THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

NEWSLETTER - FALL 2019

# IN THIS ISSUE



## PRESIDENT KIP KUBIN'S MESSAGE

Summer may be coming to a close, the business of the College continues on. The Board of Governors just completed its annual meeting in Chicago. At that meeting we welcomed new board members **Dill Battle** (WV), **Leonard Jernigan** (NC), **Paul Riegel** (WI) and **Cathy Surbeck** (PA) to the board. We are honored to have them join us. There are several items to bring to your attention as the last quarter of the year gets underway.

First, thanks to all of you who took the time to fill out the online questionnaire for the College. We had nearly a 50 percent participation rate, which is very high for that type of survey. The survey closed on August 31, and we will now analyze the answers and see if we can discern some short and medium term goals, based on that information. A full report will be provided to the membership at the induction dinner which will be held on in conjunction with the ABA Midwinter Workers' Compensation Meeting in New Orleans, LA on March 27-28. You will be receiving more information on that through emails in the next several weeks.

Second, the nomination process officially opened on September 1, 2019. The College is now actively seeking nominations for the 2020 Class of Fellows, who will be inducted in New Orleans. You should have received an email outlining the nomination process. All nominations and supporting references must be provided to our Executive Director Susan Wan before November 1, 2019. Once those nominations have been received a list of

the nominees will be sent to all Fellows for comment. Those comments and nomination forms will then be considered by the Nominating Committee, which is being chaired by **Robert Wisniewski**, which will report its recommendations to the Board for consideration on December 9, 2019. The new class of Fellows will then be notified by the Board on or before December 17, 2019. Unfortunately, these deadlines are jurisdictional, and cannot be extended. So, please, have your nominations and documents to Susan before November 1, 2019, so no deserving candidate is rejected because the information was not timely.

Finally, as mentioned earlier, the ABA Midwinter Workers' Compensation Conference will be held on March 27-28, 2020 in New Orleans. The headquarters for the event will be the Westin New Orleans Canal Place. For all of you who may not be aware, this meeting for years has been co-sponsored by the Tort Trial and Insurance Practice Section and the Labor and Employment Law Section of the ABA. Over the last several years, the College has provided the last morning of content for that meeting with its annual symposium. This year is no different. The College will provide the panels and speakers for the Saturday morning programing. I especially want to thank Fellow **Phyllis Phillips** for coordinating this year's speakers and panels. This, however, may be the last year of that arrangement. The Labor and Employment section has disbanded its Workers' Compensation Committee and it appears that 2020 will be the last co-sponsored event between the two sections. The College has always coordinated its Induction Dinner with this meeting and that may well have to change. The College is exploring a continuing relationship with the TTIP Section for an "every other year" seminar and, on the years where there is no ABA Midwinter Seminar, we are considering the possibility of hosting a separate symposium or partnering with another entity. This development will likely give us greater flexibility in providing programming that will benefit our College membership and serve as a premier educational opportunity for those who wish to learn more about workers' compensation. If you have thoughts or suggestions, please contact me or one of the board members to give us your suggestions or volunteer to help.

I look forward to seeing all of you in New Orleans.

*Kip Kubin*
*Overland Park, KS*

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## NOMINATIONS ARE NOW BEING ACCEPTED FOR THE CLASS OF 2020

The nomination process officially began on **September 1, 2019**. Forms were emailed to all Fellows in August, but if you would like another copy, feel free to contact Susan Wan. Please review all of the forms carefully as they contain not only the qualifications necessary for admission but also the procedure to follow and the considerations you should keep in mind when choosing a candidate. A timeline is set forth below:

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| September 1, 2019 | Nomination period opens |
| **November 1, 2019** | **Deadline for receipt of all nominations to Susan Wan** |
| November 6, 2019 | List of Nominees sent to all Fellows for comments |
| **November 20, 2019** | **Deadline for receipt of comments from Fellows to Susan Wan** |
| December 9, 2019 | Nominating Committee report due to the Board |
| December 12, 2019 | Board decision on Nominees |
| December 17, 2019 | Board decisions mailed to Nominees |
| March 27-28, 2020 | 2020 WC Seminar and Induction Dinner, New Orleans, LA |

It is our hope that we will soon have members in the College from all 50 states, and that we will increase the number of our members coming from the judiciary, academia, and among minorities and women in the profession. Please consider nominating an attorney from any of these categories. In addition, nominations of sitting judges can only be made by the Board or a fellow adjudicator. Please contact the Honorable LuAnn Haley

if you have a name of someone who should be considered for membership. You can also access a complete copy of the Bylaws on our website at http://www.cwclawyers.org/.

The 14th Annual Induction Dinner will again follow the mid-winter CLE program sponsored by the Tort Trial and Insurance Practice Section of the ABA and will take place at The Westin New Orleans Canal Place from March 27-28, 2020.

If you have any questions about the Nomination process or the Induction Dinner, please contact our Executive Director, Susan Wan, at susan.wan@cwclawyers.org. If you have questions or concerns regarding the nominating process and/or the committee review of the applications, please contact: the Nominating Committee Chair, **Bob Wisniewski**, at bob@azhurtonthejob.com or the past Chair, **Thomas Kieselbach** at thomas-kieselbach@cwk-law.com.

## SPOTLIGHT ON A FELLOW

**Ann Baird Bishop – Board of Governors**
**Hall Booth Smith PC**
**Atlanta, GA**

**Do you represent injured workers, employer/insurers, or are you exclusively a Judge or Mediator?**

I represent employers, insurers, and third-party administrators almost exclusively. Over the years, I occasionally have agreed to represent or be associated to represent injured workers. Still, I much prefer representing the underdog so mostly limit my practice to the defense side.

**How long have you been working representing the same segment of the workers' compensation industry?**

I began handling primarily workers' compensation matters in November 1981 when I accepted a job with Swift, Currie, McGhee & Hiers in Atlanta. Since then, I have represented employers, insurers, and third-party administrators almost exclusively for the past nearly 38 years.

**Have you worked in any different segment of the workers' compensation industry in the past and, if so, which one?**

I have never worked in any different segment of the workers' compensation industry with the exception of the handful of claimant's cases which I have handled.

**Are you in private practice? If so, how many lawyers are with your firm?**

I am in private practice and I honestly don't know how many lawyers are with my firm. I joined Hall Booth Smith in April 2019 as Of Counsel. Hall Booth Smith has 17 offices in 8 states.

**Are you in-house counsel for an employer or insurer?**

I am not in-house for an employer or insurer. However, in 1980 when I returned to Atlanta from Charleston, South Carolina, where my then husband had been attending medical school and I had been practicing for an insurance defense firm, I first accepted a job with a firm which was established by Travelers Insurance Company. I decided after only a few months that I preferred private practice and asked Charlie Drew at Swift, Currie, McGhee & Hiers if it was too late to change my mind about his earlier offer. Thankfully, he said it was not. I truly have enjoyed every minute of the practice of workers' compensation law.

**What is your case load like?**

My case load fluctuates but, at this time, I am handling approximately 60 files.

**For practicing attorneys, on average, how many cases do you try in a year?**

As I believe is the norm for most workers' compensation lawyers in Georgia, most of my cases settle or are resolved in some way without going to trial. In 2019, so far, I have tried only five (5) cases. I do not expect to try more than eight (8) this year which is probably about what I normally average.

**Did you choose the practice of workers' compensation law or did it choose you? Please explain.**

The practice of workers' compensation law definitely chose me. When I was looking for a job between my second and third year in law school, I had no real inkling what type of practice I preferred. I just wanted a job. I called a friend of my family's to ask if I could list him as a reference. As luck would have it, his firm was looking to hire their first woman. Evidently, I was an inoffensive candidate since I got the job. I was practicing labor law representing management. I was offered a full-time job after graduation and accepted. When I married, my husband decided to go to medical school in Charleston, South Carolina. I went to South Carolina and took the Bar since there was no reciprocity at that time. In Charleston, there was no labor law firm, so I went to work for an insurance defense firm. When I returned to Atlanta, I had a child. There was simply too much traveling in my labor practice. Accordingly, I went back to the tried and true method of job hunting and talked to a friend of my parents. He put in a call to Glover McGhee at Swift, Currie, McGhee & Hiers. I interviewed for whatever sort of job they would give me. Charlie Drew offered me a job in the workers' compensation arena. I love it. Of course, I also really enjoyed labor law and even insurance defense/general liability. Perhaps I'm just easily amused.

**When were you admitted to the College of Workers' Compensation Lawyers?**

I was admitted into the College in 2012 in Coral Gables, Florida.

**What is the best thing about being a Fellow in the College of Workers' Compensation Lawyers?**

The best thing about being a Fellow in the College of Workers' Compensation Lawyers is the people I have met from across the country who represent the best in our industry. I would never have met LuAnn Haley or Bob Wisniewski or Sheral Kellar or Jim Anderson or Dave Torrey or so many other outstanding people were it not for my having been admitted into the College of Workers' Compensation Lawyers.

**Are you active in the legal community? If so, how?**

I am active in the legal community. I have served on the Advisory Council by appointment of the Chair of the Workers' Compensation Board for 25 years. I participate in events with the Atlanta Bar Association. I speak at seminars and, when asked, teach classes in workers' compensation law to students at Mercer University School of Law and, in the past, at Georgia State School of Law.

**Are you active in your general community? If so, how?**

I am something of a helium hand. When someone asks, "Who will?", my hand shoots up. I teach Sunday school at my church to my adult Sunday school class where I am one of a rotation of teachers so that I teach only four (4) times per year. On the fourth Sunday of each month, I teach Sunday school at a church which is being established in a terribly impoverished area of Atlanta. I go to my grandchildren's schools to read to the class and/or to do art projects with the class. Thanks to Jim Anderson's nominating me, I serve on the Board of the Multiple Sclerosis Association of America. I am on the Board of Kids' Chance of Georgia. I am in charge of a fundraising raffle for Kids' Chance of Georgia and am assisting on the committee for the silent auction and dinner which will be held during the annual Workers' Compensation seminar.

**Tell us what activities you enjoy outside of work.**

Outside of work, I enjoy reading mystery novels (I never outgrew Nancy Drew), playing with my grandchildren, cooking, having dinner parties, drinking adult beverages and taking naps.

**Please share some words of wisdom with our readers.**

For a practitioner of workers' compensation law, the wisest words I can give are: "Read the Code! Read the [expletive deleted] Code!" Beyond this, I think the wisest course in life as well as in the practice of law is to first be concerned about doing good. My father told me many years ago, "Do good and the money will follow." But even if the money doesn't pour in, you will be happy.

