm'n*, 2017 UT 86, 416 P.3d 635 (Dec. 1, 2017), the Court similarly held that the state's 12-year limitation on permanent disability benefits under Utah Code Ann. § 34A-2-417(2)(a)(ii) was a statute of repose, but was not unconstitutional, since the issue had been contentiously debated within the state legislature and it was a reasonable and non-arbitrary means of achieving a valid legislative purpose—to end the prolonged and uncertain liability for both insurance companies and employers and reduce the level of associated insurance premiums.

Although both Utah claimants were unsuccessful with their "Padgett" arguments, others will likely take up the gauntlet. 2019 will likely be a year in which the debate on both sides of this important question is spirited and loud. I can't wait to see the results.

Other Important Issues: Medical Marijuana

Although 2018 was a relatively quiet year in terms of constitutional challenges, there were other important decisions around the country that you should know about. One of them came from Maine, a state not known for its litigiousness. In a case of first impression, the Supreme Judicial Court of Maine, in a 5-2 decision, held that an employer may not be required to pay for an injured worker's medical marijuana use [see *Bourgoin v. Twin Rivers Paper Co., LLC*, 2018 ME 77, 187 A.3d 10 (June 14, 2018)]. Indicating that it was deciding the case on "narrow" grounds, the majority reasoned that there was a "positive conflict" between the federal Controlled Substances Act (CSA) and the Maine Medical Use of Marijuana Act (MMUMA) [Opinion, ¶ 1] and that, under such circumstances, the CSA preempted state law.

Part I. Expert Analysis and Commentary

As with past editions of this work, we have assembled a number of timely and incisive articles by nationally-known legal experts and commentators on a host of interesting issues.

The Future of Workers' Compensation

Deborah Kohl's piece, "Workers' Compensation and the Future: The Macro Versus the Micro View," offers powerful insight into the tensions at play between those who see things predominantly "in the micro," and who, therefore, are concerned with pushing for change in benefits, administration, and claims adjusting (at a minimum) and those who concentrate "on the macro," and who worry that the system may break down totally if projected cost increases for claims outlay and administration are not stemmed.

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Richard Rubenstein, in "Workers' Compensation of the Future: Will Mutual Dystopia Be the New Normal?", offers his insights into a lively, recent roundtable discussion that took place earlier this year among David Stills, Mark Wilhelm, David North, Matt Peterson, and others, with co-moderators Mark Walls and Kimberly George. One of the questions offered: "Is workers' compensation 1.0 a dumpster fire, or still a Grand Bargain?"

The Opioid Crisis

One would have to live in a deep hole not to know that America is in the midst of an opioid crisis. After all, more than 90 Americans die each day from opioid overdoses. While many of these deaths are unrelated to occupational injuries, nevertheless, addiction and overuse of opioids is also common within the workers' compensation world, since opioids are often prescribed for post-surgical pain and other complex conditions associated with workplace injuries and conditions. This year's edition contains a number of articles and commentary on this hot issue.

In "New Study Links Pre-Injury Opioid and Benzodiazepine Use with Risk and Cost of Post-Injury Disability," I examine a report published by the *Journal of Occupational and Environmental Medicine*, which supports the widely-held, although not thoroughly documented, notion that pre-injury opioid and benzodiazepine use may increase the risk and cost of disability after a work-related injury.

In "WCRI Study Reveals Causal Connection Between Long-Term Opioid Prescribing and Duration of TTD Benefit Periods," I examine another study that argues there is indeed a causal relationship between the practice of providing extensive opioid prescriptions to an injured worker and the duration of that workers' temporary disability benefits.

Roger Rabb, in a piece entitled "An Alternative to Opioids: A Mind-Body Approach to Pain Management," reports on a recent OutFront Ideas webinar sponsored by Safety National and Sedgwick, in which participants discussed pain management techniques that might serve to reduce dependence on opioids and other pills, focusing primarily on the mind-body relationship and behavioral and psychological factors that might be addressed when seeking to reduce chronic pain.

In my piece entitled, "Recent Veterans Study Has Important Implications for Workers' Comp World," I highlight the findings of a recent study published by the International Association for the Study of Pain in which it is shown that the joining the pain medications may increase the risk of experiencing an adverse outcome by some 36 percent, when compared to a baseline of nonacute opioid-only use.

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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/

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While the study concentrated on veterans, I argue that it has important implications for the workers' compensation world since many injured workers share similar symptomatology with injured or wounded veterans.

Finally, and on a somewhat similar note, in "Interrelationship Between Personal and Occupational Risk Factors Complicates Opioid/Benzodiazepine Crisis," I review a recent study sponsored in part by the National Institute of Occupational Safety and Health (NIOSH) and the Health Resources and Services Administration (HRSA) that demonstrates the interrelationships among occupational risk factors (ORFs), personal risk factors (PRFs), and prescription drug (PD) use involving opioids and/or benzodiazepines in the occupational setting.

Other Stuff

Prominent New York attorneys Ronald Weiss and Ronald Balter offer keen insight into recent "Trends and Developments" in the Empire State. Stuart Colburn, from the Lone Star State, offers his own expertise in "Texas: New Commissioner Speaks and other Texas-sized Updates."

In "Comp Claims: Men Really Are from Mars—Women From Venus," I review a study published in the *Journal of Occupational and Environmental Medicine* that points to sex-specific patterns in reoccurring injury claims.

In a piece entitled, "Is the Wall Strong Enough?", I examine two recent decisions testing the limits of the "wall" or barrier created by the McCarran-Ferguson Act ("MFA"), which generally prevents federal oversight of state workers' compensation programs. In both cases, the courts ruled that states may not regulate the amounts air ambulance firms charge for transporting injured employees who are covered by state workers' compensation programs. Such regulation is not allowed because air ambulances are "air carriers" whose compensation rates are preemptively regulated by the Airline Deregulation Act ("the ADA"). The cases are important because in both instances, the courts utilized a narrow definition of "business of insurance," as that term is used in the MFA. Will this narrow reading allow federal oversight into other areas of workers' compensation law?

In "Employer-Controlled Medical Care Drives Claimants to Attorneys, Erasing Savings in Medical Costs," I review a recent article published in the *Journal of Occupational and Environmental Medicine* that cuts against the grain of a popularly-held notion in the workers' compensation world—that allowing the employer/carrier to choose the injured worker's treating physician leads to overall savings in claims costs. The JOEM study tends to show that the practice may reduce medical care costs themselves; it wipes away any such savings, however, due to higher attorney involvement on the claimant's side.

Temp Workers and the Gig Economy

In "Temporary Worker vs. Direct Hire Workers' Comp Filings in Illinois: The Art of the Raw Deal," Karen Yotis examines a recent report from the University of Illinois at Chicago's School of Public Health that analyzes data flowing from the rapid growth across industries in the use of workers offered to them by temporary staffing agencies. Among the study's findings: Temp workers are less likely to return to work following an injury and are almost three times as likely to suffer non-fatal occupational injuries than their direct hire counterparts.

Included also by Yotis is "Occupational Injuries and Third-Party Tort Claims: Effecting Change for Freelancers in the Digital Age or More Dust in the Wind?" Yotis offers commentary on a separate article written by Rutgers Law School Senior Fellow, George W. Conk, published in *Rutgers Law Review*, in which Conk argues that just as industrial accidents and occupational disease epidemics provided motivation to pass national health and safety laws, so also the interaction between third-party actions in the workplace and these same historical drivers should operate to preserve and expand what Conk calls "the crumbling Grand Bargain."

I offer a counter-cyclical argument in my piece entitled, "California Grubhub Driver is Independent Contractor, Not Employee." I discuss a February 2018 federal magistrate decision coming out of California, in which it was held that a Grubhub driver was an independent contractor, not an employee.

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I broaden the discussion somewhat from that, arguing that firms like Uber, Lyft, and Grubhub aren't nearly as disruptive as one might think. I point to "disruption" caused 70 years ago when "radio-dispatched" cab drivers were typically characterized as independent contractors and not employees. I argue that the workers' compensation world weathered that storm and can easily do it again.

