THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

NEWSLETTER
SPRING 2017

IN THIS ISSUE

The 12th Annual Induction Dinner will take place on Saturday, March 3, 2018 in Nashville, TN at the The Nashville Westin coincident with the TIPs Mid-Winter Workers' Compensation Meeting. Mark your calendars now!!

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**indicates second two year term*

PRESIDENT TOM DOMER'S MESSAGE - CHARGE TO THE TROOPS

Ten years ago, when admitted to the CWCL as a Fellow, I thought the College was a self-congratulatory dinner club, where I could trot out my tux once a year and have a nice meal in a warm climate. My views changed, as I chaired the Writing Committee, became a board member, officer, and now president. We're still an honorary organization, recognizing distinguished Workers' Comp practitioners, teachers, and judges. But we do so much more to enhance the profession of practicing workers' comp.

We just sponsored our 1st National Symposium on the Future of WC, featuring speakers with a national perspective on WC issues. The overwhelming success of this initial endeavor will likely prompt us to make this an annual event (in conjunction with the ABA TIPS or Labor/Employment Section meeting).

We inducted 41 new Fellows, expanding our rolls to over 300, adding to our gender, geographic, racial and advocacy diversity. We encourage our new and continuing members to explore opportunities for participation in one of our many active Committees:

Nominating: (recommending, vetting candidate for Fellowship)
Symposium: (planning CWCL symposium speakers, program)
Law Student Writing Competition: (promoting, reviewing student entries)
Governance: (bylaw revision, board membership, procedures, diversity)
Newsletter: (providing content, topics)
Kids Chance: (working with, creating state chapters)
Long Range Planning: (devising options for future CWCL programs)
Speakers Bureau: (providing list of speakers for events nationwide)

Volunteer for a Committee, and participate in the good work of the College. Contact our indefatigable executive director, Susan Wan susan.wan@cwclawyers.org , or any CWCL board member.

CWCL INAUGURAL SYMPOSIUM – Judge LuAnn Haley, Tucson, AZ

The College of Workers' Compensation Lawyers' Inaugural National Workers' Compensation Symposium provides a vision of the future of workers' compensation practice.

As a member of the College of Workers' Compensation Lawyers, I had an opportunity to be both a presenter and an attendee of our Symposium that was held on March 18, 2017 in Phoenix Arizona. The CWCL symposium took place on the final day of the ABA's Workers' Compensation Midwinter Seminar and the ABA's separate program is also summarized by Judge Torrey in this edition of the newsletter. The NAWCJ's Judge John Lazzara was the spearhead of this excellent symposium program and Judge Torrey and I were each involved in one of the four panel presentations that were offered that morning. The symposium topics were interesting and timely and included an excellent review of many of the challenges that all adjudicators face in the courtroom each day. The topics included: a review of claim statistics, the viability of a comp practice today, a review of recent case law and the difficulties with opioid medications and medical cannabis. Included herein are some of the high lights from the presentations at the CWCL's 2017 inaugural symposium.

The opening presentation discussed the statistics of injury frequencies and claim trends, with Peter Rousmaniere, a renowned journalist and consultant in the field of workers' compensation risk management, providing statistics which demonstrated drops in the frequency of injuries as well as the filing of claims across the country. Mr. Rousmaniere reported that the reduction in work injuries has been documented over the past few decades and is expected to continue through the year 2022. The other panelists, Brad Ingram and Richard

Thompson, both workers' compensation defense attorneys, agreed that for a number of reasons, including the changing work force, automation, and under reporting of claims, there has been a reduction in the numbers of documented work injuries. Additionally, all the panelists agreed that although the number of claims has dropped, this reduction does not mean that those who are injured are adequately compensated for their injuries. The panel made the point that although the number of claims are decreasing and costs are similarly being reduced, why then are injured workers continuing to be under compensated for their injuries.

The second presentation that raised the question as to the viability of a workers' compensation practice with the recent trends in limiting attorney fees and requiring mediation before litigation. The panel consisted of lawyers from Massachusetts, Alan Pierce; Louisiana, Charles Davoli; and Texas, Jane Libscomb Stone. The panelists discussed whether limiting attorney involvement in workers' compensation claims results in denying access to justice for the injured worker and in turn contributes to the "race to the bottom" in workers' compensation systems. Further, the group raised the issue that adjudicators often face as to whether the system has become so complex that an unrepresented claimant cannot navigate without the assistance of competent counsel.