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## Kids' Chance Update

Kids' Chance, again, thanks the College of Workers' Compensation Lawyers for its donation for 2019/2020 of $5,000.00 to assist with the mission of Kids' Chance of America "To create a strong Kids' Chance presence in all 50 states by providing national visibility, financial support, and best practices to each state Kids' Chance organization." The College of Workers' Compensation Lawyers has been a vital force in helping meet each portion of Kids' Chance of America's mission statement. The College has provided national visibility. Since the College of Workers' Compensation Lawyers began working with Kids' Chance in 2012, Kids' Chance organizations have gone from existing in 23 states to 47 states. Thanks to the financial support of the College of Workers' Compensation Lawyers, both directly through its annual $5,000.00 donation and through the

fundraising efforts of fellows in state Kids' Chance organizations, Kids' Chance of America is able to support state organizations in becoming the best that they can be.

Across the country, Fellows are working to help Kids' Chance. **Barry Hinden** and **Roger Levy**, among others in California, have been strong Kids' Chance supporters. **Burt Tillman** and **Luanne Clarke** in Georgia assist with fundraising efforts for Kids' Chance every year. **Terry Coriden** and **Sally Voland** in Indiana work closely with Kids' Chance and assist with fundraising efforts at the American Bar Association annual Workers' Compensation Conference. **Deb Kohl** of Massachusetts spearheaded the formation of Kids' Chance of Massachusetts. **Nancy Mogab** of Missouri and **Chuck Davoli** of Louisiana have been Kids' Chance supporters since the very earliest days. It is not an exaggeration to say that Kids' Chance of America would not be as strong an organization as it has come to be without the invaluable assistance of the College of Workers' Compensation Lawyers and its Fellows. If you have not yet done so, please contact your state organization to find out how you can help locally. If your state is one of the three (3) remaining states which does not yet have a Kids' Chance organization, please contact Kids' Chance of America to find out how you can help bring Kids' Chance to your state. Feel free to contact **Ann Bishop** at abishop@hallboothsmith.com with any questions.

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## LAW STUDENT WRITING COMPETITION


Submissions are now being accepted for the 2019 College of Workers' Compensation Lawyers *Law Student Writing Competition*. Fellows of the College who are law school professors in any capacity are encouraged to share information on this competition with your students. In addition to the prize money for the winning articles, there is a $1,000 award to the law school of the first-place winner. More information about the competition is below and can be found on the CWCL website.

TOPIC

The scope of permissible topics is broad, i.e., any aspect of workers' compensation law. Students are encouraged to present:

- a public policy issue;
- a critique of a leading case or doctrine; or
- a comment on a statute or the need for a statutory modification.

ELIGIBILITY

All students currently enrolled in accredited law schools in the United States and all those recently graduated from them (graduation in 2019).

PRIZES

- First prize - $2,000, (An additional $1,000 to winner's law school scholarship fund)
- Second prize - $1,500
- Third prize - $1,000 The winner's article will also be considered for publication in the Workers' First Watch, The Workers' Injury Law and Advocacy Group (WILG) magazine, and the ABA Tort and Insurance

Practice Section Law Journal. The winner will also be invited (expenses paid) to the Annual College Induction Dinner to be honored during the program.

Law Student Writing Competition Rules

1. Articles must be original from the applicant and limited to one entry. Articles must not presently be under consideration for any other publication or written as part of paid employment.
2. All articles are to be submitted in the following format:
   - Submitted by email (no author name in body of article, only in cover letter to susan.wan@cwclawyers.org (Please reference 'Writing Competition" in the subject line);
   - All articles are to be submitted by January 15, 2020;
   - Double-spaced, on $8^1/_2$ Inch by 11 inch paper, 1 inch margins;
   - Entries should be between 10 and 20 pages in length (including bottom of page footnotes);
   - Citations are to conform to "A Uniform System of Citation" (The Bluebook).
3. If published by the College, the articles become the property of the College. No submitted article may be published elsewhere until after announcement of the winners of the competition. Announcement of the winners will be made at least 30 days in advance of the Annual College Induction Dinner, March 16, 2020.
3. Include a cover letter with your entry stating your name, mailing address and phone number (both school and permanent), name of school and year of graduation.
4. Applicant must be currently enrolled in an accredited law school or submit entry within a year of graduation.

Judging

The evaluation standards will be organization, quality of research, depth, originality of analysis, clarity of style and readability. The College reserves the right not to award and/or to reject any or all submissions.

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## ARTICLES OF INTEREST


**TEMPORARY TRANSITIONAL EMPLOYMENT (FUNDED EMPLOYMENT): A PRO AND CON**
**COLLEGE OF WORKERS' COMPENSATION LAWYERS (CWCL) ANNUAL SYMPOSIUM**
March 16, 2019, Coral Gables, FL

INTRODUCTION

At a CWCL educational symposium convened in March 2019, distinguished workers' compensation Fellows from two states presented a pro and con with regard to "Temporary Transitional Employment," a device that, in some states, is called "funded employment." **Jim Gallen**, who conceived of the panel, presented the defense perspective and **Marci Rosenberg**, his colleague, presented a passionate rebuttal. Both prepared seminar papers for the session. They now appear here, republished, in somewhat different form, with the authors' permission.

***Opinions expressed by our colleagues in these re-published essays are strictly their own and are not to be attributed to the College of Workers' Compensation Lawyers.***

## TEMPORARY TRANSITIONAL EMPLOYMENT: CAN YOU USE IT? WHEN TO USE IT? HOW TO USE IT? CASES FROM ILLINOIS, TENNESSEE, AND PENNSYLVANIA -- DEFENSE COUNSEL PERSPECTIVE

**By Fellow James Gallen, St. Louis, MO**

It is sometimes good to view the place of Pennsylvania law on the continuum of national legal development. One such development is the use of Temporary Transitional Employment (TTE) throughout the country. As noted below, in Pennsylvania, TTE has been referred to as "funded employment," and appellate court authority exists addressing the legitimacy and efficacy of the innovation. This essay explains TTE and explores how the compensation system in my state, Illinois, and those of select others, have addressed the issue.

I. Introduction

Temporary Transitional Employment is a popular workers' compensation tool in which employers who cannot return injured workers to positions within the company's operations arrange for assignment to public service entities that can accommodate the worker's restrictions. Reasons advanced in support of such programs include that they maintain or restore the employee's habit of getting out and going to work, prevents or reduces deconditioning, aids in maintaining sociability, helps overcome a sense of disability, may qualify him for fringe benefits, and increases the probabilities of a return to permanent employment. A more detailed description of the benefits attributed to temporary transitional employment can be found in the article *Off Site Transitional Duty Very Effective in Reducing Workers Compensation Costs*[1] by Rebecca Shafer.

Such offers are frequently opposed by injured employees and their attorneys. Reasons given for opposing TTE include that they do not want to do such work, that it is not within their restrictions, and that they do not have to accept "volunteer" work.

Such opposition raises the question, "Can we offer an injured employee temporary transitional employment and terminate his temporary total disability benefits if he does not accept it?" Authority on the question is sparse and answers vary among the states. However, in some states, TTE has generally been accepted with little controversy.

II. Illinois

In Illinois offers of TTE are frequently opposed on the bases that the Illinois Act does not contain any provision for TTE and that the particular offers are unsuitable. Importantly, two Workers' Compensation Commission decisions exist which the Illinois practitioner may turn to for guidance.

In *Alvarez v. Foodliner*,[2] the Illinois Workers' Compensation Commission affirmed an award of TTD and penalties against an employer for its vexatious termination of benefits when the petitioner refused an offer of TTE. In his decision – which was adopted by the Commission – the arbitrator outlined deficiencies with the TTE offer. The decision provides both claimants' and employers' attorneys with insights into what may or may not constitute an offer that could compel the employee to accept an offer of TTE or risk losing their entitlement to temporary total disability benefits.

[1] Rebecca Shafer, *Off Site Transitional Duty Very Effective In Reducing Workers Compensation Costs,* https://blog.reduceyourworkerscomp.com/2013/02/off-site-transitional-duty-very-effective-in-reducing-workers-comp-costs/ (Feb. 20, 2013) (last visited June 2, 2019).

[2] Alvarez v. Foodliner, 15 IWCC 443 (Ill. Wrk. Comp. 2015).

In that case, Mr. Alvarez was employed as a pre-loader by Foodliner when he injured his left wrist. He worked light duty for about a month until Foodliner could no longer accommodate his restrictions, at which time he was referred for possible TTE with YMCA of South Chicago. However, the position was filled before his background check could be completed. Mr. Alvarez was thereafter referred for TTE with South Suburban Toys for Kids, where he was led to believe that the job duties exceeded his restrictions. In this regard, the suspended status of his driver's license required him to use public transportation that would involve a trip of over two hours, each way -- an amount of travel that he considered to be unreasonable. A third placement was attempted at a facility for senior services. Restrictions provided by the respondent were considered, but those from the treating doctor were not. When he did not appear for this final assignment, Mr. Alvarez's temporary total disability benefits were terminated.

The relevant question presented before the arbitrator was whether the respondent could terminate TTD benefits where the petitioner declines TTE placement? The arbitration concluded:

> … [T]he Illinois Workers' Compensation Act makes no mention of TTE. The petitioner is under active medical care. The Respondent cannot accommodate the petitioner's work restrictions. CBSC, (sic) Inc., the Respondent's workers' compensation carrier, has a financial bias in that it stands to gain by reducing its obligation to pay TTD. There are many unresolved issues concerning TTE, including the merit and purpose of volunteering; who is responsible for injuries the Petitioner may suffer while traveling to and from the TTE, or at the site of the TTE while volunteering; does TTE impact Petitioner's pension benefits, disability benefits, retirement benefits, or group insurance benefits; and mileage reimbursement.
>
> The arbitrator finds that Respondent cannot terminate Petitioner's TTD benefits based on their offering of TTE. A Petitioner has the right to refuse a TTE assignment, regardless of the reason. An injured worker is not required to perform TTE under the Act.

The arbitrator awarded, and the Commission affirmed, an award of the disputed temporary total disability benefits and found that "[t]he respondent's conduct was unreasonable and vexatious and caused an unreasonable delay in the payment of TTD benefits."

While *Alvarez* appears to be a clear rejection of any argument that an injured employee has an obligation to accept assignment of a TTE-type employment, the decision flowed from a series of egregious actions and a failure to present evidence to answer the questions raised in the decision, itself. Where a thorough explanation is provided of the benefits expected to inure to the employee from a TTE opportunity, a different result may be found.

