Lex and Verum

The National Association of Workers' Compensation Judiciary

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From the President

By Hon. Michael Alvey

April was an extremely busy month for the Workers' Compensation community in Kentucky. In addition to the usual motions, notices, briefs, decisions, benefit review conferences and hearings, we held our Centennial dinner and celebration commemorating the passage of the Kentucky Workers' Compensation Act in 1916. Our featured speaker was Hon. David Langham. Thanks Dave for participating in our celebration.

In addition to our usual activities, and the celebration of the Centennial, we continue to move forward with the implementation of our on-line filing system, or Litigation Management System. As in all projects, the final details and fielding of the program is somewhat tedious.

During the month of April, we also lost three of our administrative law judges who were not confirmed by the Kentucky Senate. Those judges include Greg Allen, Scott Borders and Udell Levy. Thanks for your service gentlemen. I also note we lost one of our former administrative law judges, Ed Hays, who recently succumbed to a long illness. Ed's obituary appears on page 20. He will also be greatly missed.

As we move ahead, we are looking at a very busy summer schedule for our organization. Judge Hopens and I will be representing our organization at the Workers' Compensation Summit in Dallas on May 11 and 12. Other judges from our organization will also be in attendance in varying capacities. If you have any suggestions for topics or suggestions for discussion points, please advise Judge Hopens or myself at Jennifer.Hopens@tdi.texas.gov, or michael.alvey@ky.gov.

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We are also drawing ever closer to the 2016 NAWCJ Judiciary College in Orlando, Florida. If you have yet to finalize plans to attend, I encourage you to do so at your earliest convenience. The deadline for scholarship applications is fast approaching and if you intend to apply, please do so as quickly as possible. If you do plan to attend, I encourage you to participate as a judge in the moot court competition. Please contact Tom Sculco at Thomas.Sculco@doah.state.fl.us or Melody James at mjames@wcc.sc.gov.

Finally, I encourage each of you to provide articles, news from your state, and any information you feel helpful for our organization. Please submit any article you may have to Hon. LuAnn Haley at LuAnn.Haley@Azica.gov.

Thanks for all you do.

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Opt-Out Panel Discussion Comes to Judiciary College 2015

By Michael C. Duff, Esq.*

Editor's Note: On Tuesday morning of this year's Judiciary College, NAWCJ will present a panel of experts to discuss the "opt-out" legislation of some of the southern states. This legislation permits an employer to remove itself from the workers' compensation system entirely if it substitutes an employee benefit plan for work accidents. To date, only Oklahoma has enacted such a law. When an employer of that state opts out it retains, remarkably, its historic immunity from tort suit – that same immunity which formed the basis of the original workers' compensation "bargain." The moderator of our panel, the distinguished law professor Mike Duff, has been considering the contours of this exclusive remedy immunity for years and, indeed, he treats the issue in his 2013 law school textbook. He is now the first academic to publish a full-blown law review article on the issue of opt-out. Professor Duff is joined in the discussion by key observers of the system: leaders within the Texas and Oklahoma agencies. Below, Professor Duff summarizes in detail the legal implications of the opt-out machination which will be the focus of our panelists.

~ Dave Torrey

In recent months workers' compensation opt-out systems have garnered national attention. This panel will distinguish between opt-out and opt-in, or non-subscriber, systems. The Oklahoma model, which has been enacted, and other recently-proposed legislation, are opt-out systems: employers must do something to become authorized *not* to participate in a state workers' compensation statutory regime. Texas, on the other hand, has historically been an opt-in state: employers are presumptively *not* covered by the state workers' compensation regime and must affirmatively become authorized in order to participate (thereby receiving the protection of the exclusive remedy rule).

The panel will also explore how the Employee Retirement and Income Security Act of 1974 (ERISA) has entered into opt-out/opt-in discussions. Some courts have held that employee benefit plans delivering *any* benefits besides workers' compensation benefits are necessarily "ERISA" plans, even if workers' compensation benefits predominate in the plans. However, ERISA itself preempts all substantive state regulation of ERISA plans. While state regulation of "pure" workers' compensation plans—those created and maintained solely to comply with workers' compensation laws—escape preemption under the terms of ERISA, the courts have not definitively determined whether alternative plans do, and the legislative history of the ERISA workers' compensation exclusion is unusually obscure.

The panel will underscore that the relative complexity of the ongoing ERISA discussion often obscures a very simple fact: an alternative benefit plan regulated exclusively by ERISA need not satisfy any substantive requirement. For example, the alternative plan might provide a weekly cash payment of only 10% of the pre-injury average weekly wage. Such an amount, while deviating substantially from state workers' compensation benefit levels, could not violate ERISA. The natural reaction on discovering the absence of substantive requirements in alternative benefit plans is to recommend that states simply add *critical* requirements as a condition of an employer being permitted to opt-out. However, if the alternative plans are unquestionably ERISA plans, states are *completely* preempted from regulating them. Thus, it appears that mandatory supplementation or augmentation of ERISA-covered alternative benefit plans is not an option under current federal law.

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Finally, the panel will consider state constitutional questions inherent in opt-out discussions. Opt-out creates two classifications of employees treated differently as a matter of law, those whose employers have opted out of workers' compensation, and those whose employers have not. May these two classes of employees be treated differently under the law without violating principles of equal protection? An Oklahoma administrative body has concluded they may not, but the conclusion is in tension with general principles of equal protection law. Substantive due process questions may also arise. May an alternative benefit plan provide *any* level of benefits, or is some level of benefit adequacy constitutionally implicit in the original *quid pro quo* under which employees a century ago surrendered their common law right to a tort suit? With respect to procedural due process, the courts in Oklahoma have already expressed concern with employer-designated fact finders that are a feature of some alternative plans. Finally, there is a fascinating and virtually undiscussed question. May state courts even declare ERISA-regulated plans unconstitutional under principles of ERISA preemption?

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* Professor Duff became the Centennial Distinguished Professor of Law in 2014. He teaches the College of Law's courses in Torts I, Labor Law, and Workers' Compensation Law. He also teaches a course on Alternative Dispute Resolution in the Workplace. He has previously taught Administrative Law and Introduction to Law at the College of Law; and has also taught Labor Law and Administrative Law as a visiting professor at the University of Denver's Sturm College of Law. Professor Duff founded the College of Law's Academic Support Program (now called the Academic Achievement Program) in 2006, and directed the program for seven years. A seasoned legal practitioner, Professor Duff spent nearly a decade working as a trial attorney, adjudicative official, and investigator in various National Labor Relations Board offices immediately prior to joining the UW faculty. Before engaging in federal government law practice, Professor Duff worked for two years as an associate attorney in a cutting-edge, progressive, private sector law firm in Maine, where he represented injured workers and labor unions.

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National Association of Workers' Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

NAWCJ SCHOLARSHIP 2016 OFFER

The National Association of Workers' Compensation Judiciary is offering scholarship opportunities to adjudicators attending the 2016 Judicial College in Orlando, Florida, August 21-24, 2016!

First-time scholarships may be awarded to any currently presiding workers' compensation adjudicator, who is also a member of NAWCJ, and may include a maximum of $300 for hotel accommodations, waiver of the conference registration fee and a maximum of $500 for travel expenses. Second-time awards will be 50% reduction in conference registration fee. No scholarship funds are available for meals but two lunches and two receptions with heavy appetizers are included in the registration. The evaluation of scholarship applications will include whether the applicant is eligible for funding from the employing agency and preference will be given to first time college attendees who are interested in becoming more actively involved in NAWCJ.

The scholarship program is funded by annual dues from associate members of NAWCJ (attorneys and other individuals/companies interested in supporting the education of members of the workers' compensation judiciary).

Each interested adjudicator must e-mail a completed scholarship application to NAWCJscholarship@gmail.com by May 16, 2016. Scholarship awards will be announced by June 30, 2016 and successful applicants will be asked to make travel arrangements soon after to help minimize airfares.

College attendees will have an opportunity to meet members of the workers' compensation judiciary from around the country, as well as practitioners and industry leaders. The judicial college is an excellent opportunity to receive continuing education credit in a variety of areas including order writing, evidence, medical issues and other matters that routinely come before workers' compensation adjudicators.

I encourage you to apply for a scholarship to the 2016 judicial conference, using the form on the next page, and look forward to meeting you when the college convenes in August.

Sincerely,

Michael Alvey, President

Enhance your experience at Judiciary College 2016

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Have you participated on a NAWCJ panel or committee in the past or would you be willing to do so in the future?
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Explain how you would like to participate in the NAWCJ:

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Please estimate your travel expenses for attending the college:

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Current adjudicatory position, dates held and description of duties: ___________________________

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How will attending the 2016 Judicial College and FWCI Conference benefit you in the performance of your job:

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Would you be willing to write a brief article for the NAWCJ newsletter about the 2016 NAWCJ Judicial College and FWCI Conference and its benefits? ___YES ___NO

E-mail application to NAWCJscholarship@gmail.com. Deadline 5/16/2016.

Notes from New Orleans: The 2016 ABA Workers' Compensation Sections CLE Seminar

By Hon. David B. Torrey*

Heavy rainstorms in much of Louisiana failed to disrupt the annual mid-winter CLE of the American Bar Association workers' compensation committees. If you couldn't be at this year's mid-winter event, held on March 11-12, 2016, you missed an excellent experience with an entertaining venue.

I, myself, was taken back to New Orleans 2009, when we had the ABA CLE at the Intercontinental Hotel. I'll always remember that year's robust debate about the "Fake Bad Scale" – a type of authenticity testing of which I had never heard. *See* PBA WC Law Section Newsletter, Vol. VII, No. 100, at 24. *See generally* Chuk, *"It's (not) Bad, It's (not) Bad, You Know it": The Growing Acceptance of the Fake Bad Scale*, 54 VILLANOVA LAW REVIEW 479 (2009).

Ms. Surbeck

The venue this year was the luxurious Roosevelt Hotel, now owned by the Waldorf-Astoria group, and a property that the locals told us had once been the headquarters of Huey Long.

Compared to 2009, just four years post-Katrina, New Orleans looked fairly prosperous. Still, on a distance run I took to the northwest of downtown, I could still perceive storm damage – but also revitalization.

This year's ABA educational program, led by Philadelphia lawyer (and now CWCL Fellow) Catherine Surbeck, was top-notch and obviously geared to current, practice-intensive subjects. Ms. Surbeck ran a tight ship in planning the CLE, and her execution was similarly efficient.

Cartherine's leadership led TTIPS workers' compensation chair, Stacey Tees, to later exclaim, with a beaming countenance, over how the program was so well managed!

Ms. Tees

The program, though consisting of familiar topics, featured many items that were valuable even to the veteran. The voluminous written materials this year featured mostly Power-Point slide shows, but also a number of original narrative papers. These materials were provided to us via a card with flip-out USB-portal chip. For those who regret the passage of hardcopy conference compilations, bear in mind that with e-materials, one can share such items with co-workers back home with just a few clicks. Here is an account of some particularly valuable takeaways from the CLE:

1. ***Mental claims among states – does a bare majority still require physical animus?*** So posited, in any event, Georgia lawyer Robert Hendrix, serving on a panel on psychological injuries. He asserted that 26 states still require a physical injury as a prerequisite for a cognizable psychological disability claim. His categorization was of interest to me: after the shootings at the Newtown, CT elementary school left many first responders traumatized, an analyst studying the issue asked me for a 50-state breakdown of the law on this issue, and I could not direct her to a modern compilation.

Mr. Hendrix

2. ***Rogue employee leasing entities as causing financial disruption.*** When an employee leasing firm has failed to insure, and a worker sustains an injury, the actual employer may appear in court stating that he *has no* employees. Indeed, he may state that he himself is not an employee of *his own* company (This writer heard such testimony last month - March 2016). The litigation can become a nightmare.

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Notes from New Orleans, from Page 7.

Yet, irresponsibility in the employee leasing, or "professional employment" community, can also wreak havoc on insurance guaranty associations. A sophisticated panel of experts briefed us on the working of such entities. Among other things, the panel noted that some employee leasing companies have a pattern of promising their clients workers' compensation insurance, only to fail to pay premiums and leaving employers holding the bag and carriers highly leveraged. When this happens, the carrier may become insolvent, and then the guaranty association must step in.

Mr. Snyder

Attorney Rowe Snyder, of Locke Lord, reminded us that, given their usual funding mechanism, *i.e*., assessments on all carriers, such funds "socialize" the risk of insolvency by spreading losses among insurers. Thus, all ultimately pay for the wily machinations of the rogue PEO.

3. ***A problem with compounding drugs: lack of peer-reviewed studies on efficacy.*** Assessing the utility of drug compounds is challenging given that peer-reviewed studies of compounded drugs do not exist. This is so given the inherent custom formulation of compounds. Still, the various drugs that are *being compounded* have been researched. Thus, is it really fair to deny workers the potential advantages of drug compounds on a lack of research basis?

Charles Davoli, a distinguished Louisiana lawyer, made the point that, in the present day, with some physicians becoming timid about prescribing opioids, compounds can be a crucial alternative. All on the Compound Drug Use panel, in any event, found it remarkable how the pendulum had swung back so dramatically against opioid drug use for chronic pain.

4. ***Lack of employee co-pays in workers' compensation as leading to patient over-utilization.*** Texas attorney Jane Stone, remarking on a sensitive, yet perennial, issue, posited that lack of employee co-payments in workers' compensation systems can lead to injured workers over-utilizing services and medications. But how to balance that phenomenon with the appalling fact that many injured workers have no savings, and state that they live from (disability) paycheck to paycheck? .

5. ***"Social media is the new surveillance."*** This admonition has become ubiquitous at workers' compensation conferences. And rightly so: Alabama defense attorney Josh Holden submitted that, in the present day, it is the defense lawyer's standard of care to insist that this type of on-line investigation be undertaken in *every* case. But is searching the computer only an *employer* undertaking? Social media panelist Derrick Williams, injured workers' counsel, told us that he Googles all of his potential clients even before meeting them (and then advises them to shut down their Facebook pages during the litigation). Mr. Williams also suggested that claimants' attorneys should investigate employer witnesses with the same vigor that the defense applies. After all, not all employer testimony will be from "boy scouts."

Mr. Holden

6. ***Airing the dirty laundry.*** Tom Domer, a claimants' attorney from Milwaukee, asked an excellent question of our judge panel (headed by Judge Seelig) which in general posed the broader inquiry, "How do we know you're lying?" That question is whether the claimant should bring up weak points and inconsistencies in the course of direct examination. The panel seemed unanimous in saying yes. First, deftly including the weak points adds to setting forth a rational chronology of the injury and what has unfolded in its wake. Second, a full-disclosure-type presentation takes the wind out of the sails of the defense lawyer, who, on cross-examination, is deprived of the ability to act with moral outrage over purported omissions.

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Notes from New Orleans, from Page 8.

Judge Seelig found "airing the dirty linen" obligatory. His impression, when the claimant has been "exposed" on cross-examination, is that the claimant's attorney has simply not prepared properly. Meanwhile, Judge Medina-Shore, of Florida, pointed out that, in her state, fraudulent acts (like misleading testimony), can work a complete forfeiture by claimant. Thus, airing perceived inconsistencies at the outset is crucial.

7. ***Two credibility flashpoints.*** Judge Keller, of Louisiana, is put off by claimants who have an "Everyone done me wrong" attitude. The credibility of such workers is gravely imperiled. Judge Medina-Shore, for her part, identified the "Empty Chair Syndrome." All too often, when credibility of the competing parties is the pivotal issue, the defendant is not present at the hearing. It can be difficult for the judge to be favorable to the defendant – when the employer is simply *not there*.

8. ***Credibility and expert medical testimony.*** In the present day, judges in many jurisdictions are obliged to explain, with specificity, the basis for their acceptance or rejection of expert testimony. (In Pennsylvania, of course, this is called the "reasoned decision requirement.") To establish the credibility of one's expert, and to facilitate such detailed fact-finding, claimant's counsel, in particular, must have the expert explain the pathophysiology of the injury, the medical basis for continuing symptoms and impairment, and the objective basis for disabling the worker.

9. ***An interim solution to the medical marijuana problem in workers' compensation?*** Colorado and New Mexico are states that have struggled with the legalization of medical marijuana and the conflicting federal ban. Can a carrier really be paying marijuana vendors and be free of concerns over violating federal law? The issue has made it to the appellate courts in New Mexico, with a clear answer still elusive. An interim solution? If a claimant really wants medical marijuana in a workers' compensation case, and the parties want to avoid legal conflicts, a compromise settlement of medical treatment benefits (where allowed), may be the answer. Claimant can then disburse his monies for the pot on his own.

On the other hand, is any of this really appropriate? Our visiting medical expert, Dr. Charles Bierman of the Mayo Clinic, is against medical marijuana because its use is not evidence-based. In his view, for this reason medical marijuana has *no place* in workers' compensation.

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Judge Diane Lundeen Appointed

In March 2016, Louisiana Workforce Commission Executive Director, Ava Dejoie, appointed Judge Diane Lundeen as Louisiana's fourth Workers' Compensation Chief Judge. Prior to this appointment, Judge Lundeen served as the Eastern Division Judge in the New Orleans district office from 2006 to 2016.

Judge Lundeen has a long and outstanding career in the workers' compensation industry, having been a lobbyist from 1996 to 1999, chair of the Louisiana Trial Lawyer's Association Workers' Compensation Section in 2005 and member of the governor's workers' compensation Medical Reimbursement Task Force from 2005 to 2006.

During her legal career, Judge Lundeen has practiced both state and federal workers' compensation, personal injury and domestic law. She has also served as an adjunct professor at Tulane Law School, in New Orleans, where she taught trial advocacy. She also has served as a commissioner for the New Orleans' Garden District Security District. Judge Lundeen is a 1994 graduate of Loyola School of Law, New Orleans. She received her undergraduate degree from Tulane University, also in New Orleans, in 1989.

Notes from New Orleans, from Page 9

10. ***The value to claimant's attorney of representing a claimant in a medical-only case, where attorney's fees cannot be collected.*** (In some states, the law does not allow an attorney to collect a fee when medical benefits only are being pursued. In Pennsylvania, such fees are allowed, though 20% is not per se reasonable as with disability. The lawyer who seeks fees in a Pennsylvania medical-only case must submit his quantum meruit bill.) For once, an easy answer: *it's good business development*. The injured worker you assist on a *gratis* basis will likely refer family and friends to you, in acknowledgment of your efforts.

These ten items are just a few of the many valuable insights I took away from the ABA CLE. Indeed, during Chicago attorney Matt Schiff's trademark "60 Tips in 60 Minutes," I could hardly write fast enough.

I'm personally looking forward to another great educational experience next year. Watch for more information on the date and venue of the 2017 ABA CLE.

Taking in the whole 2017 experience will be memorable and enriching!

Pittsburgh attorney Dan Bricmont and Judge Torrey

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[*] Judge Torrey is a Workers' Compensation Judge, Pennsylvania Department of Labor & Industry, Pittsburgh, PA and an Adjunct Professor of Law, University of Pittsburgh School of Law. Judge Torrey is also a past President of the National Association of Workers' Compensation Judiciary. All comments are strictly of the author and not of the Commonwealth of Pennsylvania or any of its agencies.