Part II. State-by-State Legislative & Case Survey

As we have done in past editions also, Part II offers a state-by-state rundown on important workers' compensation legislation during the past year. Part II also contains spotlight decisions from many jurisdictions.

Important state-specific updates (in addition to the articles on Texas and New York noted above), include:

- California's complex (i.e., tricky) rules for lien claimant providers that have resulted in the dismissal of more than 300,000 liens.
- Expansion of Colorado's mental impairment statute to encompass first-responders who receive a diagnosis of PTSD. Under certain circumstances, a "psychologically traumatic event" can now include events that are *within* a worker's *usual* experience.
- Legislation in Florida that provides benefits for PTSD injuries among first responders. Readers will recall that Florida is among the handful of states that does not provide compensation benefits for "mental-mental" injuries. This is an important new exception to that rule.
- Enactment of Georgia's Prescription Drug Monitoring Program ("the PDMP"), in response to the steady increase in deaths from overdose within the state in recent years.
- New provision in Maryland that generally requires medical service providers to submit bills to employers/carriers within 12 months.
- Limitations upon opioid prescriptions were included within S.B. 2244 passed by the legislature in Hawaii and signed by the governor.
- Increase in funeral benefits from $5,000 to $10,000 in Kansas.
- New rebuttable presumption in Minnesota that PTSD is an occupational disease for those employed as a licensed police office, firefighter, paramedic, emergency medical technician, licensed nurse employed to provide emergency medical services outside of a medical facility, public safety dispatcher, officers employed by the state or a political subdivision at a corrections, detention or secure treatment facility, sheriff or full-time deputy sheriff; or member of the Minnesota State Patrol.
- A South Carolina Supreme Court decision in *Nero v. SCDOT*, in which the Court clarified that where an employer witnesses the occurrence of an injury, the employer has all the notice required to move forward to defend/administer the claim.
- Expansion of presumption of compensability for certain firefighters' cancer claims in New Hampshire.

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Louisiana Judge Varnado Passes

The Louisiana Workforce Commission announced the passing of Workers' Compensation Judge Robert Varnado who presided over District 06 in Covington, Louisiana.

Judge Varnado had been a workers' compensation judge since 1990. He was one of the first workers' compensation judges appointed under the new administrative system. Judge Varnado was first assigned to the Franklinton workers' compensation court which was later moved to Covington. He served in Covington for numerous years before being reassigned to the New Orleans office.

Judge Varnado later had the opportunity to transfer back to Covington, where he served until his passing. Judge Varnado will be missed by everyone in the workers' compensation community.

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- Expansion of the use of telemedicine to treat injured workers in Texas [see Texas Department of Insurance, Division of Workers' Compensation Rule 133.3]. Additionally, Texas Department of Insurance, Division of Workers' Compensation Rules 134.500, 134.530, and 134.540 were amended to regulate the provision of compound prescription drugs in the workers' compensation system.
- A decision by the Supreme Court of Oklahoma [*Benedetti v. Cimarex*, 2018 OK 21], in which the Court restated a principle announced earlier this year that the Legislature cannot single out the oil and gas industry and give it preferential treatment when it comes to being sued in a common law negligence action. The Legislature tried to give oil and gas companies which might be negligent on a well site, immunity from a third-party negligence action in district court. In the earlier case, *Strickland v. Stephens Production Co.*, the Supreme Court said the immunity for oil and gas companies in the new comp law, the Administrative Workers' Compensation Act, was an unconstitutional special law, treating one industry different than others.
- The Utah Legislature's amendment of the Workers Compensation Act in Utah Code Ann. § 34A-1-309 to provide that, "For an adjudication of a workers compensation claim where only medical benefits are at issue, reasonable attorney fees may be awarded in accordance with and to the extent allowed by rule, adopted by the Utah Supreme Court and implemented by the Labor Commission." It also enacted Utah Code Ann. § 34A-2-114, which makes it unlawful for an employer to interfere with an employee's ability to seek workers' compensation or occupational disease benefits and provides penalties in the form of a fine of up to $5,000 against an employer for each violation.
- A Vermont administrative decision [*Hall v. Safelite Group, Inc.*, Opinion No. 06-18WC (Mar. 29, 2018)] that refused to require the employer pay for medical marijuana.
- Legislation in Washington, in which SB 6214 (Laws of 2018, ch. 264) allows firefighters and law enforcement personnel who meet certain qualifications to pursue some mental stress occupational disease claims that are otherwise statutorily barred for other workers. In particular, the new legislation allows them to pursue PTSD claims. Additionally, HB 1336 (Laws of 2018, ch. 163) provides generally that in cases where the worker is also receiving Social Security retirement benefits at the time an injury occurs, the worker's subsequent time loss or pension benefits under the workers' compensation claim are not subject to reduction on account of the worker's receipt of Social Security retirement benefits.

  Interesting spotlight cases include:
  - Alaska: Statute Affording No Death Benefits to Non-Dependent Parents is Constitutional [see *Burke v. Raven Elec.*, 2018 Alas. LEXIS 64 (May 11, 2018)].
  - Arizona: Court Adopts Larson's "Friction and Strain" Doctrine for Workplace Assaults [see *Ibarra v. Industrial Comm'n of Ariz.*, 2018 Ariz. App. LEXIS 122 (July 31, 2018)].
  - Arkansas: No Compensation Where Fall is Due to Idiopathic Cause [*Askins v. Kroger*, 2018 Ark. LEXIS 22 (Jan. 25, 2018)].
  - California: Private Citizens Assisting Police May Not Sue under state's "posse law," in Spite of Being Lured to Murder Scene [see *Gund v. County of Trinity*, 2018 Cal. App. LEXIS 522 (June 4, 2018)].
  - California: Reviewers Under State's Utilization Review Procedure are Immune from Tort Liability; Exclusive Remedy is Workers' Compensation [see *King v. Comppartners, Inc.*, 2018 Cal. LEXIS 6268 (Aug. 23, 2018)].
  - Florida: Intoxication Defense Waived Where E/C Failed to Bring it Up During 120-day Period [see *Paradise v. Neptune Fish Market*, 2018 Fla. App. LEXIS 2647 (1st DCA Feb. 23, 2018)].
  - Georgia: Meretricious Relationship Results in Disqualification of Death Benefits [see Sanchez v. Carter, 2017 Ga. App. LEXIS 465 (Oct. 17, 2017)].
  - Georgia: Court Acknowledges "Quagmire" in State's "Arising Out of Employment" Requirement [see *Cartersville City Schools v. Johnson*, 2018 Ga. App. LEXIS 203 (Mar. 16, 2018).
  - Hawaii: Exclusive Remedy Provision Does Not Bar Civil Actions for Harm to Employee's Reputation [see *Nakamoto v. Kawauchi*, 2018 Haw. LEXIS 99 (May 8, 2018).