While it is true that TTE is not specifically mentioned in the Illinois Act, it may be construed as a component of a vocational rehabilitation program which "is not limited to" specifically enumerated activities.[3]

It is submitted that the objection that the employer and facilitator of the TTE program have financial interests in the program should not be a disqualifier. The truth is that everyone in the workers' compensation industry is responding to financial incentives. The challenge is to show that the program is also in the employee's interest or, at least, is not detrimental to his or her interests.

[3] Illinois Workers' Compensation Act, § 8(a), provides, in part, "Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining including education at an accredited learning institution."

In order to persuade the finder of fact of the benefits of a TTE program, testimony should be provided by a qualified vocational rehabilitation counselor. These benefits may include such things as getting the employee back into the habit of maintaining a schedule, interacting with others, and keeping him or her active.

In order to make a successful case that an injured employee must participate in TTE or risk losing his rights to temporary total disability benefits, the respondent/employer should establish that the employee is actually working for the respondent/employer, despite his physical assignment at the TTE facility. Evidence should be presented by the respondent/employer that the employee will remain its employee; will be paid by the respondent/employer; and that any fringe benefits, such as sick and vacation time, retirement benefits, and health insurance will accrue just as if the employee were working at the respondent/employer's facility. The respondent/employer's liability for injuries arising out of and in the course of the assignment at the TTE facility should be established either through a contract with the host facility or by operation of the respondent/employer's workers' compensation insurance policy. If possible, activity restrictions imposed by the treating physician should be followed during the TTE so as to remove any issue of restrictions from the matter. An offer of TTE should also communicate that any temporary partial disability or maintenance to which the employee would be entitled by law will be paid. Travel to the TTE worksite should be compared to the employee's regular travel to/from his or her original worksite to determine if the assignment is reasonable and if any mileage reimbursement should be offered or incorporated into temporary partial disability payments.

A more recent Illinois Workers' Compensation Commission decision, *Gary Stegan v. Reladyne*,[4] answered some of the questions raised in *Alvarez*, and displayed a more sympathetic attitude toward temporary transitional employment. Although lacking precedential authority as it remains on review in the Circuit Court, the case nevertheless provides insight into the Commission's thinking on the issue.

In *Stegan*, while the injured worker was off work and receiving temporary total disability benefits, his employer lacked a position that could accommodate his medically-prescribed restrictions. The employer engaged Transitional Work Solutions to enroll the worker in its Transitional Work Program, a program that matches and places injured workers in positions within their restrictions. Transitional placed Mr. Stegan with Northern Fox Valley Habitat for Humanity ReStore, where his work activities were to include "light sorting" of incoming donations and customer service. A letter from Reladyne to Stegan, offering the position, stated that Stegan would remain Reladyne's employee, be paid his regular salary, and remain subject to Reladyne's human resources and attendance policies. The employee argued that the Act does not empower the Commission to compel him to accept a position with any entity other than his employer. The employer, meanwhile, took the position that nothing in the Act *precludes* the arrangement it made on Stegan's behalf. The arbitrator ruled in favor of the employer and the Commission, affirming, observed:

> [W]hen considering temporary total disability, [the] … claimant must show not only that he did not work but also that he was unable to work. The position argued by Petitioner seeks to expand entitlement to temporary total disability benefits despite being found capable of working to include the circumstance by which he would return to work. In this case, it is who he returns to work for that he objects to…
>
> Absent an argument that Northern Fox Valley Habitat for Humanity ReStore is objectively too far from his residence to make the endeavor cost-effective or that the work asked of him there is outside the prescribed work restrictions, the Commission is not particularly sympathetic to Petitioner's position. In the vacuum of the evidence presented, the Commission can only conclude Petitioner would rather trade earning his usual wage for the opportunity not to work and receive two-thirds of his usual wage…

[4] Gary Stegan v. Reladyne, 19 IWCC 174 (Ill. Wrk. Comp. 2019).

> The Commission finds Petitioner has no credible justification for declining to participate in the Transitional Work Program under the terms Respondent offered and, accordingly, finds Respondent to be within its rights to terminate temporary total disability benefits effective the day Petitioner failed to present to Northern Fox Valley Humanity ReStore to begin participation in the Transitional Work Program.

Indeed, an employer which follows the guidelines outlined above should have a reasonable chance of obtaining a decision establishing that an offer of appropriate temporary transitional employment justifies the termination of total disability benefits.

III. Tennessee

The issue of TTE was also addressed in 2018 in in the Tennessee case of *Richard Lasser v. Waste Management, Inc*.[5] There, an injured trucker failed in a light duty assignment – "picking up trash and washing trucks" – at Cookeville Rescue Mission General Store. He was to be paid $17.52 per hour. The employee refused to do the modified work and his temporary total disability benefits were suspended. The employee testified that his objection to performing work at the rescue mission did not concern safety issues at the job, a conflict with his schedule, nor concern over the distance between the worksite and his home. He testified that he did not accept the work because, "[i]t just wasn't my job." The trial court determined, however, that the employee's reasons for refusing employer's temporary transitional work program were personal in nature and that the Tennessee Workers' Compensation Act "does not prohibit [employer] from offering [employee] work within his restrictions at an entity other than [employer]."

On appeal, employee raised two issues: (1) whether employer's temporary transitional work program was an impermissible attempt to avoid payment of workers' compensation benefits in violation of Tennessee Code … section 50-6-114(a) (2017); and (2) whether the trial court erred in concluding that employee's refusal to perform temporary transitional work for an entity unaffiliated with his employer was unreasonable.

The court noted that the temporary transitional work program does not relieve the employer of any obligation under the Workers' Compensation Act as was intended in the agreement between the employer and employee. The temporary transitional program continued the employer's obligation to provide temporary partial disability benefits in accordance with the temporary partial disability statute.[6] Moreover, requiring employee to participate in the temporary transitional program, consistent with his work restrictions, had no different effect on his entitlement to temporary total benefits than a modified duty work program in which employee would work at employer's facility. The court stated:

> Were we to adopt Employee's rationale, any light-duty program that returns an injured employee to work prior to maximum medical improvement could fall within the ambit of Tennessee Code Annotated section 50–6–114(a), since all such programs reduce or eliminate an employer's obligation to pay temporary disability benefits. This we decline to do.
>
> Here, the temporary transitional program is not intended, nor does it allow, Employer to avoid its obligation to provide workers' compensation benefits. Rather, taking into account employee's work restrictions, employer has arranged for a modified duty placement, consistent with his work restrictions, which would result in employers paying employees for wages, rather than the lesser amount that temporary total disability

[5] Richard Lasser v. Waste Management, Inc., 2018 WL 2416267 (Tenn. Workers' Compensation Appeal Board 2018).
[6] TENNESSEE CODE ANNOTATED § 50-6-207(2) (2017).

> benefits would represent. Accordingly, we hold that Employer's temporary transitional work program does not violate section 50-6-114(a).[7]

IV. Pennsylvania

In Pennsylvania, TTE programs are frequently referred to as "funded employment," and a reduction of benefits during the period which a worker refuses an offer of employment is permitted only so long as the funding continues. However, the reduction will be deemed ongoing if the evidence shows that the work was available indefinitely.[8]

Although a funded employment job referral was, in one case, upheld where the work consisted of at-home telecommunication labor, the dissent raised reasonable questions as to the appropriateness of the offer where observing:

> Unless a person had chosen to work at home prior to an injury, I would hold that any position that requires a claimant's residence to be commandeered and turned from a home into an employer's rent-free field office, thereby invading the claimant's privacy, intruding, without permission, into other household member's daily home lives and disrupting family life, can never be considered suitable alternative employment.[9]

The concept of funded employment, meanwhile, received support in another case:

> [S]imply, there is nothing untoward about funded employment. It is a legitimate way to bring an injured claimant back to work and reduce his disability from total to partial.[10]

V. Kansas, Iowa, and Missouri

The use of temporary transitional employment in Kansas is supported by the state's workers' compensation statute. The critical proviso states, in relevant part:

> A refusal by the employee of accommodated work within the temporary restrictions imposed by the authorized treating physician shall result in a rebuttable presumption that the employee is ineligible to receive temporary total disability benefits.[11]

Meanwhile, by substituting the language "by the," for the words, "with the same," employer in section 85.33(3)(a), the 2017 amendments to the Iowa Workers' Compensation Act suggest the intention of the legislature that refusal to participate in offered TTE will result in the loss of temporary benefits.[12]

Missouri, finally, provides little official guidance, and administrative law judges lack consensus on the question.

[7] *Id.*

[8] Henry v. WCAB (Keystone Foundry), 816 A.2d 348 (Pa. Commw. 2003).

[9] Medved v. WCAB (Albert Gallatin Services), 788 A.2d 447 (Pa. Commw. 2001). *See* DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW AND PRACTICE, § 6:102, pp.696-697 (Thomson Reuters 3rd ed. 2008).

[10] Sladisky v. WCAB (Allegheny Ludlum Corporation) 44 A.3d 98 (Pa. Commw. 2012) (appeal denied).

[11] K.S.A. 44-510c(b)(2)(B).

[12] Iowa Workers' Compensation Act, § 85.33(3)(a) (new law, effective July 1, 2017), provides, in relevant part:

> 3. *a.* If an employee is temporarily, partially disabled and the employer for whom the employee was working at the time of injury offers to the employee suitable work consistent with the employee's disability the employee shall accept the suitable work, and be compensated with temporary partial benefits. If the employer offers the employee suitable work and the employee refuses to accept the suitable work offered by the employer, the employee shall not be compensated with temporary partial, temporary total, or healing period benefits during the period of the refusal.

VI. Conclusion

Although TTE is treated differently across the several states, close examination of (1) the relevant law and the details of the assignment; and (2) the employee's activity restrictions are essential in making TTE work for all parties involved.

## TEMPORARY TRANSITIONAL EMPLOYMENT/REEMPLOYMENT: INJURED WORKERS' COUNSEL PERSPECTIVE

**By Fellow Marci Rosenberg, Dunwoody, GA**

I. What is Temporary Transitional Employment or Reemployment… and What is it Not?

Reemployment companies fall into one of two categories: (1) those that provide makeshift work at home doing telephonic surveys, for example, the enterprise Catalyst RTW; and (2) those that provide makeshift work with non-profit volunteer organization, for example, the enterprise ReEmployAbility. Reemployment companies offering "transitional" employment are not providing *real* vocational rehabilitation. Nor are they providing accommodated work with the time-of-injury employer. Rather, what they are doing is marketing an attempt to get severely injured employees off the insurance companies' payrolls without any legitimate benefits to any of the parties in the workers' compensation system.