Thanks Again to our 2015 Moot Court Judges!

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Physicians and Drug Companies Strike Back at Attempts to Curb Drug Costs

By Roger Rabb, Esq.*

Are reform efforts aimed at controlling the costs of physician-dispensed drugs having the desired effect? It appears not, at least In California, Florida, Pennsylvania, Illinois, and Tennessee.

In recent years, at least 20 states have made legislative or regulatory changes attempting to control the cost of drugs dispensed directly by physicians, which have often cost consumers much more than the same drugs dispensed by pharmacies. Drugs dispensed by physicians have often had higher average wholesale prices (AWP) because physicians were dispensing "repackaged" drugs, that is, drugs that had been purchased in bulk by an intermediary, repackaged in smaller quantities, and assigned a new National Drug Code with a new AWP that was noticeably higher than the manufacturer's AWP. Reform efforts in states seeking to eliminate this discrepancy have generally focused on limiting the amounts that can be charged by physicians for repackaged drugs to the original manufacturer's AWP.

However, drug manufacturers and physicians who dispense drugs have found ways to recoup and even exceed the revenue lost because of the recent reforms. In "Physician Dispensing of Higher Priced New Drug Strengths and Formulation," a report published in April 2016 by the Workers Compensation Research Institute (WCRI), researchers have identified that for some commonly-prescribed drugs, the path around the reform efforts has been the creation of new drug-strength doses and new formulations for existing drugs. Like repackaged drugs, these new doses and formulations are given new AWPs that are not tied to the AWPs for the older doses and formulations, but because these new products are considered generic drugs and not repackaged drugs, they are not subject to the newer reform provisions.

Scope of Study

Researchers in this new WCRI study studied workers' compensation claims data generated between the first quarter of 2012 through the first quarter of 2014 from 22 states in which physician dispensing of drugs is common, although they narrowed their focus on the effects of post-reform changes to highlight only five: California, Florida, Illinois, Pennsylvania, and Tennessee. For the purposes of this study, physician-dispensed prescriptions were those prescriptions that were filled "at the offices of independent practitioners, physician groups, or medical centers or clinics which may or may not have had an on-site pharmacy," although medications "dispensed at a hospital or administered by a medical provider (e,g., injections received at a physician's office) were excluded" from the definition. In California, Florida, and Illinois, about 40% of all prescriptions were made by physician dispensers, and those prescriptions accounted for anywhere from 48 to 61 percent of total prescription payments.

They also narrowed their focus within these states to three specific common drugs that were recently given new strengths that were released between 2011 and 2013: 75-miliigram cyclobenzaprine HCL, a muscle relaxant; 150 milligram tramadol HCL extended release, an opioid drug for pain relief; and 2.5-325-milligram hydrocodone-acetaminophen, also an opioid drug used for pain relief. In California, Florida, Illinois, and Tennessee, these common drugs made up between 24 and 27 percent of physician-dispensed prescriptions. The study also included a lidocaine-menthol topical pain relief patch, a drug that was given a new formulation.

With an exception for the pain relief patch, the study focused on generic versions of these drugs, given that physicians who dispense generally dispense generics rather than brand-name drugs, and more specifically because generic versions of these drugs are generally dispensed regardless of who is doing the dispensing.

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Curb Drug Costs, from Page 12.

Drug #1: Cyclobenzaprine HCL

Their study found that despite state reform efforts, the average price for drugs dispensed by physicians continued to rise. For cyclobenzaprine HCL, the new 7.5·milligram dosage was added to the existing available dosages of 5 and 10 milligrams. However, while the average price paid for the older dosages was between $.38 and $1.77 per pill, the new 7.5 milligram dosage had an average price that ranged from $3.01 to $4.11 per pill. While not all states in the study showed a noticeable physician prescription rate for the new, more expensive dosage, several did. As a percentage of all physician-dispensed cyclobenzaprine HCL, the dispensing rate by physician dispensers in California for this new dosage in the first quarter of 2014 was 55%, while Florida followed closely behind with 49%. Illinois (22%) and Tennessee (19%) also had a sizable dispensing rate for the more expensive new dosage.

The authors of the study note that while in some cases adoption of the newer dosage of cyclobenzaprine HCL followed after price reforms were implemented in the state, as was the case in California and Illinois, in at least one state, Florida, the increased adoption of the new dosage occurred before price reforms were adopted, suggesting a more general desire to increase revenue from the more expensive drug regardless of any local reform efforts. The authors also note that while prescriptions for the intermediate 7.5 milligram strength might in some cases be the result of the patient who desires a dosage that is stronger than 5-milligrams but weaker than 10-milligrams, "if the new strength was seen mostly in physician-dispensed prescriptions, rarely dispensed at pharmacies, and dispensed at a higher price, It is unlikely that the prescribers who dispensed the new strength were motivated only by the concerns of their patient."

Drug #2: Tramadol HCL

Similar results were found for the newly-released 50-milligram Tramadol HCL extended release pain reliever. Among all physician-dispensed prescriptions for Tramadol HCL in the first quarter of 2014, 47% in California were for the newer dosage, 41% in Illinois, 26% in Florida, 21% in Tennessee, and 9% in Pennsylvania. The price difference from older dosages? The most common prescribed and dispensed by physicians had been a 50-milligram regular release dosage, at an average price between $.24 and $1.62 per pill, while the newer dosage pill cost between $8.05 and $11.66 each.

Evidence in the study suggests that almost all of the prescriptions for the newer 150-miliigram dosage are being made by physicians who dispense, with very low adoption by pharmacies or physicians who do not dispense. Moreover, while extended release dosages of the drug at 100-, 200-, and 300-milligram strength were available before, physicians who dispensed rarely prescribed these products. The fact that the AWP for those older products was noticeably lower than that of the newer l50·milligram dosage, with only the 300-milligram dosage carrying a price tag similar to the new 150-milligram pill, suggests that rapid adoption of the new pill by physician dispensers is motivated more by price than by concern for patient needs.

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Commissioner Susan Barden Confirmed

Commissioner Susan Barden was confirmed by the South Carolina Senate in April 2016. She begins her third six year term on the Commission, which is responsible for trials regarding disputed workers' compensation claims, and which collectively hears the appeals from those claims.

Commissioner Barden is the vice-chair of the Commission.

Commissioner Barden graduated from Converse College with a Bachelor's of Music in Piano Performance in 1981, and from Wake Forest University School of Law in 1984. She has served as a Staff Attorney with the South Carolina Senate Judiciary Committee and as Assistant Director of Research and Attorney to the Senate Judiciary Committee. She also served as Director of Research for the Senate Agriculture Committee.

Curb Drug Costs, from Page 13.

Drug #3: Hydrocodone-Acetaminophen

The prescription rates among physician dispensers for 2.5-325·mllligram hydrocodone-acetaminophen in the first quarter of 2014 were perhaps less drastic, with Illinois the highest at 32%, while the next highest was California at a relatively modest 11%. No other state was above about 4%. However, the preexisting dosages were all noticeably stronger, at 5, 7.5, and 10 milligrams per pill. But despite being the weakest dosage, the new pill costs between $2.59 and $3.09 each, while the stronger, preexisting pills only cost between $.61 and $.72 each.

There are several reasons why the adoption numbers for this drug may be lower than for the others. The researchers note that the recommended daily dose of hydrocodone-acetaminophen for an adult for pain relief is 20 milligrams, normally prescribed as four pills of 5 milligrams daily, and the new 2.5-325-milligram pill is too weak for effective pain relief for adult patients. They also note that many states have made changes that effectively limit the ability of physicians to dispense Schedule II and III opioids.

Drug #4 Lidocaine-Menthol Patch

As noted, the researchers also studied prescriptions for one "new formulation" drug, the lidocaine-menthol topical pain relief patch. Although topical pain medications are rarely dispensed by physicians in many states, in the first quarter of 2014 physician dispensing of this new product accounted for 24% of topical analgesic prescriptions by dispensing physicians in Illinois, 21% in Florida, 14% in California, and 11% in Pennsylvania. The average price paid per patch was $28 in Florida and $31 in Illinois. Other comparable pain patches generally ran around $13 to $16 per patch.

The researchers noted that there are other lower-cost alternatives for topical analgesia that physicians may suggest for use, inducing ice and heat, and that menthol such as used in these patches has not been shown to provide any pain relief other than as a "distraction mechanism." The researchers also noted that these new Lidocaine-menthol patches were not showing up on pharmacy-dispensed prescriptions.

Reform Redux?

The report provides much more detail about the adoption rates and costs of these drug products in the target states, but just from the data described above it seems clear that the economic benefits for self-dispensing physicians are almost certainly driving the adoption of many of these higher-priced new drugs, The researchers noted finding little clinical evidence that these new products were any better than lower-priced existing products, and they found much higher prescription rates for these products for physicians who dispense than for those physicians who do not.

These findings should be troubling, as it does not appear that anyone is benefitting from this but physicians and drug companies. Patients are paying more than necessary, whether from their own pockets or through their insurance carriers, and although this study focused on workers' compensation claims data, it seems unlikely that these drugs are only being prescribed to injured workers. It seems clear that state reform efforts to contain physician-dispensed drug prices tied to AWP are not necessarily having the desired effect and policy makers should take a second look at the problem.

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Left to right, Brad Smith, *Holding a Square Peg* . . . (Temple '15), Hon. David B. Torrey (PA), and Kyle Black, *Haters Gonna Hate* . . . (Pitt '15).

Co-Winners of the 2016
College of Workers' Compensation Lawyers
National Law Student Writing Competition

The two co-winners of the annual College of Workers' Compensation Lawyers writing contest are published in this month's *Lex and Verum*. Their interesting articles, *Holding a Square Peg and Choosing Between Two Round Holes*, by Mr. Smith and "*Haters Gonna Hate," but Will Workers' Compensation Pay?,* by Mr. Black, appear on the following pages. Congratulations, gentlemen, on your achievement and recognition.

The National Law Student Writing Competition is sponsored by The College of Workers' Compensation Lawyers (CWCL). NAWCJ members who have been inducted into the CWCL include Judge Michael Alvey (Kentucky), Commission Chair R. Karl Aumann (Maryland), Judge Melodie Belcher (Georgia), Judge Luann Haley (Arizona), Judge Sheral Kellar (Louisiana), Judge David Langham (Florida), Judge John Lazzara (Florida), Judge Deneise Turner Lott (Mississippi), Commissioner Dwight Lovan (Kentucky), Commissioner Wesley Marshall (Virginia), Commission Chair Frank McKay (Georgia), Judge Bruce Moore (Kansas), Commissioner Ferrell Newman (Virginia), Judge James Sarkisian (Indiana), Judge Kenneth Switzer (Tennessee), Judge James Szablewicz (Virginia), Judge David B. Torrey (Pennsylvania), and Commission Chair Roger Williams (Virginia).

Holding a Square Peg and Choosing Between Two Round Holes:

The Challenge Workers' Compensation Law Faces with Uber and the Sharing Economy

By Bradley Smith*

"As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes." – District Judge Vince Chhabria, describing the difficulty a jury will face in discerning whether drivers for the service Lyft are employees or independent contractors.[1]

I. INTRODUCTION

What happens when a worker is neither an employee nor an independent contractor? This question has long plagued even the country's highest court,[2] and is now exacerbated by the burgeoning sharing economy.[3] The sharing economy includes companies such as Uber, Lyft, Instacart, TaskRabbit, Postmates, and Caviar, all of which pair workers (which they classify as independent contractors) with consumers anxious to take advantage of their affordable and convenient services.[4] In the event these individuals get hurt on the job, the classification of sharing economy workers as independent contractors deprives the workers of workers' compensation coverage.[5] If these workers were classified as employees, their lost wages and medical expenses would be covered by their employer.[6]

The problem with sharing economy workers is that they embody characteristics of both independent contractors and employees.[7] It is perhaps easier to describe what sharing economy workers seem *not* to be than what they are. They do not seem to be employees, as they have incredible flexibility in terms of the hours they work (indeed, they can work as little or much and as infrequently or regularly as they desire) and they have no supervisor exercising any traditional type of control.[8] But neither do they seem like independent contractors, who typically have a special skill, serve multiple employers, perform only a certain task for a defined period, and have substantial leeway with how they perform their work.[9] The question, then, is whether state courts should accept these workers as independent contractors, effectively prohibiting them from receiving workers' compensation and other benefits.

This essay will explore the hurdles sharing economy workers face in terms of receiving workers' compensation benefits and the present legal battles where this issue arises, largely focusing on the heavyweight sharing economy entity, Uber Technologies, Inc. This essay will also explore proposals for a new classification in addition to independent contractor and employee that would better reflect reality for sharing economy workers.

II. THE INDEPENDENT CONTRACTOR–EMPLOYEE DICHOTOMY AND ITS IMPACT

As explained above, workers have great incentive to lobby and litigate their classification as independent contractors as opposed to the more favorable position of employees. Workers' compensation is just one of the many benefits. When the Supreme Court addressed the question of whether newspaper deliverers were employees or independent contractors in 1944, it did so as a result of the newspaper sellers' union seeking a right to bargain with four newspaper publishers that did not recognize their union.[10] Workers' compensation—which is based on state law, as opposed to the federal law at issue in *NLRB v. Hearst Publications, Inc.*—is an ancillary benefit to employee status. While state law will determine who is an employee for purposes of workers' compensation, the Supreme Court's opinion is instructive in that it demonstrates the difficulty of this question and opts not to create any bright-line test.

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The newspaper sellers petitioning the Supreme Court in *Hearst Publications, Inc.* had much in common with today's sharing economy workers: "They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily."[11] Also like today's sharing economy workers, the newsboys' compensation was fixed by the publishers and "minimum standards of diligence and good conduct" were enforced, just as Uber fixes the pay of its drivers and monitors user-based ratings to ensure quality.[12] Unlike today's sharing economy workers, the newsboys were scrutinized to ensure they worked certain prescribed hours.[13] The Supreme Court explained that there is no "simple, uniform and easily applicable test which the courts have used in dealing with" the independent contractor-employee dichotomy.[14] In ultimately holding that the newsboys were employees, the Supreme Court deferred to the National Labor Relation Board's interpretation as the administrative agency tasked with enforcing the law.[15] The Supreme Court essentially side-stepped the crux of the question altogether.[16]

Over 60 years later, the Ninth Circuit of the United States Court of Appeals still struggled with the same question, again interpreting the National Labor Relations Act. In *NLRB v. Friendly Cab Co., Inc.*, the Ninth Circuit deferred to the NLRB like the Supreme Court did in *Hearst Publications, Inc.*, but the Ninth Circuit delved into a deeper analysis of the competing facts, some of which indicated the workers were employees, while others indicated the workers were independent contractors.[17] In *Friendly Cab Co.*, there was a "strong inference" that the taxi drivers were independent contractors because they paid a flat fee to *Friendly Cab Co.* and kept all of their fares for themselves.[18] Other factors indicating the taxi drivers were independent contractors included that there were no set hours or minimum hours that they had to work, no benefits were provided to the drivers, no taxes were withheld, and the taxicab lease agreements identified the drivers as independent contractors.[19]

However, the Ninth Circuit still found that these taxi drivers were employees, not independent contractors. The biggest factor in the Ninth Circuit's analysis was control. While the taxi cab company did not control the workers on a day-to-day basis, the lease agreement its drivers signed restricted its drivers from operating independent businesses or developing entrepreneurial opportunities while driving for their employer.[20] Significantly, the Ninth Circuit had previously found taxi drivers to be independent contractors in *SIDA of Hawaii, Inc. v. NLRB*,[21] but the drivers in that instance were permitted to operate their vehicles for any other purpose or business they so desired.[22] The distinction between these two Ninth Circuit cases would seemingly at first glance raise concerns for Uber drivers, who appear to be more akin to the *SIDA* taxi drivers. The Ninth Circuit's additional evidence of employer control of the drivers in *Friendly Cab Co., Inc.* included guidelines prohibiting certain conduct while driving and a "strict disciplinary regime."[23]

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Further, while *SIDA* determined the drivers to be independent contractors in part because of the drivers' unlimited opportunities to operate their vehicles for other purposes, it was important to the Ninth Circuit that the *SIDA* drivers could create and capitalize on the goodwill they created with customers[24]—Uber drivers do not have that luxury as riders cannot request a particular driver. The takeaway from the Ninth Circuit's opposing holdings in *SIDA* and *Friendly Cab Co., Inc.* is that the question of a worker's status as an independent contractor or employee is an intensely fact-specific question.

While *Hearst Publications, Inc.* and *Friendly Cab Co., Inc.* do not directly deal with the impact of the independent contractor-employee decision in workers' compensation law, these cases show that the question is rife with complexities and their rulings make it more likely that the workers involved would be deemed employees for workers' compensation purposes. However, there has been little to no change from policymakers to add an additional classification or provide clarity. The growing number of sharing economy workers may finally provide an impetus for change. As discussed in Section III, companies like Uber face an influx of litigation at both the state and federal levels in which workers are asking courts to answer the incredibly difficult question that even the Supreme Court opted to effectively substantively avoid. State courts are then left to determine a question that has no correct answer, as sharing economy workers do not fit into the current framework.

Many state courts answer the independent contractor-employee question by looking at the control exercised by the alleged employee, as the Ninth Circuit did in *Friendly Cab Co.*[25] This is problematic for the sharing economy worker. Sharing economy workers set their own hours; they have no dictated schedule.[26] One employment lawyer summarized the situation sharing economy workers unwittingly get themselves into: "What they're not understanding is that this lack of control—where they can have a two-hour lunch if they want, or no lunch at all—that freedom comes at the price of if they're in an accident, the company doesn't have to pay."[27]

Into this dichotomy, judges and juries must somehow categorize workers whose employment situation can best described thusly:

> Independent workers operate in a triangular relationship: they provide services to customers identified with the help of intermediaries. The intermediaries create a communications channel, typically an "app," that customers use to identify themselves as needing a service—for example, a car ride, landscaping services, or food delivery. … The intermediaries' apps allow independent workers to select which customers they would like to serve. The intermediary does not assign the customer to the independent worker; rather, the independent worker chooses or declines to serve the customer (sometimes within broadly defined limits). However, the intermediary may set certain threshold requirements for independent workers who are eligible to use its app, such as criminal background checks. The intermediary may also set the price (or at least an upper bound on the price) for the service provided by independent workers through its app. But the intermediary exercises no further control over how and whether a particular independent worker will serve a particular customer. The intermediary is typically rewarded for its services with a predetermined percentage of the fee paid by the customer to the independent worker.[28]

This mixture of control, loose guidelines, and total freedom in the execution of fairly menial—usually not skilled—tasks creates significant problems for modern courts. The question of employment status was always one with which courts struggled and the sharing economy has made it more difficult.

As a result of being deemed independent contractors by their bosses (if you can even say that they have a "boss"), sharing economy workers have limited to no remedy for injuries on the job. Uber and Lyft drivers are at risk for car accidents and assaults. Instacart shoppers may herniate a disc or tear a muscle carrying heavy grocery loads.[29] Sharing economy workers face a litany of on-the-job dangers, like any other employee, but without the same safeguards.