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- Idaho: Injured Worker's "Undocumented" Status is Economic Factor to Be Considered in Determining Level of Permanent Disability [see *Marquez v. Pierce Painting, Inc.*, 2018 Ida. LEXIS 155 (Aug. 3, 2018).
- Illinois: Children Born with Birth Defects Could Maintain Tort Action Against Fathers' Employer for Alleged Exposure to Toxic Chemicals [see *Ledeaux v. Motorola Inc.*, 2018 IL App (1st) 161345, 2018 Ill. App. LEXIS 71 (Feb. 20, 2018)].
- Kansas: No Claimant's Attorney Fees Available for Appellate Work in Comp Case [see *Pierson v. City of Topeka*, 2018 Kan. App. LEXIS 33 (June 15, 2018).
- Kentucky: Divided Court Says Injury While Retrieving iPad Was Compensable [see *Professional Fin. Servs. v. Workers' Comp. Bd. (Gordon)*, 2018 Ky. App. LEXIS 181 (June 8, 2018)].
- Louisiana: Approved Settlement Agreement Can Be Modified to Address SSA Language Requirements [see *Clark v. Sedgwick CMS*, 17-1063 (La. App. 3 Cir. 05/30/18), 2018 La. App. LEXIS 1074].
- Maine: "Volunteer" Driver is No Employee—Injury Claim Denied [see *Huff v. Regional Transp. Program*, 2017 ME 229, 2017 Me. LEXIS 259 (Dec. 12, 2017)].
- Maryland: First Responder Establishes Occupational Disease Claim for Menisci Tears [see *Baltimore County v. Leahy*, 2018 Md. App. LEXIS 834 (Aug. 30, 2018)].
- Minnesota: Employee's Retaliatory Discharge Action Re: Potential Future Injuries Cannot Proceed to Trial [see *McBee v. Team Indus.*, 2018 Minn. App. LEXIS 71 (Jan. 16, 2018)].
- Mississippi: Benefits Awarded for Staph Infection Caused by Epidural Injections for Lumbar Injury [see *Lowe's Home Ctrs., LLC v. Scott*, 229 So. 3d 736 (Miss. Ct. App. 2017)].
- Missouri: Failure to Wear Truck Seatbelt Does Not Result in Forfeiture of Benefits [see *Elsworth v. Wayne Cty.*, 2018 Mo. App. LEXIS 421 (Apr. 24, 2018)].
- New Jersey: No Lost Wages = No Temporary Disability Benefits [see *Kocanowski v. Township of Bridgewater*, 2017 N.J. Super. LEXIS 171 (Dec. 11, 2017)].

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- New York: Lack of Written Notice of Injury Excused Where Claimant Told Supervisor of Work-Related Injury [see *Matter of Kinkhabwala v. ADP Totalsource Fl XIX Inc.*, 2017 N.Y. App. Div. LEXIS 9287 (3rd Dept. Dec. 28, 2017)].
- New York: Department Store Model is Employee of Skin Care Company [see *Matter of Colamaio-Kohl v. Task Essential Corp,* 2018 N.Y. App. Div. LEXIS 204 (Jan. 11, 2018)].
- New York: Farmhand's Claim of Injury While Birthing Calf Fails [see *Matter of Elias-Gomez v. Balsam View Dairy Farm*, 2018 N.Y. App. Div. LEXIS 4553 (3rd Dept. June 21, 2018)].
- New York: Award for Loss of Four Fingers and Thumb Exceeds That of Entire Hand [see *Claim of Deck v. Dorr*, 150 A.D.3d 1597, 54 N.Y.S.3d 765 (3d Dept. 2017)].
- North Carolina: Injuries Sustained After Choking on E-Cigarette Not Compensable [see *Brooks v. City of Winston-Salem*, 2018 N.C. App. LEXIS 504 (May 15, 2018)].
- Ohio: "Consent Provision" Regarding Employer-Initiated Appeals is Constitutional [see *Ferguson v. State of Ohio*, 2017-Ohio-7844, 2017 Ohio LEXIS 2007 (Sept. 28, 2017)].
- Oklahoma: Special Tort Immunity Provision Favoring Oil and Gas Wells Struck Down as Unconstitutional [see *Strickland v. Stephens Prod. Co.*, 2018 OK 6, 2018 Okla. LEXIS 6 (Jan. 23, 2018)].
- Oklahoma: Yet Another Provision of State's Workers' Compensation Law Held Unconstitutional [see *Gibby v. Hobby Lobby Stores, Inc.*, 2017 OK 78, 404 P.3d 44 (2017)].
- Pennsylvania: Massage Therapy Expenses Covered by Comp Act [*Schriver v. Workers' Comp. Appeal Bd.*, 2017 Pa. Commw. LEXIS 1084 (Dec. 28, 2017)].
- Tennessee: Employer Saddled With 90 Percent of PTD Award Where Preexisting Condition Prevented Surgery [see *Tankersley v. Batesville Casket Co.*, 2018 Tenn. LEXIS 16 (Jan. 26, 2018)].
- Vermont: Injured Worker's AWW Includes College Employer's "Tuition Benefit" [see *Haller v. Champlain College*, 2017 VT 86, 2017 Vt. LEXIS 107 (Sept. 29, 2017)].
- Virginia: Specialized "Running Blade" Prosthesis Found Not to be Medically Necessary [see *Pacheco v. J.P. Masonry, Inc.*, 2017 Va. App. LEXIS 294 (Nov. 28, 2017)].
- Wyoming: Cost of "Alternative" Spinal Surgery in Germany Need Not be Paid by Employer/Carrier [see *In re Worker's Comp. Claim v. State ex rel. Dep't of Workforce Servs.*, 2018 Wyo. LEXIS 102 (Aug. 22, 2018)].

As in years past, in this year's edition of *Workers' Compensation Emerging Issues Analysis*, we have endeavored to provide a broad range of interesting content for the workers' compensation community. We trust you will find it educational and informative.

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

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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New Scholarship: Compensating Injury and Disease Caused by the "Sedentary Workplace"

By Hon. David Torrey*

In a new article, published in the *Lewis & Clark Law Review*, the authors assert that employers should be liable for workers' compensation when workers, because of their sedentary duties, sustain such injuries as heart attack, stroke, and pulmonary embolism. The authors believe that jurisdictions which liberally construe the concept of accident (or injury) already maintain laws which accommodate recovery for such maladies, as long as expert evidence demonstrate medical causation. The authors emphasize that making employers no-fault liable in this fashion will incentivize them to address - via providing such things as frequent breaks and "standing desks" - the growing hazard of the more sedentary workplace. *See* Natalie Bucciarelli Pedersen & Lisa Eisenberg, *If Sitting is the New Smoking, What does this Mean for Employers? A Look at Potential Workers' Compensation Claims in the Sedentary Workplace*, 22 Lewis & Clark Law Review 965 (2018).

The authors establish that the present-day workplace is indeed more sedentary than years ago. They assert that sedentary lifestyles show a higher incidence not only of the ailments noted above, but of cardiovascular disease, cancer, and type 2 diabetes. They argue that employers should go beyond providing wellness programs and become pro-active in encouraging on-the-job fitness regimes. In their view, this is so because science informs us that mere exercise and healthy lifestyle *outside* of work, that is, the aspect of life within one's control, is no substitute for *at work* activity. They describe the energy category of "NEAT," or nonexercise activity thermogenesis, to support the proposition that not having workers active at work in fact causes injury: "'A body that's sitting isn't expending energy,'", they explain, "'so the signals that normally result in you moving – and which, in turn, burn calories – start to check out, molecularly bored with not being called to duty. Meanwhile, the processes that build up fat get busier.' …. Thus, it seems what people do in their time not devoted to exercise is quite important to maintaining their health."

The authors point out that the law in a few countries has recognized this phenomenon. For example, in Denmark, a worker now has the right to a standing desk, while the Australian and Canadian workplace safety agencies, with their "Stand Up Australia" and "Sit Kicker" initiatives, respectively, recommend that employers provide such desks and allow workers to interrupt their sitting every half hour. The authors suggest that the OSHA general duty requirement may at some point be interpreted to oblige employers to initiate similar programs. Some U.S. employers, meanwhile, are ahead of the curve of regulation on this point. Allowing such innovation is not, of course, wholly altruistic. The L.L. Bean clothing company, for its part, "has a policy of three stretch breaks a day for employees, believing that the increased production gains from the breaks make them well worth it."

As for liability in workers' compensation, the authors are well-versed with national trends, and realize that many legislatures, at the behest of business, have revolted against broad coverage of injuries and would likely do so in the face of proposals for covering maladies sustained via sitting. And, of course, jurisdictions which demand "unusual exertion" as part of the arising out of and/or accident test could well defeat even the suggestion that a gradual sitting injury could be compensable. Yet, the authors argue, if employers are not no-fault liable for physical problems caused by sitting, the costs of the same are necessarily shifted to other systems, like private health insurance and Medicaid.

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This result is, in the authors' view, unsatisfactory: "[P]lacing the burden for sedentary workplace harms on medical insurance undermines the core purpose of allocating the burden for workplace harms to employers: to treat them as a cost of production."