A. Just Another Non-Party Intermediary Making Money Off the System

A multitude of companies have sprung up in the past two or three decades that I refer to, collectively, as "non-party intermediaries." These non-party intermediaries are the result of insurers and third-party administrators outsourcing various parts of what would have previously been the tasks of adjusters, or tasks that would not have been done at all in the context of handling a workers' compensation case. Examples of these non-party intermediaries are seemingly endless; they include companies that do scheduling of physical therapy and imaging, such as Align Networks or OneCall. Medicare Set Aside evaluators are also non-party intermediaries that are hired to provide estimates of usually-unknown future medical costs. The one thing that all of these intermediaries have in common is that they are for-profit, non-parties, that are making money off the workers' compensation system. The "reemployment" companies are no different.

It is notable that "reemployment" companies *make* their money off the workers' compensation system and its participants. Catalyst RTW, for example, according to its published literature, assesses a fee at every turn. The "transitional work" provided through Catalyst RTW is subsidized on the front end by the employer or insurer.[1] A representative for Catalyst RTW has testified in depositions and hearings that the "work" is fully subsidized by the insurance company for the first 400 to 750 hours of employment.[2] In addition, employers/insurers have reportedly paid Catalyst $1,900 to schedule an interview with an injured worker, tendered another $1,900 after the interview, and continued to pay the company on a weekly basis to administer the employment.[3]

So, why would anyone pay Catalyst RTW when it entails such significant expense? I would submit that good marketing that appeals to insurers and their attorneys is at least a partial answer to this question. Catalyst RTW's marketing materials demonstrate a goal of encouraging injured workers to settle claims for reduced

[1] *See* "Catalyst RTW, Return to Work Price List, Effective January 1, 2011." (On file with the Author).
[2] Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015); Herrin v. Contrax Furnishings, *et al*., 16 OJCC 015698 (Fl. Wrk. Comp. 2016).
[3] *Id.*

values.[4] Catalyst also does some of the aggressive behind-the-scenes work, such as getting doctors to provide releases for severely injured workers to return to work at extremely accommodated "jobs."[5]

For the employer/insurer seeking to save money by utilizing the reemployment strategy, I would suggest that the actual result is less of a savings than it is advertised to be. Not only is a large outlay of money involved on the front-end for the employer/insurer to place an injured worker in a position through a company like Catalyst RTW, but, in some states and cases, the employer/insurer will have to pay additional income benefits in the way of temporary partial disability or similar type payments.[6] When it comes to paying temporary partial disability benefits, claim and potential defense litigation costs exist as well.

B. Just Another Defense Tactic

From a claimant's attorney's perspective, efforts to offer "employment" with "reemployment" companies are viewed as defense tactics to force a settlement, scare a claimant, or reduce the insurer's exposure in legitimate compensable cases. Courts, administrative law judges, and arbitrators have also concluded that "reemployment" positions "are simply an insurance-based resource" that sets people up for failure and seeks to then take advantage of the failure.[7]

Catalyst RTW gives examples in marketing materials that, with its services, cases were able to settle for much less than the claimant was previously willing to accept.[8] Meanwhile, ReEmployAbility boasts, on its website, that "Employers and carriers can significantly reduce workers' compensation and disability claim costs by returning the injured employee to the workforce as soon as they are released to modified or light duty."[9] ReEmployAbility also advertises that their Transition2Work program "[r]educes the indemnity claim costs that impact the employer's experience modification and future premiums."[10]

The use of these tactics and the efforts of insurers or self-insurers to force injured workers to work with "reemployment" companies are not viewed by claimants' attorneys as legitimate efforts to return injured workers to *real work*, let alone meaningful substantial gainful employment that would be available to people in the labor market. Rather, these efforts are known for what they are – an attempt to reduce the value of insurance claims by putting catastrophically injured workers in fully subsidized work activities where no real competitive stable labor market exists for them.[11]

[4] *See* Catalyst RTW Promotional Material, "Heads You Win!/Tails You Win!" (setting forth two asserted success stories). (On file with the Author). *See also* Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015).

[5] *See* Catalyst RTW Promotional Material, "Heads You Win!/Tails You Win!" (in recounting asserted success story, literature states, "CATALYST obtained a medical release and he [claimant] was offered home-based employment through our Return to Work program) (On file with the Author).

[6] Carmouche v. Kraft Foods, Inc., 62 So. 3d 889 (La. Ct. App. 2011).

[7] *See*, *e.g.*, Herrin v. Contrax Furnishings, et al., 16 OJCC 015698 (Fl. Wrk. Comp. 2016) (finding that job "appears to be nothing more than a sham created by the carrier, Catalyst RTW, and The Solomon Group to allow the carrier to avoid paying PTD benefits"). See also Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015).

[8] *See* Catalyst RTW Promotional Material, "Heads You Win!/Tails You Win!" (in discussing asserted success story, literature recounts, "The claimant was offered a home-based job and reluctantly accepted it. The day before he was scheduled to train and start his new job they settled for $72,500 (2 months after referral")). (On file with the Author.)

[9] *How does Transition2Work program impact the claim outcome?*, REEMPLOYABILITY, https://www.reemployability.com/ Transition-2-Work/Program-Benefits/ (last visited Feb. 8, 2019).

[10] *Id.*

[11] *See, e.g.,* Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015).

C. Temporary Transitional Employment Jobs Referred by Reemployment Companies Do not Reflect Substantial Gainful Employment

A sincere effort to return an injured worker to work should first start with an employee capable of returning to work. This means that all of the authorized treating medical providers feel that residual functional abilities exist which are available to the employee. Then, if any compensable psychological and/or psychiatric conditions are current, the authorized treating providers for those conditions must also be consulted as to whether there are certain types of environments or work conditions that would need to be restricted for the employee.[12] Only when all authorized treating providers have released an employee to return to work in some capacity can a sincere assessment of an injured worker's return to work begin in earnest.

Yet, efforts to involve "reemployment" companies seem to arise most often in the cases with very severe injuries and even multiple compensable injuries, as these are the types of claimants that are hard to return to legitimate work even with accommodations. A review of the appellate cases in this area suggests that the higher courts that have analyzed these cases have not found the use of the "reemployment" companies' efforts to be convincing. For example, in *State ex rel. Humility of Mary Health Partners v. Indus. Comm'n of Ohio*,[13] the Court of Appeals of Ohio, Tenth Appellate District, determined that the offer of employment with AllFacilities was "disingenuous" because the injured worker had significant psychological conditions and the authorized treating psychologist was not contacted.

The "transitional" or "reemployment" work subsidized by the employer/insurer of injury has been found to be "a clever mechanism to reduce workers' compensation liability but it is not competitive employment. It does nothing to enhance the injured workers' skills or ability to find employment in the real world. It is not a 'real job' and cannot be used to establish wage earning capacity."[14]

Decisions generated out of various state Boards of Workers' Compensation or Commissions have determined that job referrals from insurance companies (or their lawyers) by way of "reemployment" or "transitional" employment companies are considered suspect.[15] The at-home positions provided by Catalyst RTW through AllFacilities have not been found to be competitive employment. Rather, "less than ½ of 1% of the individuals referred to AllFacilities from Catalyst in the last [three] years continue their employment with AllFacilities after their subsidized work period has ended."

ReEmployAbility claims that it is providing short-term work on a transitional basis for people who cannot return to work with their time-of-injury employer. But, if the injured worker is able to work at all, and is not on "no-work" status, why would another organization be in a better position to offer accommodated work than the employer of injury? Moreover, one has to question how the offer of "positions that seemingly bear no appreciable relation to the business in which the [employer of injury] is engaged" furthers the interests of the employer or the injured worker.[16]

[12] *See, e.g.,* State ex rel. Humility of Mary Health Partners v. Indus. Comm'n of Ohio, 2015 WL 6459728 (Ct. App. 2015); Smith v. SDI Exterior Sys., LLC, 15MCAC000050 (Mich. Mag. Ct. 2015) (explaining that, after injured worker who participated in the transitional employment, he had to cease doing so, because his emotional condition deteriorated).

[13] State ex rel. Humility of Mary Health Partners v. Indus. Comm'n of Ohio, 2015 WL 6459728 (Ct. App. 2015).

[14] Smith v. SDI Exterior Sys., LLC, 15MCAC000050 (Mich. Mag. Ct. 2015) (applications for appeal at the Michigan Court of Appeals and Supreme Court were denied).

[15] Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015).

[16] Bergeron v. Zurich Am. Ins. Co., 2015 WL 8273621 (E.D. La. 2015) (denying the insurer's motion to deny the claimant's indemnity or maintenance benefits because he refused to accept "alternative light duty employment" offered through ReEmployAbility's Transition2Work program).

The first place for a return-to-work possibility should always be the time-of-injury employer. If that is not an option, one has to question whether, if the time-of-injury employer does not want to take on the risk of having the injured employee back to work, why would *another employer* or entity want to take on the injured employee and all the risk that comes with it?

II. Medical, Psychological, and Logistical Concerns

The theory that a return to work will necessarily be "good" for an injured worker is just that – *a theory*. However, returning to these makeshift positions is not necessarily good for severely injured workers. If an injured worker is returned to work in a position that he or she cannot do, this can also cause negative consequences, such as deterioration of his or her psychological condition.[17] Imagine an injured worker having a ray of hope that he or she might return to some kind of useful employment only to find that out that it was physically and/or mentally too difficult. This can be crushing to someone who is wanting to return to some sort of normalcy in their lives, and may even be counterproductive in the long run.

Also, returning to work too soon sometimes results in worsening or additional injuries. When this happens at a ReEmployAbility position at a volunteer-type organization, a legitimate concern exists regarding responsibility for the new work-related injury and how it will affect the original claim. From the perspective of the counsel for injured workers, I cannot just take someone's word or opinion that the time-of-injury employer or the volunteer organization will take responsibility for new injuries. This is especially true when we encounter situations where the volunteer organization wants a release before the injured worker starts the job, saying that it will not be responsible – and nothing in writing exists from the time-of-injury employer certifying that it will be responsible for a subsequent injury at such volunteer organization.