The third presentation involved a review of the top five recent workers' compensation cases in the United States and NAWCJ's Judge David Torrey was the moving force behind the panel which also included Professor Michael Duff and a defense attorney from Pennsylvania, Burke McLemore. The five cases, all of which will likely be familiar to our readers, included the following decisions: finding an "opt out" statute unconstitutional in Oklahoma, finding exclusion of agricultural workers from coverage as unconstitutional in New Mexico, use of the AMA Guides 6th as unconstitutional in Pennsylvania, waiver of right to sue third party found to violate public policy in New Jersey, and mandatory fee schedule for attorneys found to violate due process in Florida. This presentation was a high light for all in the audience as both Professor Duff and Judge Torrey provided careful analysis of the issues in each case coming from their unique prospective of law professors in the field of workers' compensation.

The final presentation of the symposium addressed the issue of the discord between law and medicine with the growing problems of opioid abuse and the advent of medical cannabis as a treatment option for injured workers. I was asked to moderate this panel that included Dr. Leon Ensalada, a medical doctor with a specialty in pain medicine, and Paul Sighinolfi, the Executive Director and Chair of the Maine Workers' Compensation Board. Dr. Ensalada provided an in depth look at the efficacy of medical cannabis as a treatment option for injured workers with chronic pain as well as whether medical cannabis is a reasonable option to reduce or replace narcotic medications. Director Sighinolfi reported on the recent cases in Maine that have approved medical cannabis as a viable treatment option for injured workers and discussed how Maine deals with reimbursement issues. In closing the panel raised the question as to who is ultimately responsible, be it doctors, lawyers or adjudicators, to work on resolving the opioid problems in workers' compensation cases. In response, Massachusetts lawyer Deborah Kohl described how her state has developed a mediation process to deal solely with the issue of medication management for injured workers who have difficulties with opioid medications. The mediation program in Massachusetts includes medical professionals as experts to assist with the resolution of difficult issues involving the use of opioid medications by injured workers.

If you missed the CWCL's 2017 inaugural symposium in Phoenix, this short article cannot provide all of the valuable information imparted by the distinguished speakers on these four panels. However, with the success of this year's program, you should plan now to attend next year's CWCL symposium which will be held in Nashville, Tennessee.

NOTES FROM A SEMINAR: Judge David Torrey, Pittsburgh, PA

The ABA Workers' Compensation Section's CLE, Phoenix 2017 - Undocumented Workers, Compensation Community Dialogue, Traumatic Brain Injury, *Castellanos* and the Best of the Rest

ABA Workers' Compensation Committee Mid-Winter CLE, Phoenix, AZ, March 16-18, 2017, **papers** available at http://www.americanbar.org/groups/labor_law/committees/wccom/archive/2017papers.html (Last visited March 27, 2017); **brochure and summary**: http://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/work/mw2017wc_brochure.authcheckdam.pdf.

The American Bar Association Workers' Compensation Committees (those of the Labor and Employment and the Tort, Trial and Insurance Practice Sections), recently convened their Mid-winter CLE in Phoenix, AZ. The sessions extended from Thursday, March 16, 2017 to Saturday morning, March 18, 2017. The conference was attended by a few logistical glitches, but those irritants were easily trumped by the flood of information and ideas that the gathering provided!

I. Undocumented Workers

For my part, I presented, as part of a panel headed by Kansas lawyer Kim Martens, a paper on workers' compensation rights of undocumented workers. I had been assisted in the project by a talented Pitt Law student, Justin Beck, who is going into our field. Our co-written paper, which analyzes the issue, and which collects current press accounts and academic commentary, concludes with a fifty-state comparative table. It is posted at the public conference URL (see above), and also at www.davetorrey.info.

As far as I can tell, 32 states now have authority holding that an undocumented worker can be an employee for purposes of workers' compensation laws; 18 are officially undecided; one state has authority to the contrary (Idaho); and one (Wyoming) considers such workers "employees" if the employer *believed* the worker was documented. The total equals 52, as I am including D.C. and the LHWCA. Not everyone, notably, categorizes the states the exact same way. Attorney Gary Wickert – long known as a national subrogation expert – has a new online table out (cited in our bibliography), with slightly different results.