The authors are correct that, in jurisdictions where the concept of injury is liberally construed, compensation systems as a matter of *legal causation* would potentially accommodate claims centered on a sedentary work injury. It is when *medical causation* is considered that the authors' thoughtful advocacy becomes highly problematic. Most, if not all, of the ailments which they identify are not obviously caused by work, and usually implicate pre-existing conditions and/or co-morbidities. The causation battles which would inevitably result from frequent claims based on sedentary work make them non-cognizable from a practical point of view.

As for the more basic objection that one's overall health (including the salutary effects of exercise) is largely a matter of personal responsibility, the reader will recall that the authors posit that employers *not* having workers active at work in fact *causes* injury. That may well be, but the entire proposal, which features employers obliging workers to undertake all sorts of physical efforts during the work day, seems at once invasive of privacy and paternalistic – in the extreme – as well. It is submitted that, whatever the gradual dangers of a sedentary job, one's general health remains a matter of personal responsibility.

Dave Torrey has been a Workers' Compensation Judge in Pittsburgh, PA, since January 1993. He teaches the workers' compensation law courses at the University of Pittsburgh School of Law. He is a Past-President of the National Association of Workers' Compensation Judiciary (www.NAWCJ.org), and is Secretary of the College of Workers' Compensation Lawyers. His treatise on Pennsylvania Workers' Compensation, published by Thomson-Reuters, is in its Third Edition. His most recent book is David B. Torrey, ed., *The Centennial of the Pennsylvania Workers' Compensation Act: A Narrative and Pictorial Celebration* (Pennsylvania Bar Association 2015). In 2016, he published Torrey & McIntyre, "Workers' Compensation and Employers' Liability Law," 51 ABA TTIPS Law Journal 749 (2015 Annual Survey Issue) (Winter 2016).

From the Pages of workcompcentral

Lost-Time Claim Costs Climb Steadily With Worker Age, Study Finds

By Elaine Goodman
November 5, 2018

Older employees who are hurt on the job tend to have more severe injuries than their younger counterparts, a trend that is quantified in a new white paper from Lockton. Lockton found that average claim costs increased, by $722, for each year of employee age between ages 20 and 50. The average incurred cost per lost-time claim was about $15,000 for 20-year-old workers, growing to roughly $35,000 for 50-year-old workers. The increases leveled off somewhat between ages 50 and 60. The figures came from an analysis of a database derived from Lockton's book of business that contains 584,310 claims from calendar years 2013 to 2017, valued at 18 months. Lockton said it excluded claims greater than $250,000 "to minimize the impact of unusually large claims."

For workers in a 16-24 age group, lost-time claims were 9.9% of total claim count and 74.1% of all incurred costs for that age group. For workers 55 and older, lost-time claims accounted for 23.2% of total claims and 89.9% of incurred costs for the age group, Lockton found. Injured workers with lost-time claims missed 96 days of work on average in Lockton's analysis. When broken down into age groups, average lost time ranged from 62.5 days for workers ages 16-24 to 108 days for workers 55 and older. "The issue with the aging workforce is when they do have occupational injuries, it takes them longer to recover," said Joe Paduda, principal of Health Strategy Associates and author of the Managed Care Matters blog. "Their claims are more severe, (with) severity defined by the cost of medical services and length of recovery."

The Lockton white paper, released last week, was authored by risk analyst Kelly Flannery and Bill Spiers, vice president and risk control services manager. It follows a 2013 white paper by Spiers that called the aging workforce "a safety tsunami." "Injuries to an aging workforce are real, significant and will continue to be a driving factor in increased employee injury costs over the next 10 to 20 years," Spiers wrote at the time. "So why does it appear that these commonly known facts have not driven more business leaders and safety professionals to develop aggressive attack plans to counteract the negative results?"

The aging workforce is a topic of ongoing interest in workers' comp. On the medical management side, some have noted that comorbidities such as diabetes, arthritis or heart disease are more common in older workers and add complexity to treatment of a workplace injury. According to the Lockton paper, workers over 55 grew, from 11.6% of the workforce in 1996 to 22.4% in 2016, and are expected to make up 24.8% of the workforce in 2026.

The National Council on Compensation Insurance last month reported that the shift to an older workforce is the result of the aging of the baby boomer generation, coupled with greater labor force participation by older workers. Labor force participation among those 55 and older grew, from 30% in 1990 to 41% in 2017, while the participation rate decreased in younger age groups. Workers' comp insurer SFM in Minnesota said declines in muscle strength, hearing and vision put older workers at higher risk of an accident. "The No. 1 risk for older workers is falls, and they can result in more serious injuries than you might expect," SFM Medical Director Dr. Dan Janiga said in a blog post.

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Claim Costs Climb, from Page 17.

Simple safety steps include encouraging the use of appropriate footwear, walking cautiously in slippery conditions and using handrails, he said. Outdoor workers can wear traction footwear in winter weather.

MedRisk, a workers' comp physical medicine management company, suggests offering older workers more frequent breaks or using a job rotation system "so an older worker is alternating tasks rather than overexerting the same muscles throughout the day."

Spiers and Flannery at Lockton said Friday that the key for employers is to take an overall look at their multi-generational workforce. "It is important to be cognizant of the needs and skill set of your employee base so that you're choosing the most effective safety initiatives for your operations and budgeting sufficiently," they said in an email. The Lockton white paper recommends having a post-offer employment testing program for all workers, not just older employees, who will be performing heavy manual labor. And noting the higher risk of falls among older workers, they suggest giving those employees assignments that involve less walking, maneuvering around obstacles or frequent climbing stairs or ladders. The Lockton white paper focusing on workers' comp claims is the first in a three-part series on "Adapting to a Multigenerational Workforce." Subsequent installments will look at employee benefits and retirement plans.

Resistance to Regenerative Medicine in Comp Remains

By Elaine Goodman
November 2, 2018

For now, the Oregon Workers' Compensation Division is sticking to a previous decision that platelet-rich plasma is a non-compensable treatment for injured workers, but its medical advisers are aware that there is growing interest in the therapy and other forms of treatment known as regenerative medicine.

The division's Medical Advisory Committee made the recommendation regarding platelet-rich plasma, which WCD Administrator Lou Savage approved. But the division will continue to take comments from the public on the decision.

The advisory committee plans to re-evaluate the compensability of platelet-rich plasma in 2020, if not sooner, as new research is published regarding its effectiveness. The most recent review of PRP followed the committee's earlier evaluation that led to a 2016 recommendation against compensability.

Committee members noted the high level of interest in the treatment, in which a patient's own cells are harvested from a blood sample and then injected at the site of a musculoskeletal injury or applied during surgery. The theory is that the high concentration of growth factors provided by the platelets will enhance healing.

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"We're getting a lot of requests," one member of the Medical Advisory Committee said during the group's Oct. 19 meeting. "And I wonder if it's going to suddenly cross that threshold that it should be covered." But for now, evidence regarding the effectiveness of PRP is not convincing, the committee concluded. The committee reviewed more than 80 published research studies on PRP in which the treatment was used on shoulder, low back, knee, hip or other parts of the body.

One problem is that PRP is prepared using a variety of methods that aren't always consistent from study to study, the panel said. Some preparations are rich in white cells, or leukocytes, while others aren't. The dose and timing of the treatment also varies. The quality of many of the research studies was another issue. "The consensus opinion is that PRP remains unproven," a PRP subcommittee said in a summary. "There are some areas that are well-studied … that have conflicting results." Most studies regarding rotator cuff tears show no clinical benefit for PRP, the subcommittee said, while most studies for knee osteoarthritis demonstrated clinical benefit.

"Other areas of study did not show a significant majority benefit one way or the other," the subcommittee said. The Medical Advisory Committee decision comes as interest in regenerative medicine seems to be surging in workers' compensation and among the general public.

In addition to platelet-rich plasma, regenerative medicine includes stem cell injections, in which cells are harvested from a patient's bone marrow or fat tissue and used to treat pain and injuries. PRP and stem cell injections are both often offered at pain clinics or regenerative medicine centers.