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III. ON-GOING LEGAL BATTLES IN THE SHARING ECONOMY

Not surprisingly, Uber and Lyft are already immersed in litigation over misclassification of employees. One of those legal battles is in federal court in the Northern District of California, where Judge Chhabria expressed particular frustration with trying to fit sharing economy workers—specifically drivers for Lyft—into either the category of employees or independent contractors.[30] *Cotter* analyzed the independent contractor-employee question by looking at the rationale behind California law for providing certain protections, such as workers' compensation and minimum wage, to employees but not to independent contractors. *Cotter* explained that independent contractors are not given certain protections because they "generally are in a far more advantageous position."[31] Independent contractors are in a more advantageous position because they can sever their relationship easily, they have contracts with more than one company, and are therefore not dependent on a single company for all of their compensation.[32]

Cotter addressed the question of what actually constitutes control, as that is so often the test for employee status, yet it can take many different forms. "The right to terminate at will, without cause, is '[s]trong evidence in support of an employment relationship."[33] But beyond control, additional factors can indicate an employment relationship, such as a low-level of skill required, the method of payment, whether or not the parties believe they are forming an employer-employee relationship, and opportunity for profit or loss.[34] As *Cotter* was procedurally before the Norther District of California on cross-motions for summary judgment, and the Court ultimately denied both motions, reasonable minds could differ based on the facts presented of drivers' relationship with Lyft. *Cotter* specifically rejected Lyft's argument that the drivers "perform services only for their riders, while Lyft is an uninterested bystander of sorts, merely furnishing a platform that allows drivers and riders to connect."[35] While not making a factual determination about the level of control Lyft exercises over its drivers, *Cotter* observed that despite the drivers' flexibility, Lyft instructed its drivers on certain rules for driving, directed them as to what route to take, reserved the right to penalize them and retained the ability to terminate at will.[36] Significantly, *Cotter* was applying California law, not federal law, meaning its opinion would be particularly persuasive in future California state court misclassification suits in which one or more drivers who are injured seek workers' compensation benefits from their sharing economy employer.

Alaska is the first state to take a definitive stand against Uber's classification of its drivers as independent contractors. In September 2015, Uber settled with the Alaskan Department of Labor and Workforce Development's Workers' Compensation Division for nearly $78,000 in unpaid guaranty funds as a result of Uber's misclassification.[37]

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Kentucky Judge Hays Passes

Kentucky Administrative Law Judge Edward D. Hays, 68, of Danville died Saturday April 9, 2016. Born January 9, 1948 in Lebanon, he was the son of the late Maurice and Susan Hays. Judge Hays was a University of Kentucky graduate who clerked for Circuit Judge Henry Pennington during his last year of law school. Ed was both a partner at Sheehan, Barnett, and Hays Law Firm as well as legal counsel to the City of Danville for over 30 years before working as an Administrative Law Judge for workers' compensation claims in Frankfort. He also served four years as a commissioner with the Kentucky Workers' Compensation Board. Ed has had an illustrious career and was an accomplished attorney.

Ed loved sports including basketball, racquetball, and tennis. He also enjoyed going to Keeneland, dancing, and singing, and enjoying life. He is survived by his wife, Pat Hays, a son, Ben Hays of Charleston, S.C., a daughter, Julie Hays Gragg of Louisville, two sisters, three grandchildren, and several nieces and nephews.

Holding a Square Peg, from Page 20.

As a result of the settlement, Uber is not operating in Alaska until it decides to deem its drivers to be employees as opposed to independent contractors.[38] The Alaska Department of Labor and Workforce Development's statement on the Uber settlement succinctly stated the issue with Uber's current business model, at least how they viewed it:

> Misclassifying employees allows companies like Uber to avoid paying unemployment insurance, taxes and workers' compensation premiums. The Uber settlement is part of a broader state and federal effort to reduce worker misclassification fraud. Worker misclassification is the practice of mislabeling employees as independent contractors, or inaccurately classifying employees in lower paying job categories, in order to avoid paying state and federal taxes.[39]
> …
> The Uber settlement is part of a growing trend in which states and the federal government are working to stop misclassification, which deprives workers of health and labor rights protections. Worker misclassification also defrauds the state and federal government of tax revenue, costing taxpayers billions of dollars while leaving workers vulnerable to on-the-job injuries.

If Alaska's approach were adopted by other states, the sharing economy business model would likely be in serious financial trouble and forced to reevaluate its worker classifications. However, until more states find that sharing economy workers are employees and not independent contractors, companies like Uber can continue their business model with minimal economic impact.[40] Until more states follow Alaska's lead, Uber appears content to take the issue state by state. "[B]ecause there is pretty much zero chance that the current Congress will address this issue, advances are more likely to come state by state. That's good in the sense that it will allow room for experimentation and comparison—but it may prove maddening to companies operating in multiple states."[41]

IV. CREATING A NEW FRAMEWORK IN WORKERS' COMPENSATION FOR EVOLVING EMPLOYMENT RELATIONSHIPS

The need for a new classification to fill the space between employee and independent contractor has been recognized since at least 1965 in a paper when the concept of a third category of "dependent contractor" was proposed in a Canadian law review article, though it reviewed American case law such as *Hearst Publications*.[42] Canada and Germany have in fact recognized a dependent contractor status for instances in which an individual who would otherwise be an independent contractor performs all his/her work for one employer.[43] In *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, H.W. Arthurs specifically mentions self-employed truck drivers, peddlers, and taxicab operators as workers who he believes fall squarely within his proposed category of dependent contractors.[44] Dependent contractors are often individuals who would seem to clearly be employees but for the fact that the employer has "sought to transform employees into independent contractors by the magic of contractual language."[45] The idea of the dependent contractor category is to provide some benefits to workers, especially workers' compensation, without raising the cost to employers as severely.[46]

In many ways, not much has changed in American law since Arthurs introduced the concept of dependent contractors in 1965; businesses are surely still attempting to transform employees (or potential employees) into independent contractors though contractual language. However, for some companies, identifying their workers as employees has become a trade-off they are willing to make.[47] While the sharing economy business model allows companies to avoid paying workers' compensation benefits, unemployment benefits, and some taxes, it requires them to relinquish substantial control, thereby making it more difficult to run the business.[48] For instance, the company Luxe—an on-demand valet service that will park your car for you—had difficulty finding workers for their busiest nights, Friday and Saturday.[49] Luxe opted to take on the extra costs associated with having employees in exchange for being able to dictate more specific duties to their employees.

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However, this market correction cannot be expected to fill the gap for all disenfranchised workers. In summarizing the independent contractor-employee choice for Uber, one commentator observed "both routes have downsides for the companies": on one hand, giving up control and labeling workers as independent contractors "makes it difficult to maintain the same level of service," while "maintaining control, through making drivers into employees, comes with the cost of workers compensation" and other benefits and taxes.[50]

A proposal for a new "independent worker" status, similar to the "dependent contractor," has attempted to modernize a third worker classification so sharing economy businesses like Luxe and Uber do not have to make a choice between two ill-fitting classifications. Seth Harris and Alan Krueger of the Brookings Institute reject the notion that the market, or even the courts as currently constrained by statute, can adequately address the employer classification question. "[C]ourts do not have the power, on their own, to ensure that independent workers receive their full and fair share of the social compact—that is, the full complement of protections and benefits that must be established by statute."[51] Harris and Krueger lay out an elaborate argument for what benefits should be transferred to the independent worker and how it would be done. As for workers' compensation, Harris and Krueger suggest that the existing tort system is adequate for many workers' injuries in the sharing economy—although this is a contention to which many Uber drivers would disagree.[52] Harris and Krueger acknowledge that this may not be sufficient, and therefore propose "that [businesses] be permitted to provide expansive workers' compensation insurance policies to the independent workers with which they work without transforming these relationships into employment. In exchange for this no-fault insurance coverage, [businesses] would receive limited liability and protection from tort suits."[53] Their proposal goes on to allow variance between some states, with some states allowing this optional workers' compensation to operate privately, or requiring that there be more protections for independent workers.[54] The pitfall of such an option seems immediately apparent: why would a business opt to provide this coverage if they are unlikely to be found negligent and thus liable in a typical civil suit?

Continued, Page 23.

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Holding a Square Peg, from Page 22

Harris and Krueger acknowledge that the opt-in system "create[s] adverse selection and moral hazard problems" but believe that experience would lead to companies striking the appropriate balance.[55] One can easily imagine that sharing economy workers—especially Uber drivers constantly at risk of a motor vehicle accident—would not find this plan adequate, at least in regard to workers' compensation insurance.

California enacted a stopgap law that does not add an additional worker classification, but rather specifically targeted the driver-on-demand companies and required them to provide primary insurance coverage for drivers while there is an Uber/Lyft passenger in the driver's vehicle.[56] This measure, while an improvement on leaving their drivers to their own devices, falls far short of the benefits these drivers would receive from workers' compensation if they were simply classified as employees or a similar new classification. California's law does not protect drivers when there is no passenger in the vehicle but the driver is still technically working in an effort to pick-up a passenger.[57] The law would also not cover lost wages as workers' compensation would. Further, there are a myriad of ways in which a driver can be injured other than in a car accident.[58]

The executive director of the company Peer, which is based on a sharing economy business model, thinks work and benefits will eventually separate, as did pensions.[59] If that prediction is right, perhaps this employment classification question that has plagued courts for decades will fade away. If not, however, serious consideration should be given by state legislatures to the idea that workers' compensation law must evolve to provide benefits to worthy individuals, who are currently being deprived of such benefits solely on the basis of a crafty business model.

V. CONCLUSION

In response to the Forbes article on misclassification of employees, a Lyft spokeswoman said, "[T]he nature of Lyft's relationship with drivers is very different than the typical employee relationship in which an employer would provide workers' comp insurance."[60] This spokeswoman is of course exactly correct. However, what she neglects to mention is that Lyft and other sharing economy businesses also have a relationship with their workers that is very different from the typical independent contractor relationship. The advent of new technologies[61] begot new business models that introduced a new wrinkle to an old legal issue. Now that sharing economy businesses are nearly ubiquitous (at least in urban areas), it may be time for policymakers to undertake the arduous task of defining a new category of workers to better reflect the reality of modern employment relationships, and hopefully extend much-needed benefits to hundreds of thousands of workers who have no proper classification in the current dichotomy. If legislation is not enacted, courts will be forced to adjudicate sharing economy business models on a case-by-case basis, perhaps creating inconsistent results between states.[62] It is conceivable that a policy could be crafted to extend workers' compensation to sharing economy workers in an acknowledgement that thousands of these workers treat driving for Uber or picking up groceries for Instacart as their full time job and are at risk of injury, like any other employee. Until such a change is made, workers' compensation judges and state appellate courts are left trying to fit a square peg into two round holes.[63]

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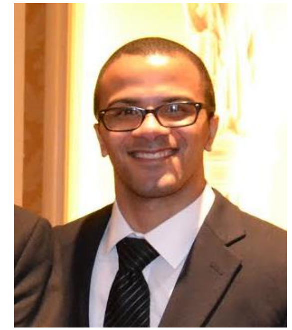
* Brad Smith is an Associate Attorney with Galfand Berger, LLP in Philadelphia, Pennsylvania. At Galfand Berger, LLP, Brad proudly champions the rights of injured workers, consumers, and individuals. Brad earned his Juris Doctor in 2015 from the Temple University James E. Beasley School of Law. While in law school, Brad was a member of the Temple Law Review and had his Comment, "Treating Professional Athletes Like Wall Street Executives: The Potential for Clawback Provisions in Sports Contracts," published in Vol. 87 of the *Temple Law Review*. Brad's essay "Pennsylvania's Mental Lapse: A History of Pennsylvania's Treatment of Mental Disabilities Caused by Mental Stress in Workers' Compensation" won the Grand Prize in the Pennsylvania Bar Association's Workers' Compensation Centennial Essay Contest and was published in *The Pennsylvania Workers' Compensation Centennial: A Narrative and Pictorial Celebration*, edited by Judge David B. Torrey. Prior to law school, Brad graduated *magna cum laude* from Gettysburg College, where he was inducted into Phi Beta Kappa.

Endnotes on pages 58-60.

"Haters Gonna Hate," but Will Workers' Compensation Pay?

An Analysis of Whether Injuries From Hate Crimes are Compensable Under Workers' Compensation Laws

By Kyle Black*



INTRODUCTION

Workers' compensation is meant to provide injured workers with compensation for injuries that arise out of and in the course of employment.[1] The fundamental inquiry of whether an injury arises out of employment is whether a causal nexus exists between the injuries sustained and the duties or service performed by the injured worker.[2] Workers' compensation is meant to be remedial in nature and meant to provide relief for a worker's injuries.[3] However, a question exists whether workers' compensation, and its remedial purpose, applies to hate crimes.

On March 29, 2006, Taneka Talley, a 26-year-old African-American woman, was stabbed to death while working in a Dollar Tree Store in Fairfield, California.[4] She left behind an eight-year-old son.[5] Talley's murderer, Tommy Joe Thompson, a white man, admitted that he attacked Talley because she was black.[6] Talley's mother filed a claim for workers' compensation death benefits on behalf of Talley's son.[7] However, Dollar Tree's insurer initially denied the claim, contending that Thompson's attack was unrelated to Talley's employment and his motives, motivated solely by race, were entirely personal.[8]

Dollar Tree's insurer would later agree to pay full benefits.[9] However, hate crimes are an unfortunate circumstance that occur in every state.[10] As evidenced above, hate crimes also occur in the workplace.[11] After Talley's death, California amended its workers' compensation statute, explicitly prohibiting the denial of workers' compensation benefits based solely on an assailant's hatred of an employee-victim of a protected class.[12] However, very few states have enacted similar legislation.[13] Furthermore, there is very little caselaw explaining if hate crimes are compensable under workers' compensation.[14] Thus, many statutes are not clear on whether hate crimes are compensable under workers' compensation.

This paper seeks to determine whether hate crimes are compensable under the typical language of and principles applied to workers' compensation statutes. Specifically, this paper seeks to determine whether hate crimes in the workplace arise out of a worker's employment. Part I of this paper discusses the background for determining whether injuries "arise out of" employment. Part II examines how a hate crime may be considered a professional risk. Part III explains the different arguments for whether a hate crime is a personal risk. Part IV presents a comparative analysis of hate crimes to rape cases. In particular, Part IV asserts that, similar to rape, the substance of a hate crime is personal in nature, and therefore cannot be considered as "arising out of" employment.[15] Part V discusses other public policy considerations for excluding hate crimes from workers' compensation. This paper concludes by asserting that while there is relief available for victims of hate crimes, such relief cannot be provided by workers' compensation.

I. BACKGROUND

A. The Injury Must Arise Out of and Occur in the Course of Employment

Workers' compensation covers injuries that arise out of and occur in the course of employment.[16] "Course of employment" refers to the time, place, and circumstances of the accident.[17] "Arising out of" refers to the origin or cause of the injury.[18] That is, the origin or cause of the injury must derive from the worker's employment.[19]

Continued, Page 25.

Haters Gonna Hate, from Page 24.

B. *Injuries That Arise Out of Employment*[20]

Determining whether an injury arises out of employment depends on the type of risk of injury involved.[21] There are three main categories of risks: professional risk, personal risk, and neutral risk.[22] "Professional risks" are those risks of injury that are specific to that particular job.[23] These types of risk are always covered under workers' compensation.[24] "Personal risks" are those risks whose origins are personal and have no relation to the employment.[25] Personal risks are never covered by workers' compensation.[26] In between professional risks and personal risks are "neutral risks," which are risks of injury that are neither distinctly associated with employment nor distinctly personal in character.[27] Instead, neutral risks are those risks to which the general public is exposed.[28] Whether these risks are compensable depends, in pertinent part, on the particular risk involved.[29]

C. Assaults are a Particular Risk of Injury

One particular risk of injury is an assault. Depending on the circumstance, an assault can be either a professional, personal, or neutral risk.[30] In order for the assault to be a professional risk, the assault must be inherently occupational in origin.[31] Such assaults include those that grow out of work disputes,[32] those facilitated by the particular environment, such as a bad neighborhood,[33] and those whose risk is accentuated by the nature of the worker's job.[34] An assault is considered a personal risk if it is inherently private in origin.[35] Such assaults include those growing out of disputes the claimant brought into the employment premises from outside, as distinguished from those generated on the premises in the course of employment.[36] An assault is considered a neutral risk if the assault is "in essence equivalent to blind or irrational forces, such as attacks by lunatics, drunks, small children, and other irresponsibles, completely unexplained assaults; and assaults by mistake."[37] Assaults that are neutral are typically covered under workers' compensation.[38]

D. The "Reasons Personal" or "Personal Animus" Exception

As mentioned above, the fundamental inquiry of whether an injury arises out of employment is whether a causal nexus exists between the injuries sustained and the duties or services performed by the injured worker.[39] That is why personal risks of injuries alone are not compensable.[40] One particular type of personal risk are those that are imported quarrels brought to the employment by the employee.[41] Particularly with third-party tortfeasors, several states explicitly exclude personal attacks from injuries that "arise in the course of employment."[42] Known as the "reasons personal" or "personal animus" exception, several state statutes contain language saying that an injury arising out of employment shall not include an injury caused by an act of a third person intending to injure the employee because of reasons personal and not directed against the employee because of his employment.[43]

Continued, Page 26

Interesting Workers' Compensation Blogs

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Workers' Compensation Institute
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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/

Haters Gonna Hate, from Page 25.

In other words, "personal animosity" means unrelated to employment,[44] and any intentional tort that is unrelated to employment is not compensable under workers' compensation. Normally, when an employee is injured in an attack by a third party, there is a rebuttable presumption that the claimant is covered under workers' compensation.[45] A party claiming otherwise bears the burden of showing an intention to injure for reasons personal.[46]

E. Hate Crime Definition

One special type of assault is a hate crime. In general, a hate crime is any harm or threat of harm placed upon another person by reasons of the actual or perceived race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual, regardless of the existence of any other motivating factor or factors.[47] The issue with determining whether a hate crime arises in the course of employment is whether the hate crime is categorized as an assault that is a professional, personal, or neutral risk of injury.[48]

II. HATE CRIMES THAT ARE PROFESSIONAL RISKS

A hate crime that is accentuated by the nature of the claimant's job, such as a hate crime in a church,[49] in an NAACP office,[50] an LGBT business,[51] or in a Planned Parenthood Center,[52] could be considered as reflecting a professional risk of assault, and therefore most likely compensable.[53] While this is admittedly an extreme scenario, a case could be made that a hate crime that is facilitated by the particular environment, such as a hate crime occurring in Topeka, Kansas, home of the Westboro Baptist Church, and considered one of the most racist cities in America,[54] could be considered as reflecting professional risks of assault and therefore, most likely compensable.[55]

However, determining whether a hate crime is a professional risk becomes difficult for hate crimes that are not facilitated by the particular environment, nor necessarily accentuated by the nature of the claimant's job. For example, assuming they are not in violent or hateful neighborhoods, positions in a Chinese restaurant,[56] an African-American barbershop,[57] or even a Chick-Fil-A, are jobs where the nature of the job does not necessarily accentuate a hate crime. Thus, outside of professions where the hate crime is clearly accentuated by the environment or the nature of the claimant's job, the inquiry falls into whether the hate crime assault is characterized as personal and therefore not compensable, or neutral and therefore compensable.