In addition, transportation is a big issue that often ends cases in litigation in these transitional-employment situations. If an injured worker is on medications or has injuries that prevent him or her from driving certain distances, that can be a very real concern and difficulty. To be compliant with medical treatment, such workers have to take their medications, but then an obvious problem exists: what if they are not supposed to drive while under the influence of such medications? Furthermore, injured workers are being set up for failure if they have to take medications once they get to the "reemployment" position and thereafter are not able to stay awake due to trying to comply with their medication regime. Or, if they do not take their medications they may have difficulty concentrating on the work due to increased pain and other symptoms.

Logistical concerns also exist about working from home and utilizing phone services as the Catalyst positions require. Many of these "jobs" require the injured worker to call churches. Certainly, however, we cannot legally force people to solicit churches if they have religious objections to doing so. In addition, it is not uncommon that city ordinances exist which prohibit commercial activity at a residence without a license. Who is going to pay for the license? Certainly, when this situation arises an injured worker cannot accept a Catalyst position that would require him or her to break the law.

III. Potential Legal Concerns

A. Retaliation Claims

Forcing an injured worker to participate in ReEmployAbility's Transition2Work program may subject the employer/insurer to a workers' compensation retaliation cause of action in some states.[18] In a case litigated in the United States District Court for the Western District of Kentucky, Louisville Division, Hume, an injured worker was informed by his time-of-injury employer that it did not have suitable restricted-duty work available, and he was instructed that "he must 'accept an offer of a light duty assignment through a separate employer at a non-

[17] *See*, *e.g*., Smith v. SDI Exterior Sys., LLC, 15MCAC000050 (Mich. Mag. Ct. 2015).
[18] Hume v. Quickway Transp., Inc., 2016 WL 3349334 (W.D. Ky. 2016).

profit company through [his employer's] Worker[s'] Compensation Carrier and [ReEmployAbility's] Transition2Work' program."[19] He worked at that job for24 hours a week for about a year-and-a-half. While the injured worker was scheduled for an upcoming major back surgery for his work-related injuries, he was instructed that his temporary restricted-duty assignment was changing and that he was to begin work with another non-profit, Volunteers of America. He was instructed that, if he did not comply with the change, he would be terminated. He had an interview and walk-through at Volunteers of America, but was later informed that the new assignment was rescinded.

Hume brought a retaliation case under KRS § 342.197, which states: "No employee shall be harassed, coerced, discharged, or discriminated against in any manner whatsoever for filing and pursuing a lawful claim under this chapter."[20] According to the court, "to establish a claim under this provision, an employee must show that (1) [he] participated in 'a protected activity,' (2) the employer 'knew' that the employee had done so, (3) the employer took an 'adverse employment action' against the employee, and (4) 'a causal connection' existed between the two."[21] The court held that Hume had satisfied the requirements for a workers' compensation retaliation case and that she had stated a plausible claim for relief. The court thus refused to dismiss her retaliation claim.

B. Illegal Interference with Rehab

In other states the involvement of one of these "reemployment" companies in the context of a catastrophic (or permanent total) case may run afoul of state laws that reserve rehabilitation services to suppliers who have specific credentials and are registered with the State Board of Workers' Compensation or Industrial Commission. For example, Georgia Code section 34-9-200.1 specifies that, in both catastrophic and non-catastrophic claims, rehabilitation services shall only be provided by a supplier who has specific credentials and is registered with the State Board of Workers' Compensation. As it relates to return-to-work efforts in catastrophic cases, Georgia Board Rule 200.1(B) specifies the duties of the rehabilitation supplier as follows:

> Section (1) states that a rehabilitation supplier "provides vocational counseling, exploration, and assessment; performs job analysis, job development, modification, and placement; evaluates social, medical, vocational counseling, exploration, and assessment, job analysis, job development, modification, and placement. . ."
>
> Section (II)(B)(1) states that the catastrophic rehabilitation supplier "shall have sole responsibility for the rehabilitation aspect of each individual case."
>
> Section (II)(B)(2) requires the rehabilitation supplier to prepare an appropriate plan for vocational services.
>
> Section (II)(C)(2) specifies that a Return-to-Work Plan shall assist the employee with job placement, as well as training.

As such, in the Georgia example, the State Board-assigned catastrophic rehabilitation supplier has the sole responsibility for the rehabilitation and assessing of vocational options. Accordingly, a reemployment company may, in some states, by involving itself in the job development of a catastrophic case, be illegally interfering with rehabilitation rules of the Board or Commission.[22]

[19] *Id.*

[20] Am. Compl. [DN 6-1] ¶ 60.

[21] Witham v. Intown Suites Louisville Ne., LLC, 815 F.3d 260, 263 (6th Cir. 2016) (quoting Dollar Gen. Partners v. Upchurch, 214 S.W.3d 910, 915 (Ky. Ct. App. 2006)); Hume v. Quickway Transp., Inc., 2016 WL 3349334 (W.D. Ky. 2016)).

[22] *See* Garner v. Ranstad No. America, et al., 2009-013568 (Ga. SBWC, October 14, 2010).

Certainly, in Illinois, use of a reemployment enterprise for the activity of job placement at the request of the insurance adjuster raised concerns that the vocational rehabilitation code of ethics was breached. This concern led to the referral of the matter to the appropriate review board to investigate apparent violations of the ethical canons for vocational rehabilitation counselors.[23] Moreover, "the vocational decision[] made by uncertified individuals…[is] in violation of Section 8(a) of the Act…."[24]

C. Who is the Employer Now, and is it Complying With the Employer's Legal Obligations?

Depending on the state, the defense attorney involved, and perhaps even the reemployment company involved, attorneys of injured workers are provided differing answers to the question of who is the employer once the injured worker is undertaking the "transitional" job. This issue alone causes a lot of confusion. If the reemployment is with another company, that raises additional concerns. For example, who is responsible for tax reporting, being in compliance with the Affordable Care Act (ACA) for medical insurance – and what happens if there is a new work injury?

Pursuant to the employer mandate provision of the ACA, all employers that employ an average of at least 50 full-time employees for 120 business days during the preceding calendar year must offer affordable health coverage to their full-time workers.[25] Under the mandate, applicable large employers must cover medical insurance under a form of an eligible employer-sponsored plan.[26] Such eligible plans include a group health plan or group health insurance coverage offered by an employer to the employee which is a governmental plan (within the meaning of section 2791(d)(8) of the Public Health Service Act) or any other plan or coverage offered in the small or large group market within a state (this includes a grandfathered health plan offered in a group market).[27] Therefore, in transitional jobs with new alternative employers, a very legitimate concern exists over who is going to provide the legally required medical insurance.

IV. How do We Really Help Injured Workers?

What if, instead of harassing severely physically and psychologically injured workers with tactics to attempt to force them into jobs that are not real jobs, we were to provide timely and appropriate job retraining and education for people who could actually re-enter the work force?

In Georgia, before 1992, if someone was hurt on the job, he or she was entitled to vocational rehabilitation. Now, only the most injured -- those whose injuries are so severe that they cannot do their prior work, or any other work available in substantial numbers in the national economy, or have otherwise suffered a catastrophic injury per O.C.G.A § 34-9-200.1 --are afforded vocational rehabilitation. Certainly, for those who have some residual functional capacity and the ability to be retrained or further educated, vocational rehabilitation makes sense.

Injured workers in all states should be afforded *real* vocational rehabilitation by their employers and insurers in workers' compensation claims if they have the ability to do some other kind of work. *Real* vocational rehabilitation might mean job retraining or providing the funds necessary for an injured worker to be able to take classes at reputable institutions, to obtain a G.E.D., and/or a new certification to undertake a different line of work. Real vocational rehabilitation would certainly include an assessment by a qualified vocational expert, known as a Certified Vocational Evaluator (CVE), who can seek to determine whether the injured worker is capable of learning new skills, as opposed to those who might be limited by borderline IQs or necessary

[23] Perkins v. Turner Indus. Grp., 15 IWCC 0468 (Ill. Wrk. Comp. 2015).
[24] *Id.*
[25] 26 U.S.C.S. § 4980H(c)(2)(A).
[26] 26 U.S.C.S. § 5000A(f)(2).
[27] 26 U.S.C.S. § 5000A(f)(1)(d); 42 U.S.C.S. § 300gg-91(d)(8).

medications due to severe injuries. Assistance through qualified and meaningful vocational rehabilitation means that such assistance would be provided by professionals who actually have a college degree in vocational rehabilitation counseling, and appropriate experience, as well; not just glorified case managers, nurses, or workers' compensation profiteers.

Helping people who are not catastrophically injured would be a way of actually helping people return to the work force. These injured workers need real help from qualified vocational experts to learn to combine their residual functional capacity, their past work experience, and their skills to assist them in a meaningful way to find jobs that are actually available in the national economy.

Such offers are frequently opposed by injured employees and their attorneys. Reasons given for opposing TTE include that they do not want to do such work, that it is not within their restrictions, and that they do not have to accept "volunteer" work.

Such opposition raises the question, "Can we offer an injured employee temporary transitional employment and terminate his temporary total disability benefits if he does not accept it?" Authority on the question is sparse and answers vary among the states. However, in some states, TTE has generally been accepted with little controversy.

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## THE EVOLUTION OF THE SCHEDULED BREAK RULE IN GEORGIA

**By Fellow Frank R. McKay, Chairman and Chief Appellate Judge, Atlanta, GA and Neil C. Thom, Administrative Attorney, Appellate Division, Georgia State Board of Workers' Compensation**

It seems simple: workers' compensation benefits are payable when an employee suffers a work-related injury. Typical of other jurisdictions, Georgia's Workers' Compensation Act defines such an injury as an "injury by accident arising out of and in the course of the employment."[1] But the question of what "arising out of and in the course of the employment" means can become complicated, resulting in disagreement and, therefore, litigation. It has been the responsibility of the courts to determine how that statutory language applies to various sets of facts. Moreover, subtle differences in facts from case to case presented to the courts can complicate the question further, making it difficult to discern a consistent set of rules on which to rely when planning for workers' compensation liability and when litigating and deciding disputed cases.

The Court of Appeals of Georgia recently encountered such a complication in *Frett v. State Farm Emp. Workers' Comp.*[2] The court analyzed the intersection of two rules of interpretation generated by case law that, in its own description, "creates anomalous and arbitrary results."[3] The two rules in question are what we call the "scheduled break" rule and the "ingress/egress rule."