The big issue, nationwide, is in fact not the basic issue of employee status, but the *extent* to which such workers are entitled to benefits. Many states, including my own (Pennsylvania), maintain the rule that an injured worker is disqualified from total and partial disability once he or he is cleared for work. Not all states, however, are so restrictive. Our neighboring state of Delaware is an example. There, the employer still has the burden of showing resolution to partial disability.

Of intrigue was the commentary of the two top-notch injured worker lawyers, from Phoenix and Tucson, who were on our panel. In Arizona, no statute or common law declaration exists unequivocally stating that an undocumented worker is an employee for workers' compensation purposes. One of these local panelists characterized the state as being "officially neutral" on the issue, and both sides are said to avoid the worker's immigration status. As many undocumented workers are laboring in Arizona, this custom and practice seems quite remarkable.

II. Keynote Address on the State of the Program

The first session was in fact a Keynote Address by Bob Wilson, the principal of workerscompensation.com (an information aggregator), and a well-known blogger about workers' compensation. Though not a lawyer, he

is unusually sophisticated about the laws, customs, and practices that surround the field. It is notable that he conspicuously refers to workers' compensation not as the practice, program, or system, but as the "industry."

Mr. Wilson discussed the progress of the Wilson-Langham Summit which has been carrying on a dialogue about the state of workers' compensation for the last year. He noted that the three critical areas all Summit participants believe need serious consideration are benefit adequacy, regulatory complexity, and the chronic problem of worker delays in receiving treatment.

Over-involvement of lawyers in the system is usually highlighted as a concern in system evaluations, and this issue has been advanced at Summit meetings. Of course, excessive attorney activity in compensation systems has been remarked upon for over half a century. (In a 1930's study of the Pennsylvania system, critics complained that too many workers had their benefits reduced by attorney's fees.) The irony, Mr. Wilson pointed out, is that when problems occur in the area of benefit adequacy, regulatory complexity, and delays in treatment, it is *lawyers* who are typically brought in to address the issues.

On the topic of lawyers, Mr. Wilson spoke with admiration of the workers' compensation system in the Canadian province of Saskatchewan. There, a governmental Board runs the entire system (a "fund" arrangement, as in Ohio and Washington). The head of the Board has commented to Mr. Wilson that *he* runs the *whole operation* (though in a ribald moment, this official used the term "shiteroo" to define the program over which he had such dominion). Reportedly, no interloping attorneys *at all* are involved in the Saskatchewan program.

Mr. Wilson posited, notably, that in American systems, where *private insurance* underwrites the entire operation, things are different: "In a for-profit system, attorneys [actually] keep everyone honest."

He also remarked that "workers' compensation is a risk averse system," leading to much delay in many areas – often including benefit delivery. "Nothing," he posited, "moves quickly in comp." He suggested that those of us involved in the system are "part of the churn." This system is problematic: with bureaucracy and the churn of other system participants delaying decision-making, items like the all-important prompt delivery of medical care can be greatly prejudiced.

Mr. Wilson seemed frustrated that, despite the ongoing dialogue – which had its genesis in criticism of retractive reform – 2017 had opened with the states of Iowa and Kentucky proposing more of the same. For example, he noted that in Iowa, a bill is pending that would have that state join others in requiring a "predominant contributing factor" type of standard to be instituted, in order to limit aggravation injuries. This Iowa proposal struck him as a depressing "re-run" that seemed not responsive at all to the concerns of critics of the system. Wilson posited that this type of continuing retractive proposal renders workers' compensation the "definition of insanity."

A frequent theme of Mr. Wilson is that workers' compensation agencies – in their bureaucratic/oversight roles – need to exercise forbearance and be less arbitrary in their administration of the laws. At least one state agency apparently features a bureaucracy displaying little flexibility; for example, it imposes oppressive fines for technical infractions relating to benign reporting protocol infractions.