III. HATE CRIMES AND THE PERSONAL ANIMUS EXCEPTION

Beyond hate crimes that are professional risks, the main argument that hate crimes are not compensable under workers' compensation is that hate crimes, by definition, are personal and therefore unrelated to employment.[58] The applicability of the personal animus exception is its own complex issue.[59] However, pertinent to hate crimes, the main issue with the applicability of the personal animus exception is determining what it means to be "personal," and also whether the animosity must be known to the victim.

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A. Case Law Dictum for the Argument of General and One-sided Animosity

As noted above, there are very few cases that speak directly to the issue of hate crimes in workers' compensation.[60] However, a California case has demonstrated a strong inference that hate crimes are not compensable under workers' compensation. In *State Compensation Insurance Fund v. WCAB (Vazquez de Vargas)*,[61] two Mexican employees were shot and killed at their place of employment.[62] The employees met their killers at a garage sale, outside the scope of the victims' employment, and discussed selling a car to their killers.[63] Later, the killers decided to rob them.[64] The killers discussed how easy it would be to "blow away Mexicans," and one of them commented he could "blow away niggers and Mexicans."[65] The killers found the two victims in their place of employment and killed them.[66] While initially found compensable,[67] the 5th District Court of Appeal overturned the trial judge's decision, finding the motive for the killings were personal and there was no connection between the victims' employment and their deaths.[68] In that case, no evidence was presented that the employment contributed in any way to the deaths.[69] Furthermore, the court explained, "when a third party intentionally injures an employee and there is some personal motivation or grievance, there must be some work connection to establish compensability."[70]

The court further stated, in dicta, that the Workers' Compensation Appeal Board in that case "ignored the racial aspect of the killings, which could cut off causation between employment and the deaths."[71] From this dicta, an inference can be made that racial hatred alone can establish a personal connection to the killings, and therefore, a hate crime cannot be compensable under workers' compensation.[72] Furthermore, the personal motivation need only be one-sided, and that personal motivation is apparent even if the killer and victim have never met nor knew each other before, or if the animosity is completely unbeknownst to the victim.[73] In other words, it may be argued that the personal animus exception applies to hate crimes because of general hatred and because there was one-sided personal motivation on the part of the killer.[74]

B. Majority Caselaw Suggests the Animosity Must be Specific, Not General

While it has been established that "personal animosity" means unrelated to employment,[75] as highlighted in *State Compensation Insurance Fund v. WCAB (Vazquez de Vargas)*, the specific issue with hate crimes is the degree of the personal animosity. That is, must the animosity be of some general hatred or must it be specific? The obvious answer is that "personal" in workers' compensation means something specific.[76] Most states require the personal animosity to be "personal," and not of some generalized nature.[77] The Eastern District Court of Pennsylvania stated it best when it held that in order for Pennsylvania's personal animus exception to apply, "the critical inquiry . . . is whether the attack was motivated by personal animus, *as opposed to generalized contempt or hatred*, and was sufficiently unrelated to the work situation so as not to arise out of the employment relationship."[78] Thus, merely attacking a person because of their race, religion or sexual orientation is a general animosity that would make the personal animus exception inapplicable.

C. Majority Caselaw Also Suggests That the Animosity Needs to be Known to the Victim

Most cases across the country have also indicated that in order for the personal animus exception to apply, there must be a history of animosity, thus requiring a two-way relationship that is known to the victim. Several decisions have repeatedly stated that the personal animus exception "has been narrowly construed . . . to allow [tort] recovery only in cases where the third party's actions were motivated by a *history* of personal animosity toward that particular employee."[79]

Courts have gone on to state that the lack of pre-existing animosity creates an inference that the attack was work related.[80] For example, In *M & B Inn Partners, Inc. v. Workers' Compensation Appeal Board. (Petriga),*[81] a female hotel employee was sexually assaulted by a hotel guest.[82] The employer attempted to raise the personal animus exception.[83] However, the court stated that the employer failed to present any evidence that suggested a pre-existing relationship between the claimant and the guest.[84]

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Since the employer failed to prove that the hotel guest had intended to injure the claimant for personal reasons, the personal animus exception did not apply, and the claimant was entitled to benefits.[85] Therefore, for personal animosity to be cognizable as a defense *in a workers' compensation case*, the animosity must be motivated by a history existing between the assailant and that particular employee. Thus, the hate crime, to give rise to a compensable injury, cannot involve a two-way relationship where the hate is known to the victim.

IV. COMPARING HATE CRIMES TO RAPE CASES

Even still, "personal animosity" means unrelated to employment,[86] and the fundamental inquiry for whether an injury arises in employment is whether there is a causal connection between the employment and the injury.[87] Since not many hate crimes cases have been brought under workers' compensation,[88] a comparison with rape and workers' compensation caselaw can help demonstrate how a hate crime may or may not be causally connected to employment.

Much like how hate crimes are considered the most heinous assault based on a person's race, religion, ideology or sexual orientation, rape is considered the most heinous assault based on a person's gender.[89] That being said, workers' compensation caselaw dealing with workplace rape demonstrates that that the very nature of the crime is something that does not have any connection with employment.

In *Krasevic v. Goodwill Industry of Central Pennsylvania*, Inc.,[90] the claimant was raped while in the course of her employment.[91] Claimant sued her employer, seeking personal damages under tort law.[92] However, the employer argued that the claimant failed to provide evidence of personal animosity necessary to overcome the exclusivity of Pennsylvania's Workers' Compensation Act.[93]

The court held the claimant's rape did fit within the personal animus exception, and permitted claimant to sue the employer under tort law.[94] The court explained that the rape was unrelated to the claimant's employment.[95] The court, *inter alia,* explained that the substance of the attack itself – a rape – "cannot by any stretch of the imagination be considered a work-related occurrence."[96] Furthermore, the court explained there was no suggestion that the claimant was attacked because of her position with the employer.[97] In fact, the assailant admitted the rape had nothing to do with work.[98]

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Haters Gonna Hate, from Page 28.

The court concluded that the attack was unrelated to the claimant's employment and therefore not restricted to workers' compensation.[99]

Similar to rape, the substance of a hate crime, that is, attacking someone solely because of a generalized hatred of race, religion, or ideology, cannot be considered a work related occurrence.[100] Since there is no causal nexus existing between the injuries sustained and the duties or service performed by the injured worker, a hate crime alone must be considered a personal risk and therefore not compensable under workers' compensation.

V. PUBLIC POLICY CONSIDERATIONS FOR EXCLUDING HATE CRIMES FROM WORKERS' COMPENSATION

Applying workers' compensation to hate crimes would also not be in unison with the fundamental purposes of workers' compensation. The humanitarian purpose of workers' compensation is to provide compensation on a no-fault basis for a work related injury, "as a fair exchange for relinquishing every other right of action against the employer."[101] However, as explained above, the causal nexus between the injuries sustained from a hate crime and the circumstances of employment are just too tenuous to make employers liable on a no-fault basis.

Another purpose of workers' compensation is to encourage employers to create a safer workplace for their employees.[102] In particular, since employers know that they will be liable on a no-fault basis for industrial injuries, employers are leveraged to do everything possible to encourage safety and the avoidance of such injuries.[103] However, in the case of hate crimes, how can employers provide absolute protection against hate crime maniacs? Unless the circumstances of employment invite the commission of a hate crime,[104] it is hard to determine what an employer is supposed to do in such a situation.

Lastly, workers' compensation was originally designed as a cost internalization mechanism.[105] That is, in order to protect employees from bearing the cost of work injuries, employers add the known costs of work injuries and deaths in manufacturing goods and services into the actual cost of goods and services, and thus pass those costs onto consumers.[106] However, with hate crimes, it is not practicable for an employer to be able to predict the cost and liabilities caused by hate crime maniacs when these crimes cannot be predicted. In other words, the cost internalization model fails in the hate crime circumstance.

VI. CONCLUSION

Injured workers who are victims of hate crimes are not without remedies. Many states contain their own hate crime statutes to provide relief for victims of hate crimes.[107] Furthermore, allowing hate crime victims to sue under tort law as opposed to workers' compensation law may arguably be more favorable, given the greater amount of monetary relief available under tort law. [108] However, workers' compensation's remedial purpose is to provide relief for injured workers due to work related injuries.[109] While there may be hate crimes that are professional risks, the substance of a hate crime alone is personal in nature.[110] Therefore, without a clear workers' compensation statute providing for the compensability of hate crimes, and unless the hate crime can be classified as a professional risk, a hate crime at work should not be compensable under workers' compensation.

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Endnotes on pages 60-63.

From the Pages of **workcomp**central®

Group Wants CMS to Limit Opioid Use in Medicare Set-Asides

By Elaine Goodman
Thursday, April 21, 2016

Amid a growing number of U.S. government initiatives to address what's being called a national crisis of opioid abuse, some say that one federal agency seems to be out of step. The Centers for Medicare and Medicaid Services continues to demand payment for large amounts of opioids as a condition for approving proposed future-medical settlements in workers' compensation and other insurance cases, Medicare set-aside consultants say.

But efforts are intensifying to reduce CMS' opioid allocations. The National Alliance of Medicare Set-Aside Professionals has proposed what it calls evidence-based limits on opioids in workers' comp Medicare set-asides. Limiting costs earmarked for future opioid expenditures would help "reduce ongoing usage of these dangerous medications," NAMSAP said in a press release last month.

And Franco Signor, a provider of Medicare secondary payer services, plans to send a letter to the White House this week asking for limits on opioid allocations in Medicare set-aside agreements, according to Heather Schwartz Sanderson, chief legal officer with Franco Signor. Sanderson said Franco Signor also supports NAMSAP's proposal.

Evidence is growing that long-term use of opioids may be ineffective, and harmful to the patient, in treating chronic pain. Even though CMS mentions evidence-based medicine in its reference guide for workers' compensation Medicare set-asides, the arrangements CMS creates often don't reflect that philosophy, Sanderson said. As an example, she cited a recent case in which a claimant in a workers' comp settlement was allocated four different opioid prescriptions to be used simultaneously, for the claimant's 27-year remaining life expectancy. "In reality, they allocate based on the claimant's prescription usage," Sanderson said. "Across the board, they're not using evidence-based medicine."

NAMSAP has called for caps on opioid usage in settlement cases based on opioid guidelines the federal Centers for Disease Control published last month. Specifically, the NAMSAP proposal asks to limit opioid prescribing to morphine equivalent doses of 90 milligrams for no more than a month when the MSA includes expectations of surgery, or a limit of 40 milligram MED for up to a month followed by a tapering plan. Morphine equivalent dose is a way of standardizing dosage among different opioid drugs.

CMS' own policy recommends that sponsors of Medicare prescription drug plans set red flags for beneficiaries taking a morphine equivalent dose of 120 milligram a day for more than 90 days and who receive prescriptions from more than three prescribers or pharmacies, according to NAMSAP. "So why do (workers' comp Medicare set-aside) approvals often include future prescription allocations with morphine equivalent dosages in excess of 120, 200 or even 500 (milligram) per day, over the beneficiary's full life expectancy?" NAMSAP said. "And what message does a WCMSA supporting these high opioid dosages over a patient's entire life expectancy send to the addicted patient?"

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Limit Opiod Use, from Page 30.

In a blog post about NAMSAP's press release, Prium President Michael Gavin noted the conflicting opioid policies between the two federal agencies, CDC and CMS. Prium provides workers' comp medical-cost management services. "When the federal government's public health agency says one thing, but that same government's health care payment policy agency says another, they ought to be called to account for it," Gavin wrote.

While he commended NAMSAP's proposal, Gavin said he was doubtful that CMS would implement it. The agency has traditionally accepted what treating physicians want to do, he said, even when the treatment plans go against evidence-based medicine. NAMSAP's opioid proposal for Medicare set-aside arrangements is a continuation of the work of NAMSAP's evidence-based medicine committee.

The group has been working with federal officials, not only at CMS, but also in the Surgeon General's office and the National Guideline Clearinghouse, said NAMSAP President Gary Patureau. CMS updated its Medicare set-aside reference guide to include references to evidence-based medicine in response to input from stakeholders including NAMSAP, Patureau said. The hope is that the next edition of the guide will address opioid usage, he added.

Patureau said use of high-dose opioids is harmful to the patient and also drives up costs beyond just the cost of the painkillers. The patient is soon taking a long list of additional drugs to counteract the side effects of the opioids. The solution, Patureau said, is to provide "appropriate care" to the injured worker. "If you provide appropriate care, everything else takes care of itself," said Patureau, who is also executive director of the Louisiana Association of Self Insured Employers.

Keith Rosenblum, a senior strategist for workers' compensation risk control for Lockton Cos., said an injured workers' opioid use should be addressed before a case heads to settlement, even if that means a prolonged delay. Lockton is an insurance brokerage that provides risk management services.

That might involve a health and behavioral assessment to find underlying causes for the opioid usage, including psychosocial issues, he said. "Get them treated effectively before attempting to settle the case," Rosenblum said. Rosenblum called NAMSAP's proposal "outstanding." He said it may take a concerted effort of NAMSAP and other proponents to make the proposals a reality.

WCRI: Generous Fee Schedules Tied to Comp Case-Shifting

By Elaine Goodman
Friday, April 15, 2016

Financial incentives in the form of generous workers' compensation fee schedules in some states lead doctors to classify more injuries as work-related, according to a report released Thursday by the Workers' Compensation Research Institute. The finding applies to soft-tissue injuries such as back, knee or shoulder pain, where it may be tricky to determine causation, according to the WCRI study.

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Generous Fee Schedules, from Page 31.

The researchers found that when workers' comp payments for doctor-office services rose to 20% above group health rates, the number of soft tissue injuries being classified as work-related increased by 6%. Treatment for those injuries is then paid for by the employer's workers' comp carrier rather than by the worker's group health plan or other insurance.

WCRI researchers did not observe the trend for trauma-related injuries such as cuts, bruises, or broken bones, where it's easier to tell when the injury occurred and whether it is work-related. "Our results demonstrate that, on average, financial incentives influence provider's classification decision," said WCRI economist Olesya Fomenko, the author of the report. The researchers call the phenomenon "case shifting" from group health to workers' comp. A 1% shift of soft-injury cases from group health to workers' comp would result in a $35 million increase in workers' comp costs in Pennsylvania, $80 million in California and $9 million in Iowa," they said.

The study's preliminary findings were presented at the WCRI conference in Boston last month. "Putting a claim in the workers' comp world creates additional hits for employers," Jim Lynch, chief actuary of the Insurance Information Institute, said in a blog post about the WCRI presentation last month. First, employers pay more for the medical treatment because the workers' comp fee schedule is more expensive, Lynch said. On top of that, injured workers are paid for income lost due to the injury. Although the insurance carrier makes the payment, the employer may eventually pay higher premiums, he noted. And when comp benefits are higher, claims can last longer, adding to costs, Lynch said.

The WCRI researchers used data from the Truven Health MarketScan Research Database, which shows if an employee's doctor visit is paid for by group health or workers' comp. The study looked at injuries that occurred from 2008 to 2010 among full-time workers younger than 65. The results were controlled for age, gender, industry and pre-injury health status. The WCRI researchers noted that as of July 2011, six states had workers' comp medical fee schedules with rates within 15% of Medicare rates. They were California, Massachusetts, Florida, North Carolina, New York and Hawaii. Workers' comp fee schedules were more than twice Medicare rates in five states: Oregon, Delaware, Idaho, Illinois and Arkansas. The seven states that don't have fee schedules typically pay more for workers' comp medical services than fee-schedule states, WCRI said.

The new study adds to previous WCRI research into the interplay of medical prices and utilization of services. A study last year found evidence of case-shifting to workers' comp when doctors' group health payments are capitated. That is, they receive a fixed amount per year for caring for the patient. The new WCRI study excludes cases where payments are capitated. And in another study last year, WCRI found that when Illinois reduced fee schedule prices, doctors compensated by performing more complex and costly services. The WCRI researchers said their findings should give policymakers another factor to consider in formulating fee schedules.

"Policymakers have always focused on the impact fee schedules have on access to care as well as utilization of services," Fomenko said. "This study shines a light on an issue that policymakers and other system stakeholders might not be thinking of."

The foregoing articles *Group Wants CMS to Limit Opioid Use in Medicare Set-Asides* and *WCRI: Generous Fee Schedules Tied to Comp Case-Shifting,* pages 33-35, are reprinted with the permission of WorkCompCentral.com. The ongoing support and contributions of WorkCompCentral.com are gratefully acknowledged.

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Eighth Annual NAWCJ Judiciary College

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Sunday, August 21, 2016

12:00 - 1:30 **MOOT COURT JUDGES' LUNCHEON**

1:40 – 5:00 **E. EARLE ZEHMER MOOT COURT PRELIMINARY ROUNDS**

Celebrating 29 years in 2016, the E. Earle Zehmer Competition will include twenty-two teams. The competition is co-sponsored by the NAWCJ and the preliminary rounds are judged by members of the NAWCJ. The final rounds on Monday are judged by a panel of the Florida First District Court of Appeal. The competition is outstanding, the participants are exceptional, and this opportunity to contribute to the law students' development is both exciting and gratifying.

The annual moot court luncheon provides collegiality and discussion as industry experts help the judges prepare for the preliminary rounds of competition.

Judges (left to right) Almeyda (FL), Alvey (KY), and Stevick (VA) preside over oral arguments in the preliminary round.

Monday, August 22, 2016

8:00 – 8:30 **REGISTRATION AND INFORMATION**

8:30 – 9:00 **WELCOME**

Michael Alvey, NAWCJ President
Kentucky Workers' Compensation Board
Frankfort, Kentucky

9:00 – 10:50 **EVIDENCE FOR ADJUDICATORS**

Honorable T. Scott Beck, Introduction of Moderator and Panel
South Carolina Workers' Compensation Commission
Columbia, South Carolina

Honorable Jennifer Hopens, Moderator
Texas Department of Insurance Division of Workers' Compensation
Austin, Texas

Panelists

Honorable Melodie Belcher
Georgia State Board of Workers' Compensation
Atlanta, Georgia

Honorable Shannon Bruno-Bishop
Louisiana Workforce Commission
New Orleans, Louisiana

Honorable Robert Swisher
Kentucky Department of Workers' Claims
Frankfort, Kentucky

Hon. David Torrey
Pennsylvania Department of Labor and Industry
Pittsburgh, Pennsylvania

One of the great challenges of the workers' compensation adjudicator is the evidentiary objection. The rules may apply, or may be persuasive, or may be irrelevant. Objections may come clearly and concisely, or in a jumbled cascade of thoughts. The adjudicator's role is to understand the applicable standards, and make concise and effective rulings to keep the trial on track and the parties on topic. This panel will bring decades of evidentiary objection experience and address a variety of evidentiary challenges.

10:50 – 11:00 **BREAK**

11:00- 11:50 **REPETITIVE USE INJURIES**

Honorable LuAnn Haley, Introduction of Speaker
Industrial Commission of Arizona
Tucson, Arizona

Dr. J. Mark Melhorn
The Hand Center
Wichita, Kansas

Repetitive trauma can be its own breed, depending on the jurisdiction, definitions, regulations and more. These injuries are often times more difficult medically in terms of diagnosis, causal relationship, and treatment. Dr. Melhorn is a nationally recognized expert in the diagnosis and treatment of common repetitive trauma injuries. He will provide insight, analysis and advice on the trials and tribulations of these injuries.