The clinics tout the therapies as a treatment for a wide range of conditions, from arthritis to thinning hair, and note that insurance is unlikely to cover them. "There's definitely an emergence of this," said Brian Downs, vice president of quality and provider relations for the Workers' Compensation Trust in Connecticut. And the providers seem to sense a big opportunity in workers' comp, he added.

Although Workers' Compensation Trust is "moving cautiously" in regard to platelet-rich plasma, for stem cell therapy the coverage decision is generally "no," Downs said. "Basically, the science isn't there," he said. And since the therapies aren't listed on the state fee schedule, he said, it's difficult to know how much the treatment will end up costing.

Warnings regarding the safety and effectiveness of stem cell therapy are coming from a variety of sources. "These days it seems like there's a stem cell clinic on almost every corner," especially in California and in Florida, states a news story in JAMA last month. "They market treatments, typically using patients' adipose tissue, for arthritis and a host of other conditions. Despite the proliferation of these clinics, however, the science to support their claims isn't there yet."

The U.S. Food and Drug Administration in May filed complaints in federal court seeking injunctions to stop clinics, in Florida and California, from marketing stem cell products without FDA approval and "for significant deviations from current good manufacturing practice requirements." Consumer Reports also issued a warning on stem cell therapy in a January article, saying "a new industry is booming. But critics worry that the treatments are ineffective and dangerous."

The articles on pages 17-19, *Lost-Time Claim Costs Climb Steadily With Worker Age, Study Finds* and *Resistance to Regenerative Medicine in Comp Remains* 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.

2019 Resolutions from the NAWCJ Board

By Hon. LuAnn Haley*

As the close of 2018 will soon be upon us, many will be giving some consideration to resolutions for the coming year. The following represents resolutions, both personal and professional, that have been offered by judges on the Board of the NAWCJ. Perhaps the comments will provide you with some inspiration as you consider your goals for 2019. Also, Judge Torrey, a voracious reader, has provided in lieu of a resolution, recommendations for those of you who resolve to read more in the coming year. At the close of the article you will find his suggestions for holiday book giving for any comp lawyer on your Christmas list!

Hon. Jim Szablewicz, President NAWCJ, VA

I don't typically make New Year's resolutions because I hate to set myself up for failure! But to do my very small part to combat the rancor, incivility and divisiveness raging throughout the country, I resolve to be kinder and more compassionate regardless of the differences and disagreements I may have with others.

Hon. Frank McKay, GA

If only I could keep my New Year Resolutions! I make the same New Year Resolutions every year so there is a good and a bad aspect to making them; it is good to aspire to improve, but it can be somewhat depressing when another year has passed and I have failed. This year, as always, I hereby resolve to: eat less, exercise more, get up earlier every day, stick with a daily devotion, read a broader variety of books and reading material, and write more thank you and appreciation notes. I predict that by December 31st, 2019, I will have achieved a mixed bag of success of varying duration. Oh well, there's always next year!

Hon. Shannon Bruno Bishop, LA

For me, 2019 will be a year of eating healthier and less sweets, but there's one caveat…I cannot start until after Mardi Gras season.

Mardi Gras season begins on January 6th which is known to Christians as the Epiphany when the three wise men delivered gifts to baby Jesus. With this joyous time of year, New Orleanians celebrate with the King Cake tradition. A King Cake is an oval-shaped donut-like cake decorated with the colors of purple, green, and gold which represent justice, faith, and power, respectively. The colors represent the Three Wise Men. The delicious pastry often contains a plastic baby inside and the person who gets the baby inside of their slice is crowned King and has to host the next party (or bring the next King Cake). Most schools and businesses participate in this tradition, so there is usually a King Cake every week until Mardi Gras Day (the day before Ash Wednesday).

As I mentioned in last year's Holiday article, "I cherish these early years with my boys and I love creating memories that will last a lifetime." The King Cake tradition is yet another. So, I will resolve to eat healthier and less sweets, but not until after Mardi Gras.

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Hon. Jennifer Hopens, Immediate Past President, TX

I'm a firm believer in the quote attributed to Michelangelo – "I am still learning." For the past few years, I've resolved each New Year's to learn more over the course of the year through reading, listening to podcasts, and traveling to new places. Since I believe this has been helpful, I will continue on this track in 2019. And, as in years past, I will aim to exercise more (check back with me on that one in February!).

Hon. LuAnn Haley, AZ

For 2019, I am resolving to include more yoga and meditation in my exercise and general wellness regime. A guiding principal in both yoga and meditation is mindfulness with an emphasis of being present in the moment. I hope to include that personal goal in my professional capacity as well by being present and listening carefully in court without allowing my mind to wander from the case at hand to items I may have to do after I leave the hearing. Although as a chronic multi tasker I find it difficult to always be present in the moment, I am hopeful by doing so in hearings, I will be a more effective judge in in 2019.

Hon. Neal Pitts, FL

It is time again to contemplate our New Year's resolutions. Of course, and as borne out by research, most of us have failed to follow through with last year's resolutions yet we optimistically set new ones. Why? The answer to that question from Oscar Wilde is because "Good resolutions are simply checks that men draw on a bank where they have no account." So it seems.

In preparation for writing down my resolution for the *Lex and Verum* article, I came upon a very insightful one to which I claim no credit: "prepare for the future by worrying about it rather than waste time worrying about the past." Clearly such resolution is meant to be humorous, but in contemplating this resolution, I find that it so clearly illuminates the ditches that line each side of the road of life: being weighed down emotionally with regrets of the past and/or fear and worry about the future. Neither is productive and both can be debilitating. Thus, I have learned the hard way that to fall into either ditch is to make succeeding in the present much more difficult; especially since we cannot change the past nor control the future.

This year I am going to resolve to work to focus on the present and not on past or the future. Such work will require that I allow myself grace for past failures and mistakes and faith to believe that the future will hold great promise and success by committing fully to the present and to those things over which I have control. While making a serious resolution for myself, I find no such grace for the lawyers who appear before me. Together with Judge Humphreys, we offer the following resolutions for the lawyers:

1. I resolve to meet my client before I appear with the client at mediation;
2. I resolve to stop helping my adversary by citing case law that actually supports the position of the other side;
3. I resolve to understand the burden of proof to establish my claim or defense and obtain the necessary evidence to prevail;
4. I resolve to wait 24 hours before sending out an angry email;
5. I resolve to stay current on the case law;
6. I resolve to treat all people with courtesy, patience, and respect;
7. I resolve not to wait until 10 minutes before the trial is set to begin to let the judge know the case settled yesterday;
8. I resolve to practice ethically even if my adversary is not;
9. I resolve to not wait until after mediation to begin obtaining discovery.

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Resolutions, from Page 21.

Hon. Sheral Kellar, LA

A real New Year's resolution is made when a person resolves to change a trait or a behavior, accomplish a personal goal or otherwise improve their life.

My New Year's resolution is to be the catalyst for improved change in the lives of Louisiana's injured workers. The best way to accomplish this goal is to promulgate fair and balanced medical treatment guidelines, update an archaic medical fee reimbursement schedule and renovate the utilization review rules so that they are user-friendly, clear and concise. These are lofty goals, to be sure. No one, however, has ever achieved any goal without first trying. My motto has always been, "nothing beats a failure but a try". If I don't try to accomplish these tasks and achieve some modicum of success my role as Assistant Secretary of the OWCA has been in vain.

Hon. David B. Torrey, PA

This writer was unable – despite our Editor-in-Chief's repeated admonitions – to come up with any New Year's resolutions that did not touch on some inflammatory political issue or embarrassing personal matter. I boldly offer, as a substitute, recommendations for holiday book giving for that special lawyer or judge in your life (or, for that matter, you or some other person), who is keen to enhance his or her knowledge about our field and/or those areas with which we often interface.