In 1935, the Supreme Court of Georgia enunciated what came to be called the "scheduled break rule."[4] In *Farr*, the court held that an employee who suffered an injury by accident while preparing to eat his lunch at

[1] O.C.G.A. § 34-9-1(4); 1 Larson's Workers' Compensation Law § 1.01.
[2] 348 Ga. App. 30, 821 S.E.2d 132 (2018).
[3] *Id.,* at 35, 821 S.E.2d at 137.
[4] *Ocean Acc. And Guar. Corp. v. Farr*, 180 Ga. 266, 178 S.E. 728 (1935).

the workplace could not recover workers' compensation benefits because he was engaged in his "individual affair" and not in any part of his employer's work.[5] Accordingly, the essential elements of a workers' compensation claim, that it be an injury by accident arising out of and in the course of employment, could not be established. At the time, the Georgia Workers' Compensation Act was only fifteen years old, and it likely seemed obvious that an injury sustained while attending to such a purely personal matter was not compensable. In this case, the employee was returning to a basement where he had been working on a boiler in order to eat his lunch after washing his hands on the first floor.[6]

In the ensuing years, the Court of Appeals applied this binding precedent, enforcing what appeared to be a clear line. In 1944, in *Aetna Cas. & Sur. Co. v. Honea*,[7] a drapery maker who fell when her feet became entangled in her employer's drapery fabric in her workroom could not recover workers' compensation benefits because she had left her work station at the beginning of a work break, changed clothes, and returned to the workroom only to retrieve her handbag while on her way to a personal appointment. Because she was free to use her scheduled break for any purpose at all, without any control asserted on her time by her employer, the court held that the accident did not arise out of and in the course of her employment. Similarly, in 1945, in *Gay v. Aetna Cas. & Sur. Co.*, a seamstress who was injured while on her way down the stairs from her work station to go to lunch, during which time she was free to do as she pleased, was deemed ineligible for benefits.[8] Additional cases held that injuries sustained by employees while walking from their work stations to the restroom, on the employers' premises, were not compensable because the employees were on scheduled breaks in which they had complete freedom of action.[9]

Beginning in 1973, the Court of Appeals made some adjustments, from time to time, to the rule's application. That year, the court used the phrase "scheduled break" for the first time in this context, holding that an injury sustained while taking an *unscheduled* break to attend to the employee's personal comfort, such as going to the restroom, can be said to arise out of and in the course of employment because the time on such a break "is not released to him as free time during which he may do as he will and it cannot be construed as an altogether personal pursuit, as is the case during scheduled breaks."[10] The court also has restricted the application of this defense to those cases where the breaks are *regularly scheduled* and not where the breaks are dictated by work load or which are subject to interruption by the employer for the performance of work.[11] Moreover, the contention that an injury occurred during a regularly scheduled break such that benefits cannot be recovered is a matter that must be affirmatively proved by the employer as a defense to a claim that otherwise has been proved compensable by the employee.[12]

While the "scheduled break" rule was developing, the Court of Appeals embarked on a separate line of cases in 1950 that developed into what became known in Georgia as the "ingress/egress rule."[13] The court had already recognized that the "course of employment" included not only the time and place that an employee is

[5] *Id.,* at 271, 178 S.E. at 730 (1935).
[6] *Id.*
[7] 71 Ga. App. 569, 31 S.E.2d 421 (1944).
[8] 72 Ga. App. 122, 33 S.E.2d 109 (1945).
[9] *Hanson v. Globe Indem. Co.*, 85 Ga. App. 179, 68 S.E.2d 179 (1951); *Wilkie v. Travelers Ins. Co.*, 124 Ga. App. 714, 185 S.E.2d 783 (1971).
[10] *Edwards v. Liberty Mut. Ins. Co.*, 130 Ga. App. 23, 24, 202 S.E.2d 208, 210 (1973).
[11] *See, e.g., Miles v. Brown Transp. Corp.*, 163 Ga. App. 563, 294 S.E.2d 734 (1982); *Home Indem. Co. v. Swindle*, 146 Ga. App. 520, 246 S.E.2d 507 (1978).
[12] *See, e.g., Rampley v. Travelers Ins. Co.*, 143 Ga. App. 612, 239 S.E.2d 183 (1977).
[13] *Employers Ins. Co. v. Bass*, 81 Ga. App. 306, 56 S.E.2d 516 (1950).

fulfilling his job duties but also the time and place that he is "engaged in doing something incidental thereto."[14] This includes preparations to begin work at the place of employment. And these incidental activities and preparations were understood to include "a reasonable time for ingress to and egress from the place of work, while on the employer's premises."[15] As for egress, the court has explained that, "until the employee has departed the [employer's] premises, he has not started traveling a route of his own choosing wholly disconnected with his employment."[16] Georgia's "ingress/egress rule" is largely consistent with the majority of jurisdictions, which exclude injuries sustained while going to or coming from work, except those that occur on the employer's premises.[17]

In 1954, the Court of Appeals identified what it characterized as a "conflict" between these two developing lines of cases. The court described in *Travelers Ins. Co. v. Smith* a theory wherein "a different rule applied to identical sets of circumstances, depending upon whether the claimant was on his way to work in the morning (in which case he might recover) or was returning from lunch (in which case he might not).[18] The court distinguished the facts of the previous "scheduled break" cases as involving employees who were *leaving* their work stations to embark on a break during which they had total freedom of movement, whereas the facts in *Smith* involved an employee who was *returning* to work at the end of a break. It appeared the court would apply the "ingress" half of the "ingress/egress rule" to accidents occurring during scheduled breaks, but not the "egress" half.[19]

This apparent tension, that many viewed as uncomfortable, continued. In 2001, the Court of Appeals was asked to decide a question of the Workers' Compensation Act's "exclusive remedy" provision in a tort claim. The Act provides that workers' compensation is an employee's exclusive remedy as to the employer for covered injuries. In *Rockwell v. Lockheed Martin Corp.*,[20] an employee was walking to her car on the employer's premises at the beginning of her scheduled lunch break when her foot became caught on a metal dumpster lid, causing a fall with injuries. The employer advised her that she was not eligible for workers' compensation benefits because she was on her lunch break when she fell. The employee filed suit in tort. The employer then moved for summary judgment, which the trial court granted. The Court of Appeals acknowledged that workers' compensation benefits are not recoverable when an injury occurs on a scheduled break during which the employee is not conducting the employer's business. However, it further held that the line of cases that includes injuries occurring during reasonable ingress *and egress* as compensable under workers' compensation applied to bring the employee's injury within the coverage of work-related injuries, barring her recovery in tort. For the first time, the court declared that an injury by accident while *leaving* the workplace on a scheduled break could be considered as arising out of and in the course of employment.

The Court of Appeals had come close to applying the "egress" coverage to scheduled break cases as far back as 1957. In *Fed. Ins. Co. v. Coram*,[21] an employee was injured on the employer's premises after she had completed her shift and while walking from her assigned work location to a parking lot provided by the employer. Although the court stated that the rest period and lunch hour cases were not applicable, it went on to disapprove expressly its previous decision in *Gay,* which involved the denial of a claim by an employee who

[14] *New Amsterdam Cas. Co. v. Sumrell*, 30 Ga. App. 682, 118 S.E. 786 (1923).
[15] *United States Cas. Co. v. Russell*, 98 Ga. App. 181, 182, 105 S.E.2d 378, 380 (1958); *see also Bass*, *supra*.
[16] *Tate v. Bruno's, Inc./Food Max*, 200 Ga. App. 395, 396, 408 S.E.2d 456, 457 (1991).
[17] 2 Larson's Workers' Compensation Law § 13.01 (2019).
[18] *Travelers Ins. Co. v. Smith*, 91 Ga. App. 305, 309, 85 S.E.2d 484, 487 (1954).
[19] *See, e.g., Chandler v. Gen. Acci. Fire & Life Assurance Corp.*, 101 Ga. App. 597, 114 S.E.2d 438 (1960).
[20] 248 Ga. App. 73, 545 S.E.2d 121 (2001).
[21] 95 Ga. App. 622, 98 S.E.2d 214 (1957).

was injured while *leaving* her workplace for lunch. The *Coram* decision instead approved the dissent in Gay, which would have held that an employee who is *leaving* work *for a lunch break* and who is injured on the employer's premises can receive benefits.[22] This view largely went unnoticed, however, and did not become controlling law until *Rockwell*, 47 years later.

Coming forward to 2018, it was against this background that the Court of Appeals decided the recent *Frett* case. The facts as found by the Georgia State Board of Workers' Compensation, which cannot be disturbed on appeal when supported by any evidence, were that *Frett*, an insurance claims associate, had a mandatory, unpaid 45-minute lunch break every day, during which she would clock out using the employer's phone system and was free to do as she pleased, including leaving the employer's premises; that on the day of her accident, she logged off the phone system and walked to the employer-provided break room to heat her lunch in the microwave; that as she was leaving the break room with her lunch, but still inside the breakroom, to go outside to eat, she slipped on some water and fell.[23] The employer denied the claim, contending that any resulting injuries did not arise out of and in the course of the employment because, at the time, the employee was on a regularly scheduled break.

Following an evidentiary hearing before an administrative law judge of the State Board of Workers' Compensation, a decision was issued awarding benefits. The administrative law judge cited *Rockwell* and concluded that workers' compensation benefits were payable for an injury sustained during reasonable egress from an employer's business even while on a scheduled break. The Board's Appellate Division reversed, concluding that the Court of Appeals' decision in *Rockwell*, a tort case, did not control the outcome in *Frett*, because the question of the compensability of a possible workers' compensation claim had not been before the court. The Appellate Division instead relied on *Farr* and its progeny for the proposition that an injury sustained during a regularly scheduled break, even while on the employer's premises, does not arise out of the employment when the employee is attending to a purely personal matter and not subject to the employer's control. The superior court affirmed the Appellate Division's denial of benefits, and the Court of Appeals granted a petition for discretionary review.