Monday, August 22, 2016, Continue

12:00 – 12:30 **LUNCH (PROVIDED)**

12:30 – 1:50 **COMPARATIVE WORKERS' COMPENSATION LAW PANEL**

This panel discussion will bring perspective on how our statutes are different, and how they are similar. Dealing with statutory interpretation is part of our daily routine. Despite the diversity of our particular statutes, we share a multitude of concordant issues and challenges, which this program illuminates. Each year brings different states to the panel, and therefore differing viewpoints to the conversation. This program is consistently among the highest rated of the judiciary college.

Honorable Ken Switzer, Moderator
Court of Workers' Compensation Claims, Tennessee
Nashville, Tennessee

Panel

Honorable R. Karl Aumann
Maryland Workers' Compensation Commission
Baltimore, Maryland

Honorable Elizabeth Crum
Pennsylvania Department of Labor and Industry
Pittsburgh, Pennsylvania

Honorable Deneise Lott
Mississippi Workers' Compensation
Jackson, Mississippi

1:50 – 2:00 **BREAK**

2:00 – 5:00 **THE AFTERNOON IS DIVIDED INTO TWO TRACKS, ONE FOR THE NEWER ADJUDICATOR AND ONE FOR THE MORE SEASONED ADJUDICATOR**

Track One - **The NAWCJ NEW JUDGE PROGRAM**

Back by popular demand, the NAWCJ presents education specifically for the new adjudicator. Transitioning to the bench from private practice can involve various challenges. Much of the three hour program Monday afternoon is intended to foster frank discussions in small groups. This series of discussions is focused on those who have been on the bench for two years or less, but all adjudicators are encouraged to attend.

2:00-2:10 **ANNOUNCEMENTS AND BUSINESS**

Honorable Michael Alvey, NAWCJ President
Kentucky Workers' Compensation Board
Frankfort, Kentucky

Monday, August 22, 2016, Continued

2:10 – 3:00 **JUDICIAL WRITING FOR THE NEW JUDGE**

Honorable Robert Cohen, Introduction of Speaker
Florida Division of Administrative Hearings
Tallahassee, Florida

Honorable Melanie G. May
Chief Judge, Florida Fourth District Court of Appeal
West Palm Beach, FL

Lawyers write, and the tenor and tone must be persuasive and informative. Taking the bench, the new judge has to learn to transition from persuasion to adjudication, both in attitude and in writing. Judge May will bring years of experience to the fore. She will provide wit and wisdom regarding the transition from effective legal writing to the adjudicatory writing required as judges.

3:00 – 3:10 **BREAK**

3:10 – 4:00 **JUDICIAL ETHICS CONUNDRUMS AND HUMDRUMS?**

Honorable Jane Rice Williams
Kentucky Department of Workers' Claims
Frankfort, Kentucky

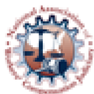
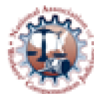
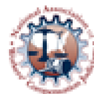
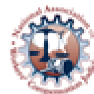
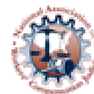
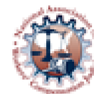
Honorable Robert Himmel
Virginia Workers' Compensation Commission
Roanoke, Virginia

Honorable Margret Kerr
Florida Office of Judges of Compensation Claims
Miami, Florida

Honorable Bruce Moore
Kansas Department of Labor, Division of Workers' Compensation
Salina, Kansas

The new judge takes the bench with a volume of experience and knowledge. As good at that foundation may be, there are new rules and processes that must now be mastered. The Code of Judicial Conduct, state regulations, and more confront the new workers' compensation adjudicator. Moderator Jane Williams and panel of seasoned judges, commissioners, and deputies will guide a discussion of some of the common ethical concerns of new judges. Attendees will gain knowledge and confidence in the interpretation of judicial ethical requirements.

4:00 – 4:10 **BREAK**

Monday, August 22, 2016, Continued

4:10 - 5:00 Transitioning to the Bench

Honorable John Lazzara, Introduction of Moderator and Panel
Florida Office of Judges of Compensation Claims
Tampa, Florida

Honorable David Imahara, Moderator
Georgia State Board of Workers' Compensation
Atlanta, Georgia

Honorable Aisha Taylor
South Carolina Workers' Compensation Commission
Columbia, South Carolina

Honorable Allen Phillips
Tennessee Court of Workers' Compensation Claims
Jackson, Tennessee

Honorable Nicole Tifverman
Georgia State Board of Workers' Compensation
Savannah, Georgia

The journey to the bench is long and hard. Having achieved it, the new judge faces a variety of new challenges, questions and trials. This panel will work through some common issues for those new to the bench, and with the help of the Judiciary College audience, provide wisdom and suggestions.

Track Two

2:00 – 5:00 **SAWCA Regulator Roundtable™**

For the more seasoned adjudicators, Monday afternoon offers the opportunity for a doctorate-level exposure to comparative law in workers' compensation. The Southern Association of Workers' Compensation Administrators (SAWCA) will present their 5th Annual Regulator Roundtable. Regulators and Administrators from across the country will discuss hot topics challenging workers' compensation systems. Attendees will hear perspectives, initiatives, problems and solutions.

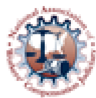
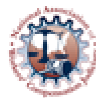
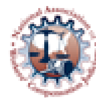
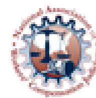
Monday Evening:

5:00 – 6:00 **NAWCJ and SAWCA Reception**

The perfect closure for the first day of our NAWCJ program is the official welcoming reception for adjudicator attendees, regulators and associate members. Following a full day of edification and instruction, this is the chance to mingle and unwind with old friends and new acquaintances from across the continent.

7:00 – 11:00 **WCI® Reception and Entertainment**

Casual attire, drinks and heavy hors d'oeuvres. This is a rocking closure to the first day of the WCI conference. All registered NAWCJ Judiciary College attendees are invited to the reception and entertainment. There will be live entertainment, lighthearted conversation, and more opportunity to renew and form friendships.

Tuesday, August 23, 2016

8:45 – 9:45 **LIVE SURGERY (IN THE ADJUSTER BREAKOUT)**

9:55-10:00 **ANNOUNCEMENTS AND UPDATES**

Honorable Ellen Lorenzen, NAWCJ Past-President
Florida Office of Judges of Compensation Claims
Tampa, Florida

10:00 – 10:50 **ETHICS JEOPARDY**

Honorable Bruce Moore, Introduction of Speakers
Kansas Department of Labor, Division of Workers' Compensation
Salina, Kansas

Deborah Hughes, Moderator
Office of the Disciplinary Administrator
Topeka, Kansas

Honorable Roland Case, Kentucky
Kentucky Department of Workers' Claims
Pikeville, Kentucky

Ethics can be a challenge and the judge may be called upon to both interpret and document attorney actions and inactions. This game-show style presentation on the intricacies and challenges of lawyer ethics will be an eye-opener for all.

10:50 – 11:00 **BREAK**

11:00- 11:50 **THE OPT OUT, THE CONSTITUTION, AND THE GRAND BARGAIN**

Honorable Deneise Turner Lott, Introduction of Speakers
Mississippi Workers' Compensation Commission
Jackson, Mississippi

Michael C. Duff, Moderator
University of Wyoming
Laramie, Wyoming

Honorable Ryan Brannan, Commissioner
Texas Department of Insurance, Division of Workers' Compensation
Austin, Texas

Honorable Robert Gilliland, Chair
Oklahoma Workers' Compensation Commission
Oklahoma City, Oklahoma

There are a great many constitutional challenges, benefits sufficiency challenges and more in the current world of workers' compensation. This panel of experts will bring analysis and understanding of the nature of these challenges and the effects on the system as a whole.

Tuesday, August 23, 2016, Continued

12:00 – 12:30 **LUNCH (PROVIDED)**

NAWCJ ANNUAL BUSINESS MEETING

Honorable Michael W. Alvey, NAWCJ President
Kentucky Workers' Compensation Board
Frankfort, Kentucky

Honorable Jennifer Hopens, NAWCJ President-Elect
Texas Department of Insurance, Division of Workers' Compensation
Austin, Texas

12:30 – 1:00 **WORKERS' COMP: WHAT IS HOT FROM A NATIONAL PERSPECTIVE?**

Honorable Jennifer Hopens, Introduction of Speaker
Texas Department of Insurance, Division of Workers' Compensation
Austin, Texas

David DePaolo, CEO and Founder
WorkCompCentral.com
Camarillo, California

1:00 – 1:10 **BREAK**

1:10 – 4:00 **ADVANCED JUDICIAL WRITING**

Honorable Melodie Belcher, Introduction of Speaker
Georgia State Board of Workers' Compensation
Atlanta, Georgia

Professor Wayne C. Schiess
University of Texas School of Law
Director - The David J. Beck Center for Legal Research, Writing, and Appellate Advocacy
Austin, Texas

Judicial writing is a skill, and challenges exist in writing effective orders. Professor Schiess will pick up where judicial writing for the new judge left off, and provide an advanced perspective on how judges can and should write more efficiently and effectively.

(There will be a ten minute break each hour, 2:00-2:10 and 3:00-3:10).

4:00 – 4:10 **BREAK**

Tuesday, August 23, 2016, Continued

4:10 – 5:00 **THE MEDICAL EXAMINATION AND ASSIGNING RATINGS**

Honorable Sheral Kellar, Introduction of Speaker
Louisiana Workforce Commission
Baton Rouge, Louisiana

Dr. Russell L. Travis
Neurosurgical Associates
Lexington, Kentucky

Workers' compensation is in a state of transition regarding the adoption of various guides to permanent impairment. Some states have adopted their own guides, while others have relied upon the American Medical Association (AMA) *Guides*. The *AMA Guides* have been through a series of updates and changes in the last 20 years. Various states are using the Fourth, Fifth and Sixth Editions of the *AMA Guides*. What are the similarities and what are the differences? Our medical expert will provide a bird's eye view of the methodology and logic of various impairment rating processes.

Wednesday, August 24, 2016

8:50 – 9:00 **ANNOUNCEMENTS AND UPDATES**

Honorable David Torrey, NAWCJ Immediate Past-President
Pennsylvania Department of Labor and Industry
Pittsburgh, Pennsylvania

9:00 – 10:15 **HEART, LUNGS AND OTHER PRESUMPTIONS**

Honorable Karl Aumann, Introduction of Moderator and Panel
Maryland Workers' Compensation Commission
Baltimore, Maryland

Honorable Jim Szablewicz, Moderator
Virginia Workers' Compensation Commission
Richmond, Virginia

Bonnie Hoskins, Esq.
Hoskins Law Offices
Lexington, Kentucky

Glen Wieland, Esq.
Weiland, Hilado, and DeLattre
Orlando, Florida

Dr. Leonard Pianko
Aventura Cardiology
Aventura, Florida

Presumptions for various populations of workers and medical conditions are a persistent challenge. Legal changes and the developments in medicine continue to refine our adjudication of these presumptions. This blue-ribbon panel will address developing issues and concerns with presumptions from both a medical and legal perspective.

10:15 – 10:30 **BREAK**

10:30 - 11:45 **HOT TOPICS IN WORKERS' COMPENSATION 2016**

Hon. Frank McKay, Introduction of Speakers
Georgia State Board of Workers' Compensation
Atlanta, Georgia

Honorable Larry Karns
Kansas Department of Labor, Division of Workers' Compensation
Salina, Kansas

Honorable Sheral Kellar
Louisiana Workforce Commission
Baton Rouge, Louisiana

Honorable Dwight Lovan
Kentucky Department of Workers' Claims
Frankfort, Kentucky

What is hot in workers' compensation adjudication? This all-star panel from four very diverse jurisdictions will bring the what and the wherefore to the table for a lively discussion of what is changing the workers' compensation laws, regulations and procedures in their states and across the country.

Judiciary College 2016

August 21-24, 2016
Marriott World Center, Orlando, Florida

NAWCJ Judiciary College Hotel - The Caribe Royale

$110.00 per night
One block away from Marriott World Center (convention site)
Continuous shuttle service to/from Marriott World Center.
To reserve, email arrival and departure dates to Shirley@wci360.com

NAWCJ Judiciary College 2016 Faculty

Honorable Michael Alvey

Chairman Michael W. Alvey received his Bachelor's degree from Western Kentucky University, and his J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1988, Chairman Alvey practiced primarily defending workers' compensation, federal black lung and personal injury claims. On November 13, 2009 Chairman Alvey was appointed to serve as Chairman of the Kentucky Workers' Compensation Board effective January 5, 2010. Chair Alvey has served on the board of directors of the National Association of Workers' Compensation Judiciary, Inc., and is the President. Chairman Alvey retired from the Kentucky Army National Guard in 2000 where he served nearly 21 years as an armor officer and is a graduate of the Armor Officer Basic Course and Armor Office Advanced Course. Chairman Alvey resides in Owensboro, Kentucky where he has been involved in various church and civic activities as well as working with youth sports including both coaching and officiating.

Honorable R. Karl Aumann

Appointed Commissioner of the Workers' Compensation Commission in February 2005, R. Karl Aumann was subsequently named as Chairman in October 2005. Immediately prior to this appointment, he served as Maryland's Secretary of State. He earned a Bachelor of Arts from Loyola University in Maryland in 1982. Chairman Aumann received his J.D. in 1985 from the University of Baltimore, School of Law and was admitted to the Maryland Bar in 1986. He was an associate with the Towson firm of Power & Mosner and later with the Baltimore office of Miles& Stockbridge. In 1991, President George H.W. Bush appointed him Counsel and Senior Policy Advisor to the Appalachian Regional Commission. From 1994 until 2003, Chairman Aumann served as Chief Administrator and District Director for Congressman Robert Ehrlich. Chairman Aumann served as president of the Southern Association of Workers' Compensation Administrators and is co-chair of the Adjudication Committee of the International Association of Industrial Accident Boards and Commissions. He has served since 2010 as a board member of the National Association of Workers' Compensation Judiciary, and since 2006 as a board member of the Maryland Workers' Compensation Educational Association.

Honorable Scott Beck

Commissioner Beck was appointed to the South Carolina Workers' Compensation Commission on June 30, 2008. In 2010, he was elected by the Commission as Interim Chairman and in December 2012, Governor Haley nominated Commissioner Beck for reappointment as Chairman. He graduated with a BS degree from Penn State in 1981 and from the USC School of Law in 1999. Prior to joining the Commission, he served in various positions in Law Enforcement from 1979-1996 and most recently as an Assistant Attorney General from 2000-2008 prosecuting healthcare fraud cases. Commissioner Beck served as a city councilman in North Augusta, South Carolina from 1993-1996, and was elected to the South Carolina House of Representatives, serving from 1996-2000.

Honorable Melodie Belcher

After ten years as a flight attendant for Eastern Airlines, Melodie Belcher needed a new career. She attended Georgia State University College of Law where she was an editor on the law review, graduating cum laude in 1992. She then worked as an associate for Swift Currie McGhee & Hiers, where she represented employers and insurers in workers' compensation claims. In 1999, she joined the State Board of Workers' Compensation as a mediator in the Columbus office. She was appointed administrative law judge in 2002, and in October of 2009, she became the chief judge, moving to the Atlanta office. Melodie is the Chair of the Administration and Procedures Committee for the Southern Association of Workers' Compensation Administrators and is the Secretary for the National Association of Workers' Compensation Judiciary. She speaks regularly on a variety of workers' compensation issues. Melodie has two grown children (one lawyer and one in law school), and a cocker spaniel and lives in LaGrange, Georgia with her husband, Bill (who is not a lawyer).

Honorable Ryan Brannan

Ryan Brannan is the Texas Commissioner of Workers' Compensation, overseeing the Division of Workers' Compensation for the Texas Department of Insurance. He was appointed Commissioner in August 2014 and confirmed by the Texas Senate during the 84th Texas Legislative session. Commissioner Brannan has led efforts to improve workplace safety and outreach to injured employees while streamlining processes and reducing costs within the Division of Workers' Compensation. He also has strengthened fraud investigations and enforcement efforts to make sure insurance carriers and health care providers comply with state regulations and provide accurate data to the Division. One goal of this sharpened enforcement focus has been to obtain better results for both employers and employees within the system. He served as a policy advisor to former Governor Rick Perry, providing strategic and operational advice on issues such as workers' compensation, property and casualty insurance, life insurance, health insurance, health care, and land use management districts. He also advised the Governor on legal issues including tort reform, property rights, and eminent domain. Commissioner Brannan spent several years as a policy analyst on issues including property and casualty insurance, health insurance, workers' compensation, health care, tort reform, eminent domain, energy, electricity, and telecommunications.

Honorable Shannon Bruno-Bishop

Shannon Bruno Bishop joined the Office of Workers' Compensation (OWC) as the District Judge in the Harahan, Louisiana office. As District Judge of the OWC, Shannon conducts judicial hearings in the district office by presiding over workers' compensation claims in a judicial capacity rendering final appealable judgments in the claims. She has full administrative responsibility in the district office. Judge Bishop is a native of New Orleans and graduated from Tulane University with a B.A. in Sociology and The University of Mississippi School of Law with a J.D. She is admitted in Mississippi and Louisiana. Prior to becoming District Judge, Judge Bishop served as mediator, in Harahan and New Orleans, where she mediated hundreds of workers' compensation cases each year. Judge Bishop is married to State Senator Wesley T. Bishop and they have two sons, ages 6 and 2. Judge Bishop's past and/or current professional and community involvements include: Louisiana State Bar Association, The Mississippi Bar, American Bar Association, National Bar Association, American Diabetes Association, Young Leadership Council, Martin Luther King Charter School, Greater New Orleans Louis A. Martinet Legal Society, Mississippi Mock Trial Competition, Boy Scouts of America, and Alpha Kappa Alpha Sorority, Incorporated.

Honorable Roland Case

Judge Roland Case is a Kentucky Administrative Law Judge in Pikeville. He was appointed by Gov. Beshear He previously served as the assistant county attorney of Pikeville County.

Honorable Robert Cohen

A native of Orlando, Florida, Bob Cohen graduated from Brandeis University in 1979 with a B.A. degree in American Studies. He graduated in 1981 from the Florida State University College of Law, where he served on the Law Review. After more than 20 years in private practice, concentrating in administrative and civil law representing large companies, professional licensees and consumer associations, Bob was appointed by the Governor and Cabinet in October, 2003, as the Director and Chief Administrative Law Judge of the Florida Division of Administrative Hearings which includes under its umbrella, the Office of Judges of Compensation Claims. Bob currently serves as President of the National Association of Administrative Law Judiciary, as a Board Member of the National Association of Workers' Compensation Judiciary, on the Second Judicial Circuit Bench/Bar Committee, as an alumni member of the William Stafford Inn of Court, as a Board Member of the Legal Aid Foundation of the Tallahassee Bar Association, and has served as a consumer organization representative on the Federal Alliance for Safe Homes Steering Committee, The Residential Community Mitigation Program Advisory Committee, and the Department of Revenue Property Tax Administration Task Force. He is active in the community, currently serving as Leadership Giving Co-Chair in the Florida State Employees Charitable Campaign, having previously served as President of the Tallahassee Bar Association, the Legal Aid Foundation (twice), and numerous community organizations. He is a Fellow of the Florida Bar Foundation and a Charter Life Mentor of the National Administrative Law Judiciary Foundation. He is also a past recipient of the Florida Bar's Pro Bono Service Award for the Second Judicial Circuit. Bob is a frequent speaker on topics related to administrative law at Bar events, regional and state organizations, and in the classroom. He is Board Certified by the Florida Bar in State and Federal Government and Administrative Practice.