The writer Paul Bowles once indicated that he learned how to speak Spanish by studying a new word every morning. He'd paste the word on a slip of paper and tape it to the mirror, better to review while he shaved. My own strategy for muscling-up on comp knowledge is to utilize the bus ride to and from work as a dedicated period of reading and annotation. It's also a balm for our bleak and the babies-are-crying ride across the ridges and slopes above the skyscrapers, a trip I have dubbed, at least on the bad days, the *Voyage of the Damned*.

Anyway, empowered by that approach, here are books I read from which, over the past year, I learned the most. I am pleased to recommend them to you.

The changing nature of work is always on the minds of workers' compensation professionals, who wonder how things like misclassification, artificial intelligence, and automation will change work, both for us and for the workers whose injuries give rise to the need for the program. Many a wonky provocateur has appeared at seminars of late peddling anxiety about the future of work – and workers' compensation itself. Indeed, such talking heads suggest, even *judges* can be eliminated by introduction of the innovative "Justice 2000" computer!

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2019 Louisiana Workers' Compensation Educational Conference

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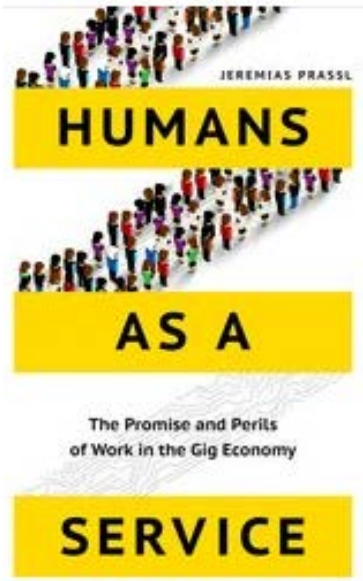
In any event, three books will better help you sort the wheat from the chaff on this topic.

The Fissured Workplace: Why Work Got So Bad for So Many and What Can Be Done to Improve it (Harvard University Press 2014), by David Weil, is the best place to start. Dean Weil explains in general how work has changed over the recent decades, emphasizing the tendency of large companies to contract out all aspects of commerce, other than their core competencies. Professor Louis Hyman digs deeper in his book, *Temp: How American Work, American Business, and the American Dream Became Temporary* (Penguin 2018), setting forth dual (but related) narratives accounting for the growth of staffing agencies and the glamorous business consultancies that recommend them so heavily. As for innovations in communications, the rise of the gig economy, and the role of employment law, the best book right now for the lawyer is *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press 2018), by law professor Jeremias Prassl.



As a lawyer, I never did figure out how to effectively cross-examine a chiropractor. Resources have always been thin on that topic, and the conventional medical literature to this day largely excludes reference to chiropractic theory and practices. Considering feuds and lawsuits going many decades back, critical analysis of chiropractic by allopathic physicians seems nowhere to be found. One will better be equipped to understand chiropractic generally, and how it has been and is subject to criticism, by way of Holly Folk's, *The Religion of Chiropractic: Populist Healing from the American Heartland* (The University of North Carolina Press 2017). This book was also a pleasure to read – a new revelation on every page. I did not know, for example, that the original Dr. Palmer, father of chiropractic and the namesake of the top chiropractors' school, also sold goldfish out of a wheelbarrow.

On the topic of things medical, an invaluable book is *Teeth: The Story of Beauty, Inequality, and the Struggle for Oral Health in America* (The New Press 2017), by Mary Otto. Here the author persuasively establishes that many of our disempowered citizens are held back (and even mortally endangered) by poor dental health. She finally provided the answer (for me, anyway), for why Medicare does not cover dental treatment and why so few dentists will accept Medicaid patients.

For the real student of the law, who wants to know how principles of American evidence law were first derived from the cases, and comprehensively cataloged, I recommend Andrew Porwancher's *John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law* (University of Missouri Press 2016). Meanwhile, for the lawyer or judge who wants a concise, updated evaluation of the workers' compensation system from the social insurance economist's point of view, the best book is by H. Allan Hunt and Marcus Dillender, *Workers' Compensation: Analysis for its Second Century* (Upjohn Institute 2017).

There is poetry on my list of recommendations. West Virginia University (my alma mater) in 2018 republished the long modernist poem *The Book of the Dead* (West Virginia University Press 2018), by Muriel Rukeyser. This is an account in verse, originally published in 1938, of the terrible Hawk's Nest Tunnel tragedy of the early 1930's, where hundreds of transient laborers, mostly African-American, engaged in building a tunnel, perished of acute silicosis. The new edition features a valuable contextualizing introduction by West Virginia writer Catherine Venable Moore.

The Board of the NAWCJ offers these holiday thoughts as well as our best wishes to all our readers for this holiday season!

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

SAWCA All Committee Conference 2018 Recap and Report

By Hon. Frank McKay*

SAWCA held its 2018 All Committee Conference in Colorado on November 13-16 and Bob Wilson of WorkersCompensation.com led a panel discussion addressing a few hot topics of concern to most states. The panelists were Dr. Robert Snyder - State of Tennessee, Judge Frank McKay - State of Georgia, Director Paul Tauriello - State of Colorado, and Deborah Watkins - Care Bridge International (Credit is also given to general members of the audience who contributed to the discussion and information included in this article including Mark Walls of Safety International).

Medicare Set Asides (MSAs) and the reporting that the Center for Medicare Services (CMS) requires is an ever evolving and increasingly onerous area of federal regulation. Medicare has invested significant funds hiring contractors to pursue lien recoveries and review MSA agreements to ensure Medicare's interests are protected. Submitting a MSA for CMS approval has always been voluntary and more payers are moving away from getting approval prior to settling a workers' compensation (WC) claim. Payers are still doing the evaluation and setting aside funds for CMS, but forgoing the actual approval process. Also, more settlements are providing for professionally administered MSAs as a benefit to both the payer and the injured worker.

The CMS discussion led to the revelation that the Social Security Administration (SSA) is increasingly seeking information from the states regarding payments of WC indemnity benefits to cross index with their Social Security Disability Income (SSDI) benefits in order to ensure the SSA is getting the federally authorized offset for state WC disability benefits paid to an injured worker who subsequently applies for and receives SSDI benefits. Some states have direct offsets within their statutory language that clearly transfer eventual responsibilities to SSDI while most states do not.

Both the CMS and SSA are concerned with cost shifting of a state workers' compensation claim to the federal government. Like CMS and the advent of MSAs, the SSA appears to be increasingly moving to protect SSDI and may eventually force another complex overlay to the workers' compensation industry.

A brief discussion was had regarding identity theft. Georgia is changing all its Board Forms to remove social security numbers starting in 2019. The challenge was in part due to the manual tasks involved to change the forms, but the real challenge was to replace the social security number in the system with a new identifying claim number that would still allow for fraud prevention and keeping track of multiple and prior WC claims involving the same individual. Abbie Hudgens of Tennessee, the current President of the IAIABC, added that due to overwhelming requests from the industry, a voluntary effort is underway to adopt a uniform First Report of Injury form for all 50 states. Both Presidents of SAWCA and the IAIABC support the concept of adopting a uniform First Report of Injury and perhaps identifying other forms that could be uniform among all the states.

Most workers' compensation systems have a permanent impairment element to them. Physicians are asked to provide an impairment rating, usually using one of the versions of the AMA Guidelines. The panel discussion focused on the frequently confused terms of a "physical disability" and a "permanent impairment rating." Often a permanent impairment rating is used to determine an injured worker's entitlement to a particular type of indemnity benefit called permanent disability benefits and not used to determine whether an injured worker is actually disabled from being able to perform a particular job. This led to a discussion of focusing on the ability of an injured worker to work and the tasks that can be performed versus what they cannot do.

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Lastly, in light of the mid-term elections and some of the changes in governorships in various states, the need for and the important role that organizations like the NAWCJ, SAWCA, IAIABC, and others play in providing critical education, networking opportunities, and historical perspectives of workers' compensation, through the ability to attend various conferences like this one, was emphasized as a high priority for judges, administrators, regulators, and the industry.