Rather than have the case decided by a three-judge panel, the full Court of Appeals participated in the decision. As noted above, the court observed that "the intersection of the ingress and egress rule with the scheduled break rule creates anomalous and arbitrary results." The court went on to observe that "[a]n employee choosing to leave her employer's premises during a scheduled lunch break who is injured while departing or returning would be compensated under the Act, but an employee who chooses to remain on her employer's premises and is injured during a scheduled lunch break would have no such coverage. Additionally, whether an employee had the subjective intent to depart the premises will determine coverage when an employee is injured on the employer's premises at the beginning of a scheduled break."[24]

In an effort to resolve these "anomalous and arbitrary results" and to reconcile apparently conflicting case law while acknowledging its duty to apply the Supreme Court of Georgia precedent in *Farr*, *supra*, the court concluded that the expansion of "arising out of and in the course of" to cover reasonable ingress to and egress from the employer's premises during a scheduled break was "an improper dilution" of *Farr*. In so concluding, the court expressly disapproved three of its previous decisions, including *Smith* from 1954 and *Rockwell* from 2001. Noting that the Supreme Court of Georgia has never weighed in on the "ingress/egress rule," generally, created and maintained only by the Court of Appeals, the majority opinion in this 9-4 case concluded that any

[22] *Coram*, at 625, 98 S.E.2d at 216.
[23] *Frett*, *supra*, at 30, 821 S.E.2d at 133-34.
[24] *Id.*, at 35, 821 S.E.2d at 137.

application of this rule to the "scheduled break rule," whose origins lie with the Supreme Court, should be made by the Supreme Court. In so holding the majority noted that other jurisdictions have allowed workers' compensation coverage for injuries sustained during work breaks. However, the court noted further that those jurisdictions did not have the kind of "scheduled break rule" that Georgia has.[25]

The dissenting opinion was written by a former appellate judge of the State Board of Workers' Compensation. In her dissent, she emphasized the importance of a "clear direction in the law" for employees and employers alike. She concluded that applying the ingress/egress rule to scheduled breaks was not inconsistent with the Supreme Court's precedent in *Farr*. She and the judges joining her agreed that the issue was "ripe for Supreme Court review."[26] The employee in Frett filed a petition for a writ of certiorari in the Supreme Court of Georgia but has since moved to withdraw the petition. It appears that the Supreme Court may not yet weigh in on the matter.

Since the Georgia Workers' Compensation Act was first created nearly 100 years ago, there has been no change to the statutory language pertinent to whether an injury sustained by an employee during a break from work is covered. In the last 84 years, however, the appellate courts' interpretation of how that statutory language applies has gone through significant changes, most recently returning to the place very much like where it began in 1935. Unless and until the Supreme Court or the legislature sees fit to make further changes, an area of the law that had appeared to be in some flux has now settled, giving employers, employees, their counsel, and the Board some certainty when planning for, handling, and deciding cases. Even with this apparent stability, however, which may be seen as good or bad depending on perspective, we can expect ongoing efforts by parties and their lawyers to bring about further evolution with new fact presentations and ongoing legal arguments.

## Lessons from Grandpa
**By Fellow Robert Wisniewski, Phoenix, AZ**

Though I have learned lessons in advising clients over the four decades of practicing law and representing injured workers (See *Article, "Communication Strategies: Clients with Challenging Behaviors"*, The College of Workers' Compensation Lawyers Newsletter, Fall 2018) – I now have new rules. These new rules of presenting an injured worker's case have been distilled over the past seven years from being a grandparent to seven grandchildren under seven years of age, into simple rules as follows:

**BE CALM**. Every injured worker is scared, hurt and broke. The unfamiliar territory of the deposition/hearing and indeed, the entire Workers' Compensation case is usually the first opportunity for the worker to try to present his story and its impact upon his life. Like the grandchild's meltdown, the worker may simply flare out angrily, out of control and jabber without direction. **Reassure** the client, advise there is ample time to tell their version and focus them on the pertinent issues of the case, rather than that which they think is important. **Remind** them not to ramble on in the deposition/hearing. Remind them what is important and what is not important and

[25] *Id.*, at 36 n.2, 821 S.E.2d at 137, citing *Hearthstone Manor v. Stuart*, 192 Ore. App. 153, 84 P.3d 208 (Or. Ct. App. 2004); *Gold Kist v. Jones*, 537 So. 2d 39 (Ala. Civ. App. 1988); *Dyer v. Sears, Roebuck & Co.*, 350 Mich. 92, 85 N.W.2d 152 (Mich. 1957); *Holder v. Wilson Sporting Goods Co.*, 723 S.W.2d 104 (Tenn. 1987).
[26] *Id.*, at 39, 821 S.E.2d at 139.

thus, not useful. Focus them. Slow them down. Like the grandchild, distract them. Remind them that you are there and they are safe. Perhaps a hand on their shoulder or on their arm reassures more than what you can say. If you are the questioner in direct exam and you see their nervousness coming through as they start answering before the question is completed or going off on a tangent, stop! Ask them, "Are you nervous"? They will say, "yes"! Then slow down the pace of your questions. If it is a deposition, take a break and use it as a tempo-slowing timeout, just as a grandparent would, pulling the grandchild aside for a little talk. As well, you must remain calm so it becomes infectious.

**BREATHE DEEPLY**. This is the corollary to "Be Calm". Encourage the client to take a deep breath (or a few) after the question. It will help calm the witness, give the witness time to think about the question and defuse the nervousness they have (P.S. you do the same.)

**USE GOOD LISTENING SKILLS**. As the grandparent or parent admonishes the child, "use good listening skills", so you must remind the client. Too often, clients are nervous and they busily start jabbering, not answering the question. The rattling on is the defense mechanism. Words are their shield caused by their nervous insecurity in this unfamiliar territory of deposition or hearing. In your pre-deposition practice of your client – if that client is displaying poor listening skills, go back to the starting point – both be calm. Both breathe deeply and start again. Here is an example of poor listening skills:

| | |
|---|---|
| Attorney question: | And after the urgent care office, did you go to see an orthopedist? |
| Injured worker answer: | Yes. |
| Attorney question. | What was his name? |
| Injured Worker answer: | Dr. John Smith and I didn't like him. |

The poor listening part is underlined. That is the time to demonstrate to your client that he or she is to only to answer the question posed and not to editorialize or ramble. It is good practice to educate the client about listening and not volunteering beyond the question or worse yet, what the client thinks is the "appropriate answer to the question". **Remind** your client to be calm, stay calm, breathe deeply, listen to the question asked and only answer the question asked and only with enough words to answer the question fully. Nothing more.

**EAT YOUR BROCCOLI**. Every case has difficult part (perhaps like broccoli). And you have to remind your client how to get through those difficult parts (just two more bites and then we will get ice cream). If in the preparation beforehand, he feels more comfortable, then probably he will eat the broccoli (and be a better witness) and the broccoli may go down more smoothly. Of course, then we can all go for ice cream.

**WHAT A NICE, BUT WELL-BEHAVED GRANDCHILD YOU HAVE**. One purpose of the deposition and especially the hearing is to make the defense lawyer and hopefully, the trier of fact (the judge), have a favorable opinion of the client. So, like the well-behaved grandchild, you want the judge to like the client so that client is believed. **Remind** them – if they like you, they will believe you. As in all human nature, when credibility is an issue (most workers' compensation cases), if you are likeable, you may be believed more so than if you are an unlikeable witness. **Remind** your client to be the well-behaved grandchild.

**LISTEN TO GRANDPA**. Like the less-than seven-year-old grandchild with a mind of his/her own, your client may have his or her own agenda as to what they think is important. They have gleaned this from their life experiences, their neighbors, television ads and the internet. You have to remind your client to be focused. Like the grandpa, you have to focus the child (client). Focus that client on the salient points of what you're both trying to prove. Explain to them what you're trying to prove. Explain how you're going to go about it and that you are the one that is orchestrating their testimony. You're not telling them what to say. You're telling them, in essence, how to say it, to present a cogent theory of the case. You are driving the ship and with their help, you'll avoid hitting the proverbial Titanic's iceberg (hopefully).

**BUCKLE THE SEATBELT.** Tightly inside the car seat, the grandchild is safe. **Remind** your client if he follows the above types of preparation, favorable witness demeanor, good-flowing direct exam, focused testimony, eye contact with the judge, being a likeable witness, they may arrive, like the grandchild, safely at the conclusion of the case, which is a favorable decision and/or settlement.

**BIOGRAPHY:** Though Bob Wisniewski is a member of The College; however, his "best" award is his auto license plate gifted from the grandchildren stating NBR1GPA (Number 1 Grandpa).

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## BOOK REVIEW – THE TECHNOLOGY TRAP: CAPITAL, LABOR, AND POWER IN THE AGE OF AUTOMATION by Carl Benedikt Frey

**by Fellow David Torrey, WCJ, Pittsburgh, PA**

A frequently-voiced social concern, universally, is the perceived growing threat of artificial intelligence (AI) to eliminate the jobs of millions of workers. The concern is voiced by workers' compensation lawyers and others in the community in a more narrow, existential way. If the number of jobs is significantly truncated, particularly those in the industrial sector, will workers' compensation become superannuated, and along with it those who labor in the dispute resolution process?

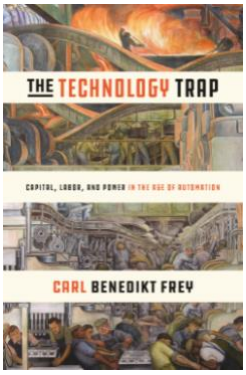
A healthy commentary exists in this realm. In this new book, Oxford University economic historian Carl Benedict Frey takes a retrospective/historical look at the situation and tries to predict the future from experiences of the past. Frey, a specialist in studying technology and employment, has, along with his colleague, Mark Osborne, published several widely-read articles on this topic over the last three years. The book is thick but, in the end, highly readable and a balanced, up-to-date treatment of this burning socio-legal issue. The book does not focus on industrial injuries. Still, the advance of AI, and the replacement of human labor with robots and/or other labor-saving innovations, holds the portent that many of the injuries and deaths encountered in the present day will be eliminated in the future.

An attractive feature of the book is the author's attention to the workers whose jobs are threatened by AI. Will they simply accede, as they did with computerization, to the elimination of jobs, or will they seek government action to suppress AI innovation? Meanwhile, will workers be attracted more and more to populist movements, fueled by resentment of elites who seem most advantaged by job-threatening technological processes?

A key focus of the book is explaining that the advance of technology has, since the eighteenth century – first in England and then in the United States – affected labor in two ways. The first affect is from technology that simply *replaces* jobs that were theretofore undertaken by human labor. Frey's example, throughout, is that of gas lamplighters. With the invention of the light bulb, such jobs were simply eliminated. The second affect is from technology that, in contrast, *enables* workers to undertake the same or similar jobs with greater ease, and hence with greater productivity; and/or which generates new, theretofore uncontemplated, jobs. Frey again uses electrification as an example, here with the technological marvel of the lighting and powering of factories. Between lighting, which allowed longer hours of work, and the powering of motors to drive manufacturing processes, workers could be more productive, avoid dangerous conditions, and, ultimately, achieve greater wages.