Honorable Elizabeth Crum

Judge Crum is Director of the Workers' Compensation Office of Adjudication with management responsibilities for Pennsylvania's workers' compensation judges, judge managers and staff in 23 offices located throughout the Commonwealth of Pennsylvania. Prior to her present position, she was Deputy Secretary for Compensation and Insurance with the Pennsylvania Department of Labor and Industry. Judge Crum also served as Judge Manager for the Eastern District of Pennsylvania and as a Judge in Philadelphia. Prior to her appointment as Judge, she served as an attorney and Chief of the Compliance Division with the Bureau of Workers' Compensation. She began her legal career as an attorney/advisor with the U.S. Department of Labor in Pittsburgh. Judge Crum is a 1987 graduate of the University of Pittsburgh School of Law.

Continued, Page 41

David DePaolo

After practicing workers' compensation law for nearly 18 years, David DePaolo founded and grew WorkCompCentral into the most respected news and education service in the workers' compensation industry. He is a regular public speaker on workers' compensation to industry trade shows, educational seminars, radio and television, and has been quoted or cited in general media publications such as Fortune Magazine, the LA Times and Wall Street Journal. He has been published in leading industry journals and scholarly publications on topics ranging from the underlying financial issues that led to an historic makeover of the California workers' compensation system, to the new paradigm in work injury protection and national trends in the workers' compensation industry.

Professor Michael C. Duff

Professor Duff became the Centennial Distinguished Professor of Law in 2014. He teaches the College of Law's courses in Torts I, Labor Law, and Workers' Compensation Law. He also teaches a course on Alternative Dispute Resolution in the Workplace. He has previously taught Administrative Law and Introduction to Law at the College of Law; and has also taught Labor Law and Administrative Law as a visiting professor at the University of Denver's Sturm College of Law. Professor Duff founded the College of Law's Academic Support Program (now called the Academic Achievement Program) in 2006, and directed the program for seven years. A seasoned legal practitioner, Professor Duff spent nearly a decade working as a trial attorney, adjudicative official, and investigator in various National Labor Relations Board offices immediately prior to joining the UW faculty. Before engaging in federal government law practice, Professor Duff worked for two years as an associate attorney in a cutting-edge, progressive, private sector law firm in Maine, where he represented injured workers and labor unions.

Honorable Robert Gilliland

Robert Gilliland is a veteran trial lawyer whose prior practice concentrated in the area of business litigation in both state and federal courts. Following his admission to the Oklahoma Bar, Robert served four years as a captain in the Judge Advocate General's Corps of the US Army in the United States and the Republic of Vietnam. Robert holds the distinction of being one of only a handful of lawyers in the United States to be selected for continuous inclusion in The Best Lawyers in America (bet-the-company litigation; commercial litigation; energy law; environmental litigation; real estate litigation; securities litigation) since the publication's debut in 1983. He was also perennially named to Oklahoma Super Lawyers. He was appointed Chair of the Oklahoma Workers' Compensation Commission effective June 1, 2015.

Honorable LuAnn Haley

After earning her JD in 1981, Ms. Haley worked in the field of Workers' Compensation as a defense lawyer in Pennsylvania. After passing the bar in Arizona in 1999, she was appointed an Administrative Law Judge for the Industrial Commission of Arizona. Ms. Haley lectures for state bar CLE programs and also serves as a reviewer for AMA publications. She is a member of the Board of Directors of the National Association of Workers' Compensation Judiciary and the Editor of the Lex and Verum newsletter.

Honorable Robert M. Himmel

Robert M. Himmel was appointed to serve as Deputy Commissioner to the Roanoke Regional Office on September 25, 2013. Deputy Commissioner Himmel earned a Bachelor of Arts degree from Mary Washington College and a Juris Doctor degree from the University of Richmond T.C. Williams School of Law. For 17 years, Mr. Himmel was engaged in the private practice of law, specializing in Virginia workers' compensation cases. During the past seven years, Mr. Himmel focused primarily on appellate litigation before the Virginia Workers' Compensation Commission and the Virginia Court of Appeals. While in private practice, Mr. Himmel lectured frequently and was voted by his peers to the Best Lawyers® in America publication.

Honorable Jennifer Hopens

Jennifer Hopens received her undergraduate and law degrees from the University of Texas at Austin. She was licensed to practice law in Texas in 2002. In 2007, she joined the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) as a Hearing Officer. She has traveled extensively for the Division, holding contested case hearings in workers' compensation matters in the Austin, Beaumont, Bryan/College Station, Corpus Christi, Dallas, Fort Worth, Lufkin, Missouri City, Houston East, Houston West, San Antonio, Uvalde, Victoria, and El Paso Field Offices of TDI-DWC. She attended the Judicial College of the National Association of Workers' Compensation Judiciary (NAWCJ) in Orlando, Florida in 2009, 2010, and 2011. In 2010, she was chosen to serve on the NAWCJ Board of Directors. She was previously a Hearing Officer for the Texas Workforce Commission. In her free time, Jennifer enjoys reading, traveling, genealogy, and photography.

Bonnie Hoskins, Esq.

Bonnie Hoskins graduated from the University of Kentucky in 1978 with Honors and High Distinction. She next studied at the Centre for Renaissance Studies in Oxford, England before entering the University of Kentucky College Of Law in 1979. While attending the University Of Kentucky College of Law, Ms. Hoskins served as a member of the National Moot Court Team. She received her Juris Doctorate Degree in 1982. Since that time, she has practiced primarily administrative law specializing in workers' compensation defense. She clerked with Kentucky's Special Fund while in law school and then practiced with the Special Fund for a short time after completing her law degree. In 2001, Ms. Hoskins founded Hoskins Law Offices PLLC. She is a former Chair of the Workers' Compensation Committee of the Kentucky Bar and a regular speaker at Continuing Legal Education seminars. Ms. Hoskins has published numerous outlines and articles in continuing education publications. She is also a contributing author to the University of Kentucky Workers' Compensation Desk Book.

Honorable Abbie Hudgens

Abigail Hudgens is the Administrator of the Workers' Compensation Division at the Tennessee Department of Labor and Workforce Development. She is the President elect of Southern Association of Workers' Compensation Administrators, and will become President in July 2016. She received her bachelor's from the University of Memphis and earned her Master of Public Administration from the University of Tennessee, Knoxville. She served as the risk and insurance manager for Metro Nashville; and previously served as the risk and benefits manager for the City of Knoxville. She has served as president of the national Public Risk Management Association, president of the Knoxville Risk Management Society, and Tennessee Valley Employee Benefit Council. She was a founding member and later chairman of the board of the Healthcare 21 Business Coalition and served for a number of years as the public sector representative on the Governor's Workers Compensation Advisory Council.

Deborah Hughes

Ms. Hughes has been with the Disciplinary Administrator's Office since 2013. She is a 1989 graduate of the University of Kansas School of Law. After law school, she worked in private practice for 12 years. In 2001, she joined the Shawnee County District Attorney's Office, where she was responsible for the office's appeals and post-conviction cases. From 2004 through 2012, she worked for the Kansas Supreme Court as the Court's Special Projects Attorney. Just prior to joining the Disciplinary Administrator's Office, Ms. Hughes worked as an appellate defender with the Kansas Appellate Defender Office. Ms. Hughes has served on the Kansas Judicial Council Criminal Law Advisory Committee, and is a member of the Kansas Bar, Topeka Bar, American Bar and the Kansas Women Attorney's Association. She serves as a Master in the Sam Crow American Inn of Court.

Honorable David Imahara

Judge David Imahara is the Chief Administrative Law Judge for the Georgia Board of Workers' Compensation. He previously served as Administrative Law Judge, Deputy Chief Judge, and director of the Alternative Dispute Resolution unit of the State Board. He has served on the Board of the National Association of Workers' Compensation Judiciary.

Honorable Larry Karns

Larry Karns began his new career as the Director of the Kansas Department of Labor, Division of Workers Compensation, in 2012 after practicing law with the Topeka, Kansas, law firm of Glenn, Cornish, Hanson & Karns for 36 years and after a year with McAnany, Van Cleave & Phillips, a Midwest regional law firm specializing in workers compensation defense. He is a 1972 graduate of the University of Kansas School of Business and a 1975 honors graduate from the Washburn University School of Law. In addition to the practice of law, Larry served for several years as a hearing officer for various state agencies and as a judge pro tem for the Topeka, Kansas, Municipal Court. During his legal career Larry has served on the Board of Directors of a local bank, a domestic insurance company and a regional agricultural lender. He currently serves as a member of the Board of Directors of the International Association of Industrial Accident Boards and Commission.

Honorable Sheral Kellar

Sheral C. Kellar has served at the Louisiana Workforce Commission (formerly the Louisiana Department of Labor) as a Workers' Compensation Judge since 1991 and as Workers' Compensation Chief Judge since May 1999. In January 2016, she was appointed Director of the Louisiana Office of Workers' Compensation Administration. Judge Kellar was appointed co-chair of the Louisiana State Bar Association Access to Justice Committee and served from June 2004 to June 2008. In June 2007 she received its President's Award for her many contributions to the Bar Association and her exceptional service as Co-Chair of the Access to Justice Committee. She is a member of Baton Rouge Bar Association, Louisiana Association of Administrative Law Judges, Louisiana State Bar Association Medical Legal Inter-professional Committee and the National Association of Workers' Compensation Judges. In 2009 she was elected the recording secretary for the Louisiana Center for Civil Justice, a state-wide call center that facilitates the provision of pro-bono and low-fee civil legal assistance to Louisiana's poorest citizens. Also, in 2009 Judge Kellar was appointed Chair of the Access to Justice's Gap Assessment Sub-Committee, where she spearheaded an Economic Impact Study detailing the tremendous positive financial impact Louisiana's legal services programs have on the state economy. She is a former member of the American Bar Association, the National Legal Aid & Defender Association, board member of the Louisiana Bar Foundation and at-large member of the Louisiana State Bar Association Board of Governors having been appointed in 2002 to a three year term. She is also a Court Appointed Special Advocate (CASA volunteer) and in June 2005 she was selected the CASA-Baton Rouge volunteer of the month. Judge Kellar speaks frequently on issues of workers' compensation and professionalism. She received her Bachelor of Science and Juris Doctorate degrees from Louisiana State University.

Honorable Margret Kerr

Judge Kerr is originally from England and Australia. She received her B.A. from the University of Kent at Canterbury, U.K. in 1980, and her J.D. from the University of Miami in 1993. She began her legal career at the law firm of Underwood, Karcher & Anderson where she worked as an associate for 3 years. In 1996, she joined Kubicki Draper, as an associate and then partner, for the next 12 years, limiting her practice to workers' compensation cases. In 2008, she joined the law firm of Arrick, Peacock and Kerr where she continued to practice workers' compensation defense, until her appointment as a Judge of Compensation Claims by Governor Scott in 2013.

Honorable John Lazzara

Judge Lazzara was initially appointed Judge of Compensation Claims (JCC) for the Tampa District in 1990 by Governor Bob Martinez. In 1993 he requested reassignment to the Tallahassee District following the retirement of the late Judge Gus Fontaine. Since then he has been reappointed twice by Governors Lawton Chiles and Jeb Bush, and once by Governor Charlie Crist. In 1998 and 2002, Judge Lazzara was nominated for appointment to the First District Court of Appeal. In November 2005, Governor Bush was appointed him Interim Deputy Chief Judge, and served in that capacity until May 2006.

Prior to his appointment to the tribunal, Judge Lazzara practiced law in Tampa for 23 years, and served as a Hearing Officer for the Hillsborough County Environmental Commission and the Property Appraisal Adjustment Board. He was also an Arbitrator with the Florida New Motor Vehicle Arbitration Board and the American Arbitration Association. Judge Lazzara has been a Certified Circuit Civil Mediator since 1989, when the Florida Supreme Court appointed him to its initial Special Committee for Mediation/Arbitration Rules. Judge Lazzara was President, Florida Conference of Judges of Compensation Claims (1997-99); Chair, The Florida Bar Workers' Compensation Rules Committee (1994-95); and Chair, Division of Administrative Hearings' Workers' Compensation Rules of Procedure Revision Committee (2005-06).

Continued, Page 50.

He was a member of the Florida Bar Appellate Court Rules Committee (2001-07) and chaired its Workers' Compensation Practice Subcommittee (2002-03, 2005-07). He is a member of The Florida Bar's Standing Committee on Professionalism, and chairs the Scholarship Committee of the North Florida Chapter of Friends of 440. In 2009, he was inducted as a Fellow of the College of Workers' Compensation Lawyers, and is a founding Director and the Inaugural President of the National Association of Workers' Compensation Judiciary (2008-10). Judge Lazzara received his B.A. and J.D. degrees from the University of Florida. In 1996, he completed studies at the IAIABC International Workers' Compensation College at Arizona State University. He is a frequent lecturer on workers' compensation trial, appellate and procedural topics, and has testified before committees of the Florida Legislature on workers' compensation legislation. Judge Lazzara has co-authored chapters on "Workers' Compensation Mediation" in the Florida Bar's *Alternative Dispute Resolution in Florida*, Vol. II, 1995, and in the *Florida Workers' Compensation Practice*, 4th & 5th Editions and Supplements.

Honorable Ellen Lorenzen

Ellen Lorenzen was originally from Los Angeles, CA. but grew up in Baton Rouge, LA. She received her B.A. from Emory University, Atlanta, GA in 1971 and moved to Florida. She began working as an all-lines adjuster until she attended Stetson College of Law where she graduated in 1978. After admission to the Bar, she became employed as staff counsel for Continental Insurance in Tampa, practicing primarily in the area of personal injury defense with some workers' compensation cases. In 1985 Ms. Lorenzen became employed with the firm of Morris & Rosen where she represented injured employees. In 1986 she was hired by Travelers Insurance as a staff attorney where she was responsible for a mix of workers' compensation and personal injury cases until 1990. At that time she became the managing attorney for the Tampa staff counsel office of Travelers and restricted her practice solely to workers' compensation defense. In 1994 Ms. Lorenzen became associated with the firm of Barr, Murman, Tonelli in Tampa and became a partner there in 1997. In 1998 Ms. Lorenzen and John Dixon, Esq. formed a firm handling workers' compensation defense statewide on behalf of several self-insured employers. Ms. Lorenzen resigned her membership in that firm in 2004 when she was appointed a Judge of Compensation Claims by Governor Bush. She has been Board Certified in Workers' Compensation since 1988 and has been a Board Certified Circuit Civil Mediator since 1994. Ms. Lorenzen serves on the board of Tampa Jewish Family Services, a non-profit social services agency providing mental health counseling and food bank assistance to those in need in the Tampa area irrespective of race or religion. She is also on the Friends of 440.

Honorable Deneise Turner Lott

Deneise Turner Lott has served as an Administrative Judge with the Mississippi Workers' Compensation Commission since November 1988. She is currently senior judge and is the first woman to hold that position. She was engaged in private law practice with an emphasis on disability claims before joining the Commission as a staff attorney. She served the Commission as senior staff attorney before becoming an Administrative Judge. She graduated from the University of Mississippi *cum laude* with a B. A. degree in English. She also received her law degree from the University of Mississippi School of Law. She has served on several bar committees and has twice served as chair of the Administrative Law and Workers' Compensation Section of the Mississippi Bar. She has also taught administrative law and workers' compensation law as an adjunct professor at Mississippi College School of Law. She regularly provides programs for continuing legal education credit on workers' compensation topics. Judge Lott co-chaired the Kids' Chance Mediation Project which is designed to help fund the higher education of children of seriously disabled or deceased workers and which is sponsored by the Workers' Compensation Section of the Mississippi Bar. She has twenty hours of mediation training and over 1000 hours of court-annexed settlement experience.

Honorable Dwight Lovan

Commissioner Dwight T. Lovan received his Bachelor's degree from Baylor University and J.D. from the University of Kentucky College of Law. Admitted to the Kentucky Bar in 1977, Commissioner Lovan worked as a staff attorney for the Kentucky Court of Appeals with responsibility for workers' compensation appeals for 15 months. From 1979 to 1990 he practiced law in Owensboro, concentrating in the areas of workers' compensation and civil litigation.

In May of 1990, Commissioner Lovan was appointed Administrative Law Judge and remained in that position until August of 1994 when he was named to the Kentucky Workers' Compensation Board. Between July 2000 and January 2004, Commissioner Lovan served as Chairman of the Kentucky Workers' Compensation Board before returning to private practice in the firm of Jones, Walters, Turner and Shelton. By executive order signed on February 7, 2008, Commissioner Lovan was appointed to serve as the Commissioner of the Department of Workers' Claims.

Honorable Melanie G. May

Judge May has served as Chief Judge of the Florida Fourth District Court of Appeal since 2011, and has served on that Court since 2002. Before her appellate tenure, she served as a trial judge on the 17th Judicial Circuit Court for eleven years. Her initial legal experience was clerking at the U.S. Eleventh Circuit Court of Appeal, after which she practiced for nine years before taking the bench. Judge May has served on an array of councils, boards, and committees. These include the Access to Courts Committee, the Unauthorized Practice of Law Committee, the National Association of Drug Court Professionals, and the Supreme Court Steering Committee on Treatment-Based Drug Courts. Judge May has been involved in leadership of many such committees. She was an instructor on Legal Research and Writing at the Nova Law Center and an Instructor with the National Judicial College.

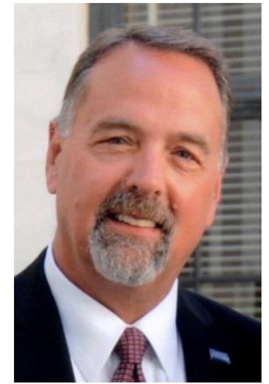
Honorable Frank McKay

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.

Dr. J. Mark Melhorn

Mark Melhorn MD FAAOS FAADEP FACOEM FACS is an occupational orthopaedic physician who specializes in the hands and upper limbs. He received his BS from McPherson College and his MD from the University of Kansas and is currently a Clinical Associate Professor, Department of Orthopaedics, University of Kansas School of Medicine - Wichita. He has been elected to national boards and educational committees while authoring and lecturing on his research of workplace injuries and illnesses; return-to-work options; impairment and disability; and prevention of musculoskeletal pain in the workplace, including the text "AMA Guides(tm) to the Evaluation of Work Ability and Return to Work" 2nd edition AMA Press (2011), Guides to the Evaluation of Disease and Injury Causation 2nd edition AMA Press (2014) and was the lead author for the Upper Extremity Chapter in the 6th Edition of the AMA Guides to Impairment.