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* Frank R. McKay is the Chairman of the Georgia State Board of Workers' Compensation, 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. He 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 Chairman.

T'was the Night before Christmas (Attorney's Version)

By Lloyd Duhaime*

WHEREAS on an occasion immediately preceding the Nativity festival, throughout a certain dwelling unit, quiet descended, in which could be heard no disturbance, not even the sound emitted by a diminutive rodent related to, and in form resembling, a rat; and

WHEREAS the offspring of the occupants had affixed their tubular, closely knit coverings for the nether limbs to the flue of the fireplace in expectation that a personage known as St.Nicholas would arrive; and

WHEREAS said offspring had become somnolent, and were entertaining re: saccharine-flavored fruit; and

WHEREAS the adult male of the family, et ux, attired in proper headgear, had also become quiescent in anticipation of nocturnal inertia; and

WHEREAS a distraction on the snowy acreage outside aroused the owner to investigate; and

WHEREAS he perceived in a most unbelieving manner a vehicle propelled by eight domesticated quadrupeds of a species found in arctic regions; and

WHEREAS a most odd rotund gentleman was entreating the aforesaid animals by their appellations, as follows:

> "Your immediate co-operation is requested. Dasher, Dancer, Prancer, and Vixen; and collective action by you will be much appreciated, Comet, Cupid, Donder, and Blitzen";

and WHEREAS subsequent to the above, there occurred a swift descent to the hearth by the aforementioned gentleman, where he proceeded to deposit gratuities in the aforementioned tubular coverings.

Now, therefore, be ye advised: that upon completion of these acts, and upon his return to his original point of departure, he proclaimed a felicitation of the type prevalent and suitable to these occasions, i.e.!

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* http://www.duhaime.org/LawMag/LawArticle-1515/Justice-and-Law-Christmas-Jokes.aspx

Postcard from Orlando

Evidence Topics From The 2018 NAWCJ Judiciary College … With Some Pennsylvania Notes

NAWCJ Judiciary College; Orlando, FL, August 20, 2018

By Hon. David Torrey*

This writer, for the tenth year in a row, attended the National Association of Workers' Compensation Judges "Judiciary College" in Orlando. The College was held on August 19-22, 2018 (as always) at the Marriott World Center. Judges from more than 20 states attended. Attendance at the Judiciary College is invaluable for the workers' compensation judge (WCJ) who desires to achieve excellence in his or her profession. The knowledge to which one is exposed – and which can be shared – has, in our field, no equivalent.

1. ***Applicability of the Rules of Evidence.*** An interesting aspect of the Judiciary College is hearing the approach of the various states as to the admissibility of evidence. Those approaches are diverse indeed. In the Vermont, Nebraska, and Texas (administrative) systems, for example, the rules of evidence are not applicable. In Florida, meanwhile, the codified state rules of evidence apply, and the rigorous *Daubert* standard guides the admissibility of expert evidence.

I conceive of Pennsylvania as a mainstream state, that is, one where the rules do not apply, but where all adjudications must nevertheless be based on legally competent evidence. Because of this latter (rather mainstream) rule, in the trenches of litigation we do apply the rules of evidence, and the lawyer or judge who does not know the same risks being regarded as incompetent.

2. ***Specialized fact-finding on expert medical issues.*** The Florida Judge of Compensation Claims (JCC) must not only apply *Daubert* but must act gingerly in consideration of *from whom* that expert medical opinion *comes*. Florida is a state that, as part of reform, has tried to jettison the "dueling doctors" syndrome found in so many workers' compensation systems. In this regard, when a difference in medical opinions exists in a given case, the JCC is *required* to appoint an impartial physician, called an "EMA," or expert medical advisor. It's also critical to note that only *authorized* physicians are allowed to testify in the first place.

As to the mandatory referring-out process, Colorado, Maine, Utah, and Wyoming are other states that have instituted systems of impartials. These devices are reform innovations that were emphasized during the cost crises of the 1980's and 1990's, when frustration with inefficient litigation was at its height. Now, with falling injury rates and costs, and the popularity of compromise settlements, the desire on the part of legislatures to experiment with this type of innovation seems to have waned. Paring off benefits surely strikes reform-minded legislators as much more attractive than the creation of some new bureaucracy.

The Pennsylvania judge has long had the power to appoint his or her own impartial, one that comes with the WCJ's investigative powers. This power is rarely exercised, though Judge Stokes of Upper Darby has often undertaken such appointments. The Act 44 amendments (medical cost containment) also gave the WCJ the ability to appoint a peer to opine on the issue of reasonableness and necessity of medical treatment.

3. ***The unsatisfactory residuum rule.*** Under the Pennsylvania Act, a perennial thorn, intellectual and practical, is the applicability of the *Walker* Rule to workers' compensation proceedings. Of course, under the *Walker* Rule – thoughtlessly imported (in 1987) into our field, like an invasive weed – unobjected-to hearsay cannot support a finding of fact. Any admitted hearsay must be corroborated by legally competent evidence before a decision will be upheld. Even when the party against whom the evidence is being offered *expressly indicates that no objection exists*, the evidence (typically a signed doctor's report) cannot support the WCJ's decision. This kudzu of comp is often called the "residuum rule."

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Judges from Georgia reported that its system "recently got rid of the residuum rule" when it adopted (Jan. 2013), for workers' compensation purposes, the general rules of evidence. As noted in the state bar's 2012 Workers' Compensation Law Section *Newsletter*: "Arguments over the admissibility of out-of-court statements are among the most frequent evidentiary issues in workers' compensation claims and in all litigation. The old rules deem hearsay 'illegal evidence,' and such evidence cannot sustain a verdict even if admitted without objection…. The new rules 'legalize' hearsay evidence, and to the extent that there is no proper objection to hearsay, it is admissible and can support a finding or verdict…." Matthew D. Walker, *Georgia's New Evidence Code in the World of Workers' Compensation*, STATE BAR OF GEORGIA WORKERS' COMPENSATION LAW SECTION NEWSLETTER, p.1 *et seq.* (Summer 2012), https://www.gabar.org/committeesprogramssections/sections/workerscompensationlaw/upload/WC_Summer_12web.pdf.

Would that the Pennsylvania legislature follow suit and free the workers' compensation community from the one-score-and-eleven years' yoke of the *Walker* Rule.

4. ***ALJ's examination of inadmissible proofs.*** As with any system that has the judge as both fact-finder and interpreter of law, an issue arises as to his or her review of objected-to, impermissible proofs. Chief Judge Switzer of Tennessee recognized the view of many that "you cannot unring the bell," a phrase which voices the concern that once the judge reviews impermissible proofs, his or her thinking will be tainted by such examination. However, in his view, good judges are able to "compartmentalize," and disregard the objected-to proofs, *and only* rely on those which are properly admissible.

5. ***Professor Ehrhardt holds forth on Judicial Notice.*** As he often does at the Judiciary College, the distinguished (and leonine) Florida State University law professor, Charles Ehrhardt, lectured on evidence for the assembled judges.

Jefferson declared that the view at Harper's Ferry was "worth [a] voyage across the Atlantic." In this same spirit Torrey declares that hearing a lecture from Professor Ehrhardt is worth a voyage to Orlando – even if it's always during the steamy third week of August.

A key item for Professor Ehrhardt this year was the concept of judicial notice. He discussed, in this regard, Federal Rule of Evidence 201(b)(2). That rule states, in pertinent part, "*Judicial Notice of Adjudicative Facts*…. The court may judicially notice a fact that is not subject to reasonable dispute because it … (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* https://www.law.cornell.edu/rules/fre/rule_201#. The Pennsylvania version of this rule (see below) bears the same number and reads essentially the same.

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Indiana Governor Appoints New Board Members and Reappoints Four

Indiana Governor Eric Holcomb made four reappointments and two new appointments to the Worker's Compensation Board:

Daniel Foote (Indianapolis), will continue his service on the board. His term expires August 31, 2021.

Linda Hamilton (Ft. Wayne), will continue her service on the board and will continue as chair. Her term expires January 1, 2023.