Of course, workers are better off when technology generates jobs that are of the enabling sort, as opposed to that which totally eliminates jobs. However, even with enabling technology, history has shown that a period of adjustment, which he calls "Engels' Pause," may exist. During such a period, workers may be displaced from their customary employments and experience depressed wages and other social and economic disruption. This phenomenon is most vividly illustrated by the Luddites, with their rebellion against mechanization and their destruction of labor-replacing machinery. Their revolt against innovation was not based on some abstract devotion to custom and tradition but, instead, on the real threat of unemployment and other socio-economic upheaval.

On this point, Frey, throughout, makes an observation that may be counterintuitive. In this regard, over the centuries, rulers, particularly monarchs, often joined in the *suppression* of technological development because of anxiety surrounding social disruption. They feared that the population, particularly enterprises like craft guilds, would turn against them. In the late eighteenth and early nineteenth centuries, however, commercial interests in England gained formidable political clout and began to displace landed aristocratic interests. With this change in power structure, the government began *supporting* technological innovation. Indeed, the army was called out to crush the Luddites. Meanwhile, the new governing elites did nothing (at first) to prevent factory owners from replacing able-bodied men with women and children – who could easily, and cheaply, labor at the new machinery. In any event, the pattern over the last two centuries has been for government to support technological innovation in the workplace. The anxiety over displaced (and displeased) workers has persisted, but the typical response, with a few exceptions, has been retraining programs and unemployment compensation.




Frey thoroughly covers the past in trying to predict the AI future. Most familiar to the current reader will be how workers and society reacted to such things as the automation of automobile and other factories, the invention of the typewriter, and computerization of innumerable processes. By and large, these technologies have been ones of *enablement*, however hard for some the transition. In contrast, Frey believes that AI is full of *replacement-of-jobs* potentialities. He identifies, in particular, truck driving. The coming loss of jobs to autonomous vehicles in this area is especially critical, as truck driving is a leading form of employment in virtually all states. He ponders, as noted at the outset, whether those currently employed in the field, and in other entry-level and low-skilled jobs, will simply roll over in the face of the phenomenon. The author seems certain that at least some workers will suffer through another "Engel's Pause" period of adjustment, such as was encountered so painfully during the initial phase of the industrial revolution.

The author's final chapter is devoted to recommendations to make the period of adjustment easier. First and foremost is the promotion of education; it is the non-educated who, in the wake of AI innovations, will suffer the most. The second is retraining and a more flexible approach to educating the displaced. Frey also reviews, among other things, wage insurance, tax credits (he is unsympathetic to universal basic income), decreased regulation, *i.e.*, licensure, of skilled jobs (which he favors), relocation, and modifying transportation systems to connect displaced workers in a region to another where work is plentiful.

In the end, Frey has no hard answers to the labor issue in the age of automation, but a considered reading of his book is thought-provoking and, gratifyingly, places the issue in detailed historical context.

Princeton University Press. 2019. 465 pp.
Interview and summary by the author: https://www.youtube.com/watch?v=SIOIN-R4Qh4
Associated lecture: https://www.youtube.com/watch?v=p1725ulAMqg

## Honors and Accolades

- Congratulations to the following Fellows who were nominated for the *2019 Compe Laude Awards* which will take place September 23-25, 2019: Hon. **Michael Alvey** (KY), **James Anderson** (MS), **Charles Davoli** (LA), **George Kagan** (FL), Hon. **John Lazzara** (FL), Hon. **Denise Lott** (MS), Hon. **Frank McKay** (GA), **Alan Pierce** (MA), **William Pipkin** (AL), **Jane Stone** (TX), Hon. **Robert Swisher** (KY), Hon. **Kenneth Switzer** (TN), **Richard Thompson** (FL), Hon. **David Torrey** (PA).,

- Fellow **Joel Alpert** (MI) inducted in 2010, presented at the Workers' Injury Law and Advocacy Groups (WILG) Mid-West Regional Conference in Kansas City, MO, April, 2019, on the topic of "Social Security & Medicare Set Asides, Tactics and Considerations; Preventing Abuses, Options/Obligations to Client." He is scheduled to speak at the WILG Annual Convention in Santa Barbara, October 2019, on the topic of "Attorney Fees – Trends & Challenges." His Workers' Compensation chapter in "Attorney Fee Agreements in Michigan", Institute for Continuing Legal Education, was updated and republished.

- Fellow **Deborah Blevins** (VA) presented an ethics CLE, "Negotiation Ethics: Sales Puffery v. Full Disclosure," to several regional chapters of the Virginia Workers' Compensation American Inn of Court in 2019. She is also serving as Chair of the Special Committee to Study Appellate Mediation in Virginia. The recommendations of this committee resulted in the Supreme Court of Virginia and the Court of Appeals of Virginia undertaking pilot projects in appellate mediation on January 1, 2019.

- Fellow **Luanne Clark** (GA) was selected to receive the 2019 *Dr. Tom Howell Award* which was presented at the Georgia State Board of Workers' Compensation annual conference on August 26, 2019. The *Dr. Tom Howell Award* is presented to an individual who embodies Dr. Howell's integrity, commitment to excellence, the setting of high standards, especially for one's self, and a selfless, caring heart, attitude and sacrificial service for the betterment of the workers' compensation system in Georgia.

- Fellow **Tommy Dulin** (MS) was inducted a Fellow of the Mississippi Bar Foundation at its Annual Meeting on April 11, 2019 where lawyers who have made outstanding contributions to the public and the profession are honored and recognized.

- Fellow **H. Emily George** (GA) was selected to receive the *2018 Distinguished Service Award* which was presented at the annual ICLE Workers' Compensation seminar in October 2018. The *Distinguished Service Award* is presented by the Workers' Compensation Section of the State Bar of Georgia to members of the bench and bar who have made outstanding contributions to the practice or development of workers' compensation law.

- Fellow **Barbara Holmes** (PA) will be presented with the Pennsylvania Bar Association Workers' Compensation Law Section *Irvin Stander Memorial Award* at its annual fall meeting, September 26-27, 2019.

- Fellow **Sheral Keller** (LA) was recently elected Vice-President of the Southern Association of Workers' Compensation Administrators (SAWCA) at its 71st Annual Convention in Savannah, GA, in July 2019. Previously, she served as Secretary/Treasurer of the organization, having been elected to this position at its mid-year meeting in Middleburg, VA in July 2018. Also, in August 2019, Judge Kellar was elected Secretary of the National Association of Workers' Compensation Judiciary (NAWCJ) at its annual meeting in Orlando, FL.

- Fellows **R. Todd Lundmark** (AZ) and **Robert Wisniewski** (AZ) presented a point/counterpoint presentation to over 500 attendees at the Annual Arizona Industrial Commission Seminar, August 8th, on the topic of "Compensability: The Truth About Humpty Dumpty."

- The Honorable **Frank McKay** (GA) was named to the Board of Advisors for the Workers' Compensation Institute (WCI) in Orlando, Florida. Judge McKay was also named a finalist for a 2019 Comp Laude Award. For

2019/2020 Judge McKay is serving as the Immediate Past President of the Southern Association of Workers' Compensation Administrators (SAWCA) and on the Board of Directors for the International Association of Industrial Accident Boards and Commissions (IAIABC) and on the Board of Directors for the National Association of Workers' Compensation Judiciary (NAWCJ) and on the Kids' Chance of Georgia Board of Directors, and is a Workers' Compensation Research Institute (WCRI) Georgia Advisory Committee Member.

- Fellow **Shari Miltiades** (GA) was awarded the *Robbie Robinson Award* by the Savannah Bar Association at its annual law day event on May 2, 2019. The *Robinson Award* honors the memory of Robert E. "Robbie" Robinson, a Savannah civil rights attorney who was killed in his office by a pipe bomb in December 1991. The Award annually honors a member of the Savannah Bar Association in recognition of outstanding personal contributions to the goals of professional services, protection of the rights of individuals, and the promotion of justice through law.

- Fellow **Melinda Poppe** (AZ) has been selected as Vice Chief, Administrative Law Judge of the Arizona Industrial Commission.

- Fellow **Lucas Strunk** (CT) has again been named *Best Lawyers Employers' Lawyer of the Year* for 2019. Luke has been honored with this title three out of the last six years. Congrats to Luke for this prestigious honor! Fellow **Jason Dodge** (CT) of the same firm has also been named to *Best Lawyers* for 2019 for workers' compensation defense.

**Fellows are encouraged to submit articles or a blog website for publication in future CWCL newsletters. Please contact any committee member with questions, or to forward your article:**

**Ann Bishop, LuAnn Haley or David Torrey**

## In Memoriam

We are saddened to report the recent passing of two Fellows.

**Steven M. Licht** died on August 26th at age 77. He was born in New York and grew up on the Lower East Side.

Steven was a graduate of New York University with a BA degree and of Brooklyn Law School with an LLB (JD) degree. He was admitted to the New York State Bar in 1966. He worked at the New York State Insurance Fund from 1970 to 1998 and retired as Director of Claims. Steven served as CEO and Attorney of the Special Funds Conservation Committee until its dissolution in 2018. A distinguished leader in the workers' compensation industry, receiving many awards and accolades for his years of service, expertise, mentorship and guidance. He was a member and past Chairman of the International Association of Industrial Accident Boards & Commissions (IAIABC) joint committee on Fraud & Abuse, member of the New York State Bar Association, member and past President of the New York Claims Association, and past Chairman of American Association of State Compensation Insurance Funds Claims Committee. Survived by his wife, Diana, daughter Lisa and son James.

**Frank A. Flynn** passed away May 14th at age 65. Frank graduated from University of Southwestern Louisiana (now ULL) and Loyola University New Orleans College of Law. He was a hardworking and respected attorney and partner at Allen & Gooch law firm for nearly 40 years and was considered by many to be the finest example of humility, kindness and generosity. He served as President and Vice President of Concerned Citizens for Good Government, was a Board Member for the Children's Museum of Acadiana, and a member of Knights of Columbus Lafayette Council 1286. Frank also served as chairman of the Lafayette Democratic Parish Executive Committee in 2004 and as a Democratic Committeeman to the State Party from 2008 until his death. He will be honored with recognition by Governor John Bel Edwards. In lieu of flowers, memorial contributions may be made in Frank's honor to the American Sickle Cell Anemia Association, the Frances Foundation for Kids Fighting Cancer, or to the Shriners Hospital for Children in Shreveport, LA. He is survived by his wife Cynthia Meche Smith, daughter Kaitlin Armstrong (Travis) and stepchildren Allison and Neil Smith.

## CWCL LOGO

Fellows are encouraged to include the College logo on their website. Please email Susan Wan for a downloadable file or download the logo below.

THE COLLEGE OF WORKERS' COMPENSATION LAWYERS