Honorable Bruce Moore



Judge Bruce Moore has served as an administrative law judge for the Kansas Department of Labor, Division of Workers' Compensation, since 1995 where he presides over workers' compensation cases. He also serves as a municipal court judge pro tempore for the City of Salina, Kansas. Before joining the Department of Labor, Judge Moore served as municipal court judge *pro tempore* for the City of Prairie Village, Kansas, and as a district judge *pro tempore* for Kansas' 10th Judicial District. He practiced law in Kansas for 15 years, concentrating his practice on criminal prosecution and defense and the prosecution and defense of personal injury and workers' compensation claims. Judge Moore received his bachelor's degree from Kansas State University and Juris Doctor from Kansas University. He is the author of "Litigating a Defense of Alcohol or Drug Impairment Under the Workers' Compensation Act," published by the Journal of Kansas Trial Lawyers Association, and Chapter 25, "Causation: A Judge's Perspective," for the American Medical Association's *Guides to the Evaluation of Disease and Injury Causation*," Second Edition (2013). He has served as President of two Rotary Clubs, and as an Assistant District Governor of Rotary International; he served two terms as President of the Board of Directors of the Salina Community Theatre, and as a Disaster Response team member for the American Red Cross. Judge Moore was awarded a Professional Certificate of Judicial Development in Administrative Law Adjudication Skills in 2008 and a Professional Certificate of Judicial Development in Dispute Resolution Skills in 2009 by the National Judicial College. Judge Moore is an alumnus of The National Judicial College and joined its faculty in 2009.

Honorable Allen Phillips

Allen Phillips is a judge of the Tennessee Court of Workers' Compensation Claims, presiding in Jackson, Tennessee. He previously was a partner with Waldrop & Hall where he had practiced since 1990. His varied practice included employment law, personal injury, insurance defense, family law and worker's compensation. He served on the board of directors of the Jackson-Madison County Bar Association. He graduated from Lambuth College and earned his J.D. from the University of Tennessee College of Law in 1990.

Dr. Leonard Pianko

Dr. Pianko practices in Aventura, Florida and specializes in cardiovascular disease and internal medicine. He is the founder of the Aventura Cardiovascular Center. Dr. Pianko is board certified in cardiology and internal medicine with special expertise in cardiovascular disease, preventive cardiology, and non-invasive treatment options, including echocardiogram and nuclear stress testing. He is a native of New York, born in the Bronx, and earned an undergraduate degree from Yeshiva University in New York before receiving his medical education at top-ranked Mount Sinai School of Medicine and completing his training at the prestigious Robert Wood Johnson School of Medicine in New Brunswick, New Jersey. Recognized as a "Top Doctor" by Castle Connolly, Dr. Pianko is proud to call himself a "patient advocate," working together with his patients in order to educate on best practices and tailored treatment options—from lifestyle and preventive to diagnostic and clinical. Central to his practice is an unwavering commitment to compassionate and quality care, supporting patients and their families throughout their medical decision-making processes.

Professor Wayne C. Schiess

Professor Schiess joined the faculty at The University of Texas School of Law in 1992, after three years of law practice in the Dallas office of Baker Botts, LLP. Professor Schiess is the director of the legal-writing program and teaches legal writing, legal drafting, and plain English. He is also a frequent seminar speaker on those subjects. He has published more than a dozen articles on practical legal-writing skills, plus two books: Writing for the Legal Audience and Better Legal Writing. He expects his third and fourth books on legal writing to be published soon. He received his Juris Doctor from Cornell Law School. In 2012 and 2015, he was chosen as the Law School's legal-writing teacher of the year. In 2011, the Texas Pattern Jury Charges Plain Language Project, for which he was the drafting consultant, was named a finalist for a ClearMark Award by the Center for Plain Language. He blogs on legal writing at LEGIBLE.

Honorable Robert Swisher

Robert Swisher is the Chief Judge of the Kentucky Department of Workers' Claims. Appointed to the bench in 2009 by Governor Beshear, Judge Swisher became the Chief Judge in 2014. Prior to his appointment, Judge Swisher was a partner with the Northern Kentucky based workers' compensation defense firm of Jones, Dietz & Swisher. He is a graduate of the University of Notre Dame and the University of Kentucky College of Law. He has been licensed to practice law since 1979.

Honorable Kenneth Switzer

Kenneth M. Switzer is the Chief Judge of the Tennessee Court of Compensation Claims. He graduated from David Lipscomb College and earned his law degree from the University of Louisville. Judge Switzer has been practicing law almost forty years, since 1977. He has been a litigator and a mediator in workers' compensation personal injury and medical malpractice. Judge Switzer is certified by the National Board of Trial Advocacy. During his practice, he has been a frequent speaker at educational seminars on the subjects of civil trial and workers' compensation practice.

Honorable James Szablewicz

Jim Szablewicz is the Chief Deputy Commissioner of the Virginia Workers' Compensation Commission and has been in that position since April 2004. In this capacity, he supervises the Judicial Division of the Commission, including the functions of the Commission's Clerk's Office, six Regional Offices and all of the Deputy Commissioners state-wide. Prior to becoming Chief Deputy Commissioner, Jim served as a Deputy Commissioner for two years, and was engaged in the private practice of law on Virginia's Eastern Shore for eleven years, primarily representing injured workers. Jim received his B.A. in Political Science from Yale University in 1984 and his J.D. from the University of Virginia School of Law in 1987.

Honorable Aisha Taylor

Commissioner Aisha Taylor was appointed to the SC Workers' Compensation Commission on January 31, 2013. Before serving on the Commission, Commissioner Taylor was a shareholder in the law firm Collins & Lacy, practicing primarily in workers' compensation defense and employment law. Commissioner Taylor graduated from the University of South Carolina where she was a team captain of the 2002 Women's Track & Field National Championship Team. Following her graduation from the University of South Carolina School of Law, Commissioner Taylor clerked for the Honorable Brooks P. Goldsmith of South Carolina's Sixth Judicial Circuit. She and her husband, Henry, live in Blythewood, South Carolina with their three children.

Honorable Nicole Tifverman

Nicole Tifverman is an Administrative Law Judge with the Georgia State Board of Workers' Compensation in Savannah. Prior to her appointment as an ALJ in 2011, she practiced workers' compensation law for twenty-four years, representing employees, employers, and insurers. She hears cases in Savannah, Claxton, and Millen, and also mediates when her schedule permits. Judge Tifverman received her B.A., with highest distinction, from the University of Rhode Island and her J.D. from Emory University School of Law.

Honorable David Torrey

David B. Torrey, a native of Alexandria, VA, has been a Workers' Compensation Judge with the Pennsylvania Department of Labor & Industry since 1993. He is Adjunct Professor of Law, University of Pittsburgh School of Law (1996-present). He is also the Editor of the Pennsylvania Bar Association Workers' Compensation Newsletter (1988-present). He received his A.B., 1982, from West Virginia University; and his J.D., 1985, from Duquesne University School of Law. While in law school, he was Editor-in-Chief of the Duquesne Law Review (Volume 23, 1984-85). In 2010 he was elected to membership in the National Academy of Social Insurance. He is the Immediate Past President of the National Association of Workers' Compensation Judiciary; and a Fellow and Secretary of the College of Workers' Compensation Lawyers. In 2008, he published the Third Edition of his treatise, Torrey & Greenberg, Pennsylvania Workers' Compensation: Law & Practice (4 Volumes: Thomson-Reuters 3rd ed. 2008 & Supp. 2015). He also served in the U.S. Army (1976-1979), and in the West Virginia Army National Guard (1979-1982).

Russell L. Travis, M.D.

Russell L. Travis is a neurological surgeon from Lexington, Kentucky. He is a former president of the American Association of Neurological Surgeons. Dr. Travis attended Centre College in Danville, and received his medical degree from the University of Louisville. Following his residency at the Medical College Hospital of South Carolina, Dr. Travis returned to Lexington to begin his practice as a neurological surgeon. One of Dr. Travis' most outstanding contributions has been his commitment to ensuring that all Kentucky citizens have access to affordable, quality health care. As both an advocate for change at a legislative level and as a volunteer in the field, his efforts are widely known and appreciated. Almost every week for the past 25 years, Dr. Travis has traveled hundreds of miles to see patients in places where you wouldn't normally find a neurosurgeon. He played a key role in the formation of Kentucky Physicians Care, a group of physicians who volunteer their services to provide free medical care to the less fortunate in their communities. This national recognized program was the first all-volunteer, nongovernment-sponsored statewide program of its kind in the country. To ensure its success, Dr. Travis traveled to every part of the State at his own expense, encouraging his colleagues to participate. Since 1985 more than 300,000 Kentucky citizens have received needed medical attention from Dr. Travis' physician volunteers.

Glen Wieland, Esq.

Born and raised in Orlando, Glen Wieland seemed destined to be a lawyer, his father as well as his brothers were attorneys. "My father was a very big influence on all three of us," he says. "He was one of the original workers' comp lawyers in town before he sat as a judge for 23 years." No surprise that Mr. Wieland, who has been practicing for over 25 years himself, has been Board Certified in Workers' Compensation since 1990. The firm, Wieland Hilado & DeLattre, represents individuals injured or who have suffered loses as a result of automobile accidents, premises accidents or job-related accidents. Mr. Wieland has served as president of the Florida Workers' Advocates, a statewide organization of trial attorneys who specialize in workers' compensation. His other areas of practice include personal injury, automobile negligence, insurance disputes, wrongful death, toxic torts and social security disability. Mr. Wieland completed his undergraduate studies at Presbyterian College in South Carolina before receiving his law degree from The Cumberland School of Law in Birmingham, Alabama. He returned to Orlando in 1982 and began practicing law at Walker & Buckmaster, where he stayed for five years. He left to partner with another attorney for more than 10 years before forming Wieland Hilado & DeLattre. As one of three attorneys, Mr. Wieland prefers the personal interaction between attorneys that can be found only at a smaller firm. He is admitted to practice before the Middle Court of Florida, the Eleventh Circuit Court of Appeals and the U.S. Supreme Court. He has been selected by his peers to be included as a member of The Best Lawyers in America. He has spoken on behalf of injured workers at national meetings of the National Council of Insurance Legislators. He has also been recognized by Orlando Magazine as one of Orlando's Best Attorneys. Martindale Hubbell rates attorneys worldwide and has awarded Wieland its highest rating, AV. He belongs to the Million Dollar Advocates Forum devoted only to trial lawyers who have achieved a settlement or verdict of a million dollars or more. Mr. Wieland's parents inspired him with the idea of giving back to the community. His mother was personally recognized by President George W. Bush for having spent over 50 years in continuous volunteer work for the community. He is a past-chairman and trustee for the Orlando Area Trust for the Homeless, Chancellor of Anglican Diocese of the East and Anglican Province of America. He is married to Kennie Wieland and has two children, Billy and David.

Honorable Jane Williams

Jane Rice Williams is an Administrative Law Judge with the Kentucky Department of Workers' Claims. Judge Williams received her Bachelor of Arts from the University of Kentucky and Juris Doctorate from Salmon P. Chase College of Law. She was admitted to the practice of law in the Commonwealth of Kentucky in October of 1995 and is a member of the Kentucky and Laurel County Bar Associations.

Judge Williams is a native of Harlan, Kentucky. She was in private practice in Lexington and then London from 1995 until July 2012 handling a variety of civil matters with a concentration on workers' compensation law representing both plaintiffs and defendants. Judge Williams was appointed as an Administrative Law Judge and has served in that position since July 15, 2012.

Sixth Annual National Regulators Roundtable

This year celebrates the 6th Annual National Regulators Roundtable, sponsored by the Southern Association of Workers' Compensation Administrators (SAWCA). This session brings together regulators from throughout the country to discuss challenges, concerns and issues facing individual jurisdictions in the oversight of the ever-changing workers' compensation industry. Problems may have already been successfully addressed by other jurisdictions; developing issues of concern in one state may be an omen for future developments in another and legislative issues know no boundaries. The National Regulators Roundtable is a forum where regulators share lessons learned and seek timely answers to their most pressing issues.

Topics may include: Emerging Medical Treatments; Employer Compliance; Adjudication of Benefits; Managing the Legislative Environment; Technology, and ending with an open forum providing the audience the opportunity to raise their own issues and concerns for the regulators to address.

The 6h Annual National Regulators Roundtable remains open to all WCI attendees, representing a unique opportunity for participants and audience alike. Be sure to join us as the regulatory leadership from across the nation gathers in Orlando addressing those topics that shape our industry.

Welcome:
Gary Davis
Secretary / Treasurer
SAWCA Lexington, KY

Moderator:
Honorable Melodie L. Belcher
SAWCA Past-President
Administrative Law Judge
Georgia State Board of
Workers' Compensation
Columbus, GA

Arizona
Honorable Luann Haley
Judge
Industrial Commission of
Arizona
Tucson, AZ

Colorado
Paul Tauriello
Director
Division of Workers'
Compensation
Denver, CO

Florida
Tanner Holloman
Director
Division of Workers'
Compensation
Tallahassee, FL

Florida
Honorable David Langham
Deputy Chief Judge
Florida Office of Judges of
Compensation Claims
Pensacola, FL

Florida
Andrew Sabolic
Assistant Director
Division of Workers'
Compensation
Tallahassee, FL

Georgia
Honorable Frank McKay
Chairman
Georgia State Board of Workers'
Compensation
Atlanta, GA

Kansas
Larry G. Karns
Director
Division of Workers'
Compensation
Topeka, KS

Kentucky
Honorable Dwight T. Lovan
Commissioner
Department of Workers' Claims
Frankfort, KY

Louisiana
Sheral Kellar
Louisiana Office of
Workers' Compensation
Administration
Baton Rouge, LA

Maine
Honorable Paul H. Sighinolfi,
Executive Director/Chair
Workers' Compensation Board
Augusta, ME

Maryland
Honorable R. Karl Aumann
Chairman
Maryland Workers'
Compensation Commission
Baltimore, MD

Maryland
Scott Curtis
Assistant Attorney General
Maryland Workers'
Compensation Commission
Baltimore, MD

Mississippi
Honorable Deneise Lott
Administrative Law Judge
Mississippi Workers'
Compensation Commission
Jackson, MS

Nebraska
Hon. Tom Stine
Judge
Workers' Compensation
Court
Lincoln, NE

New Mexico
Darin Childers
Director
New Mexico Workers'
Compensation Administration
Albuquerque, NM

Oklahoma
Honorable Bob Gilliland
Commissioner
Oklahoma Workers'
Compensation Commission
Oklahoma City, OK

Pennsylvania
Honorable Elizabeth Crum
Director of Adjudication
Pennsylvania Department of
Labor & Industry
Harrisburg, PA

South Carolina
Gary M. Cannon
Executive Director
South Carolina Workers'
Compensation Commission
Columbia, SC

Tennessee
Kenneth Switzer
Chief Judge
Tennessee Court of Workers' Claims
Nashville, TN

Texas
Honorable Ryan Brannan
Commissioner
Texas Division of Workers'
Compensation
Austin, TX

Virginia
Honorable Roger Williams
Commissioner
Virginia Workers' Compensation
Commission
Richmond, VA

Washington
David Threedy
Chair
Board of Industrial Insurance
Appeals
Olympia, WA

Wisconsin
Joe Moreth
Director, Bureau of Insurance
Programs
Wisconsin Worker's
Compensation Division

NAWCJ
National Association of Workers' Compensation Judiciary
P.O. Box 200, Tallahassee, FL 32302; 850.425.8156 Fax 850.521-0222

1 *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067, 1081 (N.D. Cal. 2015).

2 *See NLRB v. Hearst Publications, Inc.,* 322 U.S. 111 (1944) (grappling with the question of whether a union of newsboys were employees or independent contractors under the National Labor Relations Act).

3 The "sharing economy" is also referred to as the "peer-to-peer marketplace" and "online gig economy" and this essay will use these terms interchangeably. Automobile transportation applications (apps) like Uber and Lyft are often referred to as "driver-on-demand" services. Both Uber and Lyft are essentially taxi services, but the drivers are private individuals using their own vehicles who are paired with customers via a smartphone app. The unifying feature in these sharing economy business models is that they rely on freelance labor and pair individual service-providers with consumers via online apps or websites. *See* Lauren Weber and Rachel Emma Silverman, *On-Demand Workers: 'We Are Not Robots'*, WALL STREET JOURNAL (Jan. 27, 2015), http://www.wsj.com/articles/on-demand-workers-we-are-not-robots-1422406524?KEYWORDS=on+demand+job (explaining companies like Uber and others that utilize the sharing economy "rely on freelance labor" and "describe their workers as micro-entrepreneurs at the vanguard of a new flexible future of work in which people only do the jobs they like, when they like").

4 Uber's recent valuation at $50-billion demonstrates just how readily consumers have adopted the peer-to-peer marketplace. Douglas MacMillan and Telis Demos, *Uber Valued at More Than $50 Billion*, WALL STREET JOURNAL (July 31, 2015, 8:50 p.m.), http://www.wsj.com/articles/uber-valued-at-more-than-50-billion-1438367457. There are 17 sharing economy businesses worth more than $1-billion. James B. Shrimp, *Uber and the Heightened Scrutiny of Independent Contractor Status*, THE LEGAL INTELLIGENCER (Sept. 30, 2015), http://www.thelegalintelligencer.com/id=1202738521960/Uber-and-the-Heightened-Scrutiny-of-Independent-Contractor-Status?slreturn=20160014234905.

5 There are a bevy of legal issues that arise from the distinction between independent contractor and employee, of which the receipt of workers' compensation is only one. Other benefits of being an employee as opposed to an independent contractor include expense reimbursement, unemployment insurance, discrimination protection and organization for collective bargaining. However, this essay will focus on workers' compensation.

6 Ellen Huet, *What Happens to Uber Drivers and Other Sharing Economy Workers Injured on the Job?*, FORBES (Jan. 6, 2015, 1:15 p.m.), http://www.forbes.com/sites/ellenhuet/2015/01/06/workers-compensation-uber-drivers-sharing-economy/.

7 *Cotter*, 60 F. Supp. 3d at 1069.

8 *Id.*

9 *Id.*

10 *Hearst Publications, Inc.*, 322 U.S. at 113.

11 *Id.* at 116. However, this description was for only one element of the diverse group of "newsboys" petitioning the Court in *Hearst*. The union also included individuals the Court referred to as "vendors," in a reflection of the vendors' more secure and traditional style of employment.

12 *Id.* at 117-19.

13 *Id.* This distinction is not of small significance. Workers' compensation pays for medical bills and lost wages. If an individual working in today's sharing economy worked wildly inconsistent hours before getting injured, calculating that individual's lost wages would impose a very difficult practical problem on workers' compensation judges. See Seth D. Harris and Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* BROOKINGS INSTITUTION: THE HAMILTON PROJECT, 13 (December 2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf (explaining the immeasurability of sharing economy workers' hours).

14 *Hearst Publications, Inc.*, 322 U.S at 120.

15 *Hearst Publications, Inc.*, 322 U.S at 130.

16 Interestingly, because the question of whether an individual is an employee or independent contractor is so important, the Truman Administration attempted to reverse the Supreme Court's decision in *Hearst Publications, Inc.* with the Taft-Hartley Act. Justin Fox, *Uber and the Not-Quite-Independent Contractor*, BLOOMBERG VIEW (June 23, 2015, 11:59 a.m.), http://www.bloombergview.com/articles/2015-06-23/uber-drivers-are-neither-employees-nor-contractors.