Mr. Wilson again endorsed the spirit of the Maine Act's Section 222. The law defeats the delay-in-treatment problem by obliging group health insurance payers to pay for treatment during any dispute in the compensation realm. (In my state, Pennsylvania, this has been the rule by order of the Insurance Commissioner since 1991, though it has never been officially codified.)

Is the system broken? Wilson believes not, and he submitted that 85% of claims are handled without dispute. It is the "ten to fifteen percent" where the system gets in trouble. Though not broken, Mr. Wilson reiterated his advocacy that the conceptualization of workers' compensation should be altered. Too much

emphasis exists on "compensation" and not on another goal of the system: the worker's recovery. He would rename the Workers' Compensation Act the Workers' *Recovery* Act.

Mr. Wilson also expressed frustration that injured workers do not understand how the system works, "and we do a bad job on this" – that is, proactive communication. In light of this lack of injured worker sophistication, changing workers' compensation to "recovery" keeps the "goal in mind."

To a great extent, a lesson of the three Wilson-Langham Summit meetings is that too many members of our privately-underwritten system dwell in "knowledge silos." Wilson believes that greater connections among members of the field, and consequent better understanding among system participants, would improve the system – okay, the *industry* – immensely.

III. Mild Traumatic Brain Injury

Another presentation dealt with mild traumatic brain injuries. This topic is very current at workers' compensation seminars, particularly in my city (Pittsburgh), a kind of ground zero for the study of concussion injuries. In this presentation, the speaker was the Chicago neuropsychologist Dr. Robert Heilbronner. The doctor noted at the outset (perhaps surprising some of us!) that the field of neuropsychology is actually not recognized formally by state licensure agencies, except in the state of Louisiana.

Dr. Heilbronner's speech was provocatively entitled, "Mild Traumatic Brain Injury, Post-Concussion Syndrome and Insufficient Effort/Malingering." The presentation set forth the thesis of one of his articles, "Neuropsychological Assessment of Effort, Response, Etc." It is published at volume 23, pages 1093-1129, of *The Clinical Neuropsychologist*.

Dr. Heilbronner is a treating neuropsychologist, but he also undertakes independent psychological examinations (IPE's). He had strong feelings about the IPE and the procedures surrounding the same. Indeed, much of the doctor's presentation vindicated the title of his session: talking about how he addressed, and reacted to, IPE claimants who undertake insufficient effort during the exam or are outright "malingering." Of course, he immediately noted that he is cautious about using the "M" word. He declared, "neuropsychologist have been sued for saying a personal injury claimant is a malingerer."

On a miscellaneous note, it is interesting to this writer that the defense, in Pittsburgh, rarely utilizes neuropsychologists for the concussion IME process. Usually, the IME in a concussion case is a conventionally-trained neurologist.

In any event, the doctor's comments were familiar to the veteran. For his part, he does not want claimant attorneys at the neuropsychological exams that he undertakes – nor will he abide video or audio recordings of the IPE. He insisted that test results can be affected by these intrusions. If he has been employed as the IPE doctor, and the lawyers and/or the court insists that the claimant's lawyer can be present, he will withdraw from the case. It is notable that he has authored an article addressing the issue of layperson attendance at such exams. The doctor referred to such individuals as "third party observers." I believe that the doctor's commentary can be found at the following paid-content link:

http://link.springer.com/referenceworkentry/10.1007%2F978-0-387-79948-3_1031

The doctor repeated the familiar wisdom that the vast majority of mild TBI victims *recover.* On this point, he warned against treating physicians catastrophizing head injuries by declaring to workers, "you will never work again."

Nevertheless, it is true that 10% of concussion victims do not enjoy resolution of their conditions. He referred to these individuals as the "miserable minority." Usually such patients are legitimate: it is just that other conditions – preexisting or subsequent – have now intervened and are the true cause of impairment and

disability. Another part of this 10% population, however, are indeed complaining of persistent concussion symptoms because of secondary gain considerations.

The doctor admonished us that workers can have both concussion and the psychological condition of post traumatic stress disorder. He used the example of the many soldiers of the Middle Eastern Wars who have returned with precisely these two conditions.

Addressing the occupational hazard of concussions among football players, Dr. Heilbronner strongly implied that Chronic Traumatic Encephalopathy (CTE), is over-diagnosed and had become exaggerated. He rejects the supposition that the condition is empirically proven to be endemic to football players. There are simply not that many football players in the first place, he argued, that have the condition so that an epidemic may be declared.

Surely another implication of his cynicism, however, is that single-episode concussion victims are in a whole different category from football players – with their frequent collisions and other head traumas.

IV. A First-hand Account of the Florida *Castellanos* Case

Another panel discussed the dramatic Florida case of *Castellanos v. Next Door Co.,* 192 So.3d 431 (Fl. 2016). There, the Florida Supreme Court struck down as unconstitutional a statute which had in general limited attorney's fees, via a "sliding scale," and restricted judges (JCC's) from considering any enhanced fee given the circumstances of individual cases. Lawyers could not charge above the scale regardless of the complexity and extent of the litigation.*

The discussion was particularly interesting because the prevailing attorney, Mr. Mark Toudy, was on the panel. Mr. Toudy described the litigation in meticulous detail. That review was invaluable, because the *Castellanos* opinion is cursory on the facts and does not even state how the claimant became injured. Mr. Toudy, however, explained that the injury occurred when Castellanos was assaulted by a coworker in a dispute over a tool. The claim at first was for medical only; yet, the employer vigorously contested the claim in court.

Ironically, only $800.00 in medical bills were at stake, and the JCC, in awarding the claim and finding compensability, awarded a fee that, when divided by the claimant's hourly time, computed to compensation in the amount of $1.53 per hour.

The First District Court of Appeal certified the case to the Florida Supreme Court as one worthy of consideration. The high court accepted the appeal, but it rephrased the issue; the court conceptualized the question as whether the in-effect "unrebuttable presumption" of reasonableness, as calculated by the sliding scale, violated the U.S. and Florida constitutions. Of course, perhaps the re-wording was prescient: "irrebuttable presumptions" are usually disfavored in the law.

The *Castellanos* dispute, Mr. Touby asserted, was the classic case which features "good facts" to take on appeal. He also submitted that the fee limitation issue was one *essential* to appeal. In Mr. Toudy's words, "we would lose all the good lawyers in Florida were we allow this [that is, the current fee limitation statute] to be the law."

* *See* FLA. STAT. § 440.34. Specifically, the act provided that "[a]ny attorney's fee approved by a judge of compensation claims for benefits secured on behalf of a claimant must equal to 20 percent of the first $5,000 of the amount of the benefits secured, 15 percent of the next $5,000 of the amount of the benefits secured, 10 percent of the remaining amount of the benefits secured to be provided during the first 10 years after the date the claim is filed, and 5 percent of the benefits secured after 10 years." For a complete summary, see David B. Torrey, Lawrence D. McIntyre, Kyle D. Black & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law (Survey Issue)*, 52 ABA TORT TRIAL & INSURANCE PRACTICE LAW JOURNAL 709 (2017).

Mr. Toudy went on to explain that the Supreme Court, answering its own question, struck down the sliding scale, and lack of any collateral consideration, as violative of the claimant's due process rights. Receiving workers' compensation is, indeed, a *right*; and a reform which removes representation in a complex system to vindicate such a right constitutes a due process violation. Mr. Toudy explained that the high court's declaration was that the law was "facially unconstitutional."

The attorney's fees discussion continued. Just a week or so before *Castellanos* was decided, the 1st DCA issued a ruling in *Miles v. City of Edgewater*, 190 So.3d 171 (Fla. 2016). That case dealt with a different, but related, issue. The Florida reform noted above provided that it was not only forbidden, but a matter of criminal infraction, for an attorney to receive any fee over the sliding scale schedule. Thus, although not a terribly common practice, lawyers could not take retainers. The restriction made it difficult for such things as non-litigative consultation sessions to be billed. The *Miles* case was ultimately to hold that the law was unconstitutional in this respect because it violated the right to freedom of speech. Currently, as a result, attorneys can charge fees as they please, constrained only by the familiar disciplinary rule addressing reasonableness.

Now, a conundrum exists. Because the sliding scale has been abolished, and freedom of fee contract exists, some lawyers are actually assessing a 25% fee. Indeed, according to the panelists, this significant fee has quickly become standard in a washout (lump sum compromise settlement). Florida judges vary in their rulings with