Diane Parsons (Indianapolis), will continue her service on the board. Her term expires August 31, 2022.

Bridgett Repay (Schererville), will join the board. Her term expires January 1, 2023.

Kyle Samons (Greenville), will join the board. His term expires August 31, 2022.

James Sarkisian (Valparaiso), will continue his service on the board. His term expires August 31, 2022.

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Professor Ehrhardt, treating judicial notice and the (perennial) issue of the incriminating Facebook post, opined that judges cannot take judicial notice of Facebook and others social media postings – statements made on Facebook posts are hearsay. On the other hand, if it is established that the party whose statement is under scrutiny did indeed execute the post, the declaration of the same can constitute an admission of a party. And, of course, the fact that some items might have been in the Facebook user's "private" area is irrelevant to the critical analysis.

On another Facebook issue, Professor Ehrhardt completely rejected the idea that a judge can be a "friend" with an attorney who appears before the Judge. Of course, Professor Ehrhardt does not use Facebook and was quite *contemptuous* of the whole concept. "Who the hell cares," he exclaimed, "what I had for breakfast!?"

As for Pennsylvania Rule 201, the WCJ has the power to take judicial (or administrative) notice of items, consistent with the Pennsylvania rule. As a WCJ, careful not to rely on incompetent proofs, I would personally follow the relevant provisos in taking notice of an item. The rule, in its entirety, provides as follows:

> Rule 201. Judicial Notice of Adjudicative Facts.
> (a) *Scope.* This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
> (b) *Kinds of Facts That May Be Judicially Noticed.* The court may judicially notice a fact that is not subject to reasonable dispute because it:
> (1) is generally known within the trial court's territorial jurisdiction; or
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
> (c) *Taking Notice.* The court:
> (1) may take judicial notice on its own; or
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.
> (d) *Timing.* The court may take judicial notice at any stage of the proceeding.
> (e) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
> (f) *Instructing the Jury.* The court must instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

https://www.pacode.com/secure/data/225/chapter2/s201.html.

The applicability of judicial notice has been addressed by Commonwealth Court in a workers' compensation case. There, the court held that the WCJ had committed reversible error when he took judicial notice of U.S. Labor Department statistics. *See Kashuba v. WCAB (Hickox Constr.)*, 713 A.2d 169 (Pa. Commw. 1998) (WCJ committed error by taking judicial notice of statistics of Bureau of Employment Security that a carpenter in the Scranton area would have earned a certain amount, citing *Savoy v. Beneficial Consumer Discount Co*., 468 A.2d 465 (Pa. 1983) (trial court erred in determining the value of an automobile based on judicial notice of its Red Book value)).

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* Dave Torrey has been a Workers' Compensation Judge in Pittsburgh, PA, since January 1993. He teaches the workers' compensation law courses at the University of Pittsburgh School of Law. He is a Past-President of the National Association of Workers' Compensation Judiciary (www.NAWCJ.org), and is Secretary of the College of Workers' Compensation Lawyers. His treatise on Pennsylvania Workers' Compensation, published by Thomson-Reuters, is in its Third Edition. His most recent book is David B. Torrey, ed., *The Centennial of the Pennsylvania Workers' Compensation Act: A Narrative and Pictorial Celebration* (Pennsylvania Bar Association 2015). In 2016, he published Torrey & McIntyre, "Workers' Compensation and Employers' Liability Law," 51 ABA TTIPS Law Journal 749 (2015 Annual Survey Issue) (Winter 2016).

WCI Recognized for Give Kids the World Workday Philanthropy

Per Curium

The Comp Laude awards were conceived by David DePaolo. The founder of WorkCompCentral was perturbed by a perception that workers' compensation made the news only when there was negativity to report. He started the awards and the Comp Laude Gala to recognize those in the industry that are doing good things, exemplars, and inspirations. David and his team defined categories in which awards would be made: attorney, injured worker, medical professional, industry leader, employer, service provider, claims professional, and work comp philanthropy. They decided to designate two high honors, similar to educational honors, naming them Summa Comp Laude (highest distinction) and Magna Comp Laude (great distinction). Following his untimely passing in 2016, the Summa Comp Laude was renamed the Summa Comp Laude/David J. DePaolo Award.

Each year, WorkCompCentral opens nominations for the various categories (nominations are open now). There is no public nomination, however, for the Summa and Magna awards; the judges select those distinctions. In 2018, the Workers' Compensation Institute was nominated for an award in the work comp philanthropy category. The nomination noted that WCI produces and presents the nation's largest workers' compensation education event each year in Orlando, Florida. There, some 8,000+ people converge on the world's largest Marriott hotel and there are four days of an incredibly diverse and densely-packed educational agenda.

Though WCI has been financially generous for decades, it decided in 2012 to initiate a broader philanthropy. WCI decided to work with Give Kids the World. Orlando is a frequent destination for children who are honored by the Make a Wish Foundation and similar efforts. Sick children are brought to Orlando to escape the day-to-day of serious illness. In 1986, Henri Landwirth started a grand facility to provide those children and their families with accommodations during their Orlando visit. He named it Give Kids the World Village (GKTW).

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It is a like no other hotel, offering exemplary lodging, but with intriguing twists. Children staying at GKTW (http://gktw.org/about/) enjoy an 84 acre facility complete with meals, entertainment, resort tickets, transportation, and more. "More," like an ice cream parlor that is open for breakfast (yes, ice cream for breakfast), a train, swimming pools, you name it. It has delivered on its promise in excess of 160,000 times since its founding. And in 2012, WCI adopted GKTW as its official philanthropy. That commitment involves an element of fundraising and financial contribution. Each year, since 2014, the Saturday night before the WCI conference, a Gala and silent auction is held. In four short years, WCI has raised and donated over $200,000 to GKTW. Impressive, yes; but, that is not the best part.

WorkCompCentral CEO Kristen Chavez presents Summa Comp Laude/David J. DePaolo award to WCI program Chair Steve Rissman. Photo courtesy of William Zachry.

In partnership with conference attendees, sponsors, and partners, WCI busses volunteers to GKTW Village each Saturday morning before the conference, the morning before the Gala. Those volunteers provide the labor to make GKTW Village work. They scoop ice cream, drive the train, and interact with the kids and their families. They also weed, trim, paint, rake, sweep, repair, and anything else that is asked. They contribute sweat, emotion, and heart where it is needed most, in the lives of children struggling with medical challenges.

The work party groups have grown over the years. In 2017, over 700 volunteers participated in the GKTW philanthropy work day. They promoted human welfare, demonstrated goodwill to people, and performed an act of humanitarian love. Seven hundred workers' compensation professionals from all walks of life, professions, businesses, and perspectives came together to give back, to build, and to serve.

But in August 2018, after the Comp Laude nomination had been submitted, WCI and partners showed up for another work day 1,100 strong. Over a thousand people descended on a hot August morning and made this world a little better place to be! They impacted countless lives.

In October, at the Comp Laude Gala in San Diego, WorkCompCentral recognized WCI and its GKTW effort with the 2018 Summa Comp Laude/David J. DePaolo Award. And, one might conclude that the financial contributions and hard labor are the best part; but, not so.

WorkCompCentral founder David J. DePaolo. Photo courtesy of Kids' Chance of California

As the Comp Laude nomination noted, the focus here should be on the hundreds of volunteers and their day of work, certainly for the work that was done, but more. On that workday, barriers were overcome, conversations were started, and friendships were formed. People from across the amalgamation that we refer to as "workers' compensation" met and learned from each other in service to others. People came together for the benefit of children and contributed their time, sweat, and effort. They formed teams, wore matching t-shirts, and they were a bit competitive. But, they contributed.

When we discuss philanthropy in workers' compensation, there are so many efforts out there. But, the GKTW workday is philanthropy of the mind, the heart, and the body. It is contribution of effort, teamwork, and cooperation. It builds bridges, spans chasms, and promotes understanding (or at least interaction). And the Laude judges recognized that. Congratulations WCI on this momentous recognition!

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