17 512 F.3d 1090 (9th Cir. 2008).

18 *Id.* at 1097. Note that this is unlike Uber drivers, who are paid a percentage of their fares.

19 *Id.* at 1097-98. Note that Uber drivers similarly have flexible hours and have agreements identifying them as independent contractors.

20 *Id.* at 1098.

21 512 F.2d 354 (9th Cir. 1975)

22 *Friendly Cab Co., Inc.*, 512 F.3d at 1098.

23 *Id.* at 1098, 1100.

24 *Id*. at 1098-99 (citing SIDA, 512 F.2d at 357-58).

25 *See Cotter*, 60 F.Supp. 3d at 1075-76 (explaining the focus of California's test is on the company's right to control).

26 Huet, *supra* note 6; Harris and Krueger, *supra* note 13 at 6-8.

27 Huet, *supra* note 6 (quoting Nick Woodfield, an attorney with the Employment Law Group).

28 Harris and Krueger, *supra* note 13 at 9. Note that Harris and Krueger have created a new classification for sharing economy workers that they call the "independent worker," which will be discussed more in depth in Section IV.

29 Huet, *supra* note 6.

30 *Cotter*, 60 F. Supp. At 1081.

31 *Id*. at 1074.

32 *Id*.

33 *Id*. at 1076 (citations omitted).

34 *Id*.

35 *Id*. at 1078.

36 *Id*. at 1079.

37 "Press Release: Uber Agrees to Stop Worker Misclassification in Alaska," State of Alaska Dep't of Labor and Workforce Development (Sept. 3, 2015), http://labor.alaska.gov/news/2015/news15-38.pdf.

38 *Id*.

39 *Id*.

40 Alaska is the 48th-most populated state. As of the writing of this essay, Uber is not operating in Alaska due to the September 3, 2015 settlement. Uber has essentially forfeited Alaskan business over the worker misclassification issue. If, for instance, California's state government adopted the position of Alaska, Uber's business would be seriously impaired and a change in its business model would likely be necessary, as opposed to merely refusing to operate in that state. Not only is Uber's headquarters in San Francisco, California, but California, the nation's most populous state, has an estimated 160,000 Uber drivers, which would surely lead to a far more expensive settlement and detrimental loss of business. *See* Katy Steinmetz, *California Court Gets One Step Closer to Deciding Uber's Fate*, TIME (Aug. 6, 2015), http://time.com/3988272/uber-class-action-lawsuit/ (explaining the United States District Court of Norther California's decision in an analogous FedEx workers misclassification suit and its potential impact on Uber's pending class action case in that federal court).

41 Fox, *supra* note 16.

42 H.W. Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 Univ. of Toronto Law J. 89 (1965).

43 Harris and Krueger, *supra* note 13 at 7.

44 Arthurs, *supra* note 42 at 89.

45 *Id*. at 96.

46 Lydia DePillis, *No, driver lawsuits won't destroy the 'Uber for X' business model*, THE WASHINGTON POST (March 13, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/03/13/no-driver-lawsuits-wont-destroy-the-uber-for-x-business-model/.

47 Katy Steinmetz, *Why Startups Are Making the Expensive Switch to Traditional Employment*, TIME (Aug. 5, 2015), http://time.com/3984957/independent-contractor-versus-employee-startups/.

48 *Id*.

49 *Id*.

50 DePillis, *supra* note 46.

51 Harris and Krueger, *supra* note 13, at 15.

52 *Id.* at 19; Huet, *supra* note 6.

53 Harris and Krueger, *supra* note 13, at 19.

54 *Id*.

55 *Id*.

56 Stephanie Ross, *Uber Drives Insurance Industry to Innovate*, WORKERS' COMPENSATION INSTITUTE (Oct. 12, 2015), http://www.wci360.com/news/article/uber-drives-insurance-industry-to-innovate.

57 *Id*.

58 *See* Huet, *supra* note 6 (detailing the story of an Uber driver who was assaulted by a passenger).

59 Huet, *supra* note 6; *see also* Arun Sundararajan, *A safety net fit for the sharing economy*, FINANCIAL TIMES (June 22, 2015, 6:07 p.m.), http://www.ft.com/cms/s/0/b1d854de-169f-11e5-b07f-00144feabdc0.html#axzz3xI8kmxVO (arguing that "market-based solutions can work" to provide insurance to workers, much as private pensions are now standard).

60 Huet, *supra* note 6.

Endnotes *Holding a Square Peg, Paged 17-23*

[61] While technology in the form of apps have expanded the sharing economy through companies like Uber, Lyft, Instacart, and Postmates and thereby grown the complex independent contractor versus employee question, technology may also soon eradicate this problem, at least for drivers-on-demand. Uber is ferociously working toward a self-driving car, the successful implementation of which could erase the need for human drivers altogether. Jillian D'Onfro, *Travis Kalanick says Uber needs self-driving cars to avoid ending up like the taxi industry*, BUSINESS INSIDER (Oct. 21, 2015, 12:48 a.m.), http://www.businessinsider.com/uber-ceo-travis-kalanick-on-self-driving-cars-2015-10.

[62] Ross, *supra* note 56.

[63] *Cotter*, 60 F. Supp. 3d at 1081.

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Endnotes *Haters Gonna Hate, Paged 24-29*

[1] 1-1 Larson's Workers' Compensation Law § 1.01 (2015).

[2] *See* Lakeside Casino v. Blue, 743 N.W.2d 169, 174 (Iowa 2007) ("The element of 'arising out of' requires proof 'that a causal connection exists between the conditions of [the] employment and the injury.'"); *see also* Miedema v. Dial Corp., 551 N.W.2d 309, 311 (Iowa 1996) ("[T]he injury must not have coincidentally occurred while at work, but must in some way be caused by or related to the working environment or the conditions of [the] employment."); *but see* Tredway v. District of Columbia, 403 A.2d 732, 736 (D.C. 1979) ("While it is true that such a causal relation is required under many state workmen's compensation acts, the rule under the federal compensation act has been much more liberal to [federal] employees.").

[3] *See* Tooey v. AK Steel Corp., 81 A.3d 851, 860 (Pa. 2013) ("[W]hen reviewing issues concerning the [Pennsylvania Workers' Compensation] Act, we are mindful that the Act is remedial in nature and its purpose is to benefit the workers of this Commonwealth.").

[4] Mariko Yamada, *Racial Violence and Workers' Compensation: Calif. Assembly member Mariko Yamada on Her Assembly Bill 1093 – "Taneka's Law,"* LexisNexis Legal News Room (Jun. 1, 2009, 8:44 PM), http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2009/06/01/racial-violence-and-workers_2700_-compensation_3a00_-calif.-assemblymember-mariko-yamada-on-her-assembly-bill-1093-_2d00_-_2200_taneka_2700_s-law_2200_.aspx.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

10 *See* Press Release, *Combating Hate Crimes in Every State: ADL Launches "50 States Against Hate," New Campaign for Tougher Hate Crimes Laws All Across the Country*, (Aug. 17, 2015), http://www.adl.org/press-center/press-releases/hate-crimes/adl-launches-50-states-against-hate.html?referrer=https://www.google.com/#.Vlsa79-rRAY (Anti-Defamation League launches an initiative for stronger hate crime laws).

11 *See also* Hate Incident, Southern Poverty Law Clinic (last visited December 5, 2015) https://www.splcenter.org/fighting-hate/hate-incidents (database listing reported hate crimes in each state).

12 Cal Lab Code § 3600(c) (2015) ("For purposes of determining whether to grant or deny a workers' compensation claim, if an employee is injured or killed by a third party in the course of the employee's employment, no personal relationship or personal connection shall be deemed to exist between the employee and the third party based only on a determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, disability, sex, gender, gender identity, gender expression, or sexual orientation.").

13 This author performed a comprehensive search of each states workers' compensation laws and has found no other statute similar to California's hate crime statute.

14 This author performed a comprehensive search and has found only dicta discussion explaining if a hate crime may be compensable under workers' compensation. *See infra* note 61.

15 *See infra* Part IV.

16 1-1 Larson's Workers' Compensation Law § 1.01 (2015).

17 *Id.* at § 3.01.

18 *Id.*

19 *Id.*

20 This author notes there are different risk analyses applied in each state. However, as discussed in this section, every jurisdiction accepts injuries from assault categorized as a professional risk. 1-8 Larson's Workers' Compensation Law § 8.01 (2015). Furthermore, if an assault is categorized as a neutral risk, a growing majority of jurisdictions will expressly apply the positional or but-for test, and recognize the injuries from the assault as compensable. 1-8 Larson's Workers' Compensation Law § 8.03 (2015).

21 1-4 Larson's Workers' Compensation Law § 4 (2015).

22 *Id.* Larson also identifies a category of mixed risk. However, for this article, this risk is irrelevant.

23 1-4 Larson's Workers' Compensation Law § 4.01 (2015).

24 *Id.*

25 1-4 Larson's Workers' Compensation Law § 4.02 (2015).

26 *Id*. However, for federal employees, personal risks of injury may be compensable. *See* Tredway v. District of Columbia, 403 A.2d 732, 736 (D.C. 1979)("[Federal Employees' Compensation Act (FECA)] coverage cannot be denied on the grounds that the injury was not an inherent risk or hazard of the type of job. All that is required is that the injury result from a risk incidental to the environment in which the employment places the claimant.").

27 1-4 Larson's Workers' Compensation Law § 4.03 (2015).

28 *Id.*

29 *Id.* Compensability will also depend on the particular risk analysis applied in each jurisdiction. *See* 1-3 Larson's Workers' Compensation Law, chapter 3 (2015).

30 1-8 Larson's Workers' Compensation Law § 8.03 (2015).

31 *Id.*

32 *See* 1-8 Larson's Workers' Compensation Law § 8.01 (listing the common work disputes not covered under workers' compensation).

33 1-8 Larson's Workers' Compensation Law § 8.01 (2015); *see also* Williams v. Munford, Inc., 683 F.2d 938 (5th Cir. 1982) (convenience store clerk was raped during store robbery located in a high-crime area. Court found rape compensable).

34 *See* 1-8 Larson's Workers' Compensation Law § 8.01(1)(a) (listing the type of professions with dangerous duties).

35 1-8 Larson's Workers' Compensation Law § 8.02 (2015).

36 *Id.*

37 1-8 Larson's Workers' Compensation Law § 8.03 (2015).

38 *Id.*

39 *Supra* note 2.

40 1-4 Larson's Workers' Compensation Law § 4.02 (2015).

41 1-9 Larson's Workers' Compensation Law § 9.03 (2015).

42 *See* 77 P.S. § 411.

43 *Id.*

44 *Williams v. Munford, Inc.*, 683 F.2d at 939.

45 Mike v. Aliquippa, 421 A.2d 251, 254 (Pa. Super. 1980).

46 *Id.*

47 *See* 720 ILCS 5/12-7.1 (2015) (Illinois' hate crime statute).

48 *Supra* Part 2.

49 *See* Robert Costa et al., *Church Shooting Suspect Dylann Roof Captured Amid Hate Crime Investigation*, The Washington Post, (June 8, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/17/white-gunman-sought-in-shooting-at-historic-charleston-african-ame-church/ (discussing mass shooting occurring during a church service).

50 *See* Wesley Lowery, *Man Arrested in Bombing Near Colorado Springs NAACP Office*, The Washington Post, (February 20, 2015), https://www.washingtonpost.com/news/post- nation/wp/2015/02/20/man-arrested-in-bombing-near-colorado-springs-naacp-office/ (discussing bombing occurring near an NAACP office. However, while initially thought a hate crime, the accused argued he attempted to bomb an accountant in the same building, not the NAACP office).

[51] *See* E.R. Shipp, *Murder Suspect in Villiage Found not Responsible*, THE N.Y. TIMES (July 25, 1981), http://www.nytimes.com/1981/07/25/nyregion/murder-suspect-in-village-found-not-responsible.html (discussing the shooting of a gay bar in New York where the doorman was killed and the assailant committed the shooting believing gays were agents of the devil).

[52] *See* Julie Turkewitz and Jack Healy, *3 Are Dead in Colorado Springs Shootout at Planned Parenthood Center*, THE N.Y. TIMES, (November 28, 2015), http://www.nytimes.com/2015/11/28/us/colorado-planned-parenthood-shooting.html (discussing the shooting of a Planned Parenthood Center).

[53] *See supra* note 23.

[54] *See* Vincent Roy, *10 Most Racist Cities in America Ranked by Hate Crimes*, Insider Monkey (August 21, 2015), http://www.insidermonkey.com/blog/10-most-racist-cities-in-america-ranked-by-hate-crimes-366373/ (listing the 10 most racist cities in American Ranked by Hate Crimes).

[55] *See supra* note 23.

[56] *See* Katherine E. Finkelstein, *5 People are Shot to Death, and a Lawyer is Arrested*, THE N.Y. TIMES, (April 29, 2000), http://www.nytimes.com/2000/04/29/us/5-people-are-shot-to-death-and-a-lawyer-is-arrested.html (discussing man who went on a racist motivated shooting spree, killing 2 Asian employees in a Chinese restaurant).

[57] *See Four Valley Men Accused of Committing Race Crimes*, Los Angeles Daily News (February 3, 2009), http://www.dailynews.com/general-news/20090203/four-valley-men-accused-of-committing-race-crimes (men charged with two counts of assault with a firearm after they allegedly threatened a barbershop owner and his patrons, all of whom were black).

[58] *See supra* note 47.

[59] *See* 1-8 Larson's Workers' Compensation Law § 8.02D (discussing the various state applications of the personal animus exception). For more discussion on the personal animus exception, see Note, *Intentional Employer Misconduct and Pennsylvania's Exclusive Remedy Rule after Poyser v. Newman & Co.: A Proposal for Legislative Reform*, 49 U. Pitt. L. Rev. 1127 (1988); *see also* Nathaniel R. Boulton, *Establishing Causation in Iowa Workers' Compensation Law: An Analysis of Common Disputes Over the Compensability of Certain Injuries*, 59 Drake L. Rev. 463 (2011).

[60] *Supra* note 14.

[61] 133 Cal. App. 3d 643 (1982).

[62] *Id.* at 646.

[63] *Id.* at 647.

[64] *Id.* at 648.

[65] *Id.*

[66] *Id.* at 649.

[67] *Id.* at 649-50

[68] *Id.* at 655-57.

[69] *Id.*

[70] *Id.* at 654.

[71] *Id.* at 656.

[72] *Supra* note 4.

[73] *Id.*

[74] *Id.* This author notes that in *State Compensation Insurance Fund v. WCAB (Vazquez de Vargas)*, a personal relationship between the killers and the employees did develop outside the employees' employment, given the purported car sale and robbery in relation to the car sale. That being said, the dicta creates the overarching inference that general hatred alone may make a hate crime personal and not compensable.

[75] *See Williams v. Munford, Inc.*, 683 F.2d at 939.

[76] Joyner v. Sch. Dist., 313 F.Supp. 2d 495, 503 (E.D. Pa. 2004).

[77] *Id.*

[78] *Id.* (emphasis added).

[79] Krasevic v. Goodwill Indus. of Cent. Pa., Inc., 764 A.2d 561, 565-66 (Pa. Super. 2000) (emphasis added).

[80] *See* Mike v. Borough of Aliquippa, 421 A.2d 251, 255 (Pa. Super. 1980) ("the lack of pre-existing animosity between the combatants strongly suggests that the motive for the attack was work-related and not because of reasons personal to the assailant.").

[81] 940 A.2d 1255 (Pa. Cmwlth. 2008).

[82] *Id.* at 1256.

[83] *Id.* at 1257.

[84] *Id.* at 1259.

[85] *Id.* at 1256.

[86] *Supra* note 44.

[87] *Supra* note 2.

[88] *Supra* note 14.

[89] *See Rape*, Black's Law Dictionary, (10th ed. 2014) (defining "rape" as unlawful sexual activity with a person, usually a female, without consent and usually by force or threat of force).

[90] 764 A.2d 561 (Pa. Super. 2000).

[91] *Id.* at 563.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 567.

[95] *Id.*

[96] *Id.*; *but see* 1-8 Larson's Workers' Compensation Law § 8.01 ("While it may be admitted that there is no clearer example of non-industrial motive than rape, it is equally clear, and has been held by the United States Supreme Court, that employment which requires women to be in isolated places is a causal factor contributing to such an attack.").

[97] *Id.*

[98] *Id.*

[99] *But see* Tredway v. District of Columbia, 403 A.2d 732 (D.C. 1979) (holding that a teacher's injuries resulting from her rape by two strangers in her classroom were covered by FECA. "FECA coverage cannot be denied on the grounds that the injury was not an inherent risk or hazard of the type of job. All that is required [under FECA] is that injury result from a risk incidental to the environment in which the employment places the claimant.")

[100] For further discussion on rape in the workplace, see Martha S. Davis, *Rape in the Workplace*, 41 S.D. L. Rev. 411 (1996).

[101] Rudy v. McCloskey & Co., 35 A.2d 250 (Pa. 1944).

[102] David B. Torrey & Andrew E. Greenberg, *Workers' Compensation Law and Practice* § 1:13 (3d ed. 2008).

[103] *Id.*

[104] *Supra* Part II.

[105] David B. Torrey & Andrew E. Greenberg, *Workers' Compensation Law and Practice* § 1:12 (3d ed. 2008).

[106] *Id.*

[107] *Supra* note 47.

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[108] *See* Rodgers v. Workers' Comp. Appeals Bd., 36 682 P.2d 1068, 1082-83 (Cal. 1984) ("Unlike civil damages, compensation benefits are not intended to make whole, persons who have suffered 'detriment from the unlawful act or omission of another.' Unrelated to concepts of 'fault' or 'wrong,' benefits paid under the compensation system are ultimately tied to the notion that injured workers are to be compensated for their loss of competitive status in the labor market. The purpose of workers' compensation is to rehabilitate, not to indemnify."); *see also* S. Coast Framing, Inc. v. Workers' Comp. Appeals Bd., 61 Cal. App. 4th 291, 299 (Cal. Ct. App. 2015) ("Under workers' compensation, generally, liability is mitigated by apportioning monetary compensation to the degree that an industrial injury contributed to the disability."); *and* Ferguson v. Workers' Comp. Appeals Bd., 33 Cal. App. 4th 1613, 1625-26 (Cal. Ct. App. 1995) (explaining that compensatory damages under tort law include (1) the reasonable value of necessary medical expenses thus far incurred and fairly certain to be incurred in the future; (2) the value of loss of earnings or impairment of earning capacity from the time of injury to the time of settlement and loss or impairment of future earning capacity; (3) a reasonable compensation for physical pain, physical disability and mental suffering, including past and future; and (4) the value of all other special losses or expenses that can be proven.).

[109] *See* Tooey v. AK Steel Corp., 81 A.3d 851, 860 (Pa. 2013) ("[W]hen reviewing issues concerning the [Pennsylvania Workers' Compensation] Act, we are mindful that the Act is remedial in nature and its purpose is to benefit the workers of this Commonwealth.").

[110] *See supra* Part IV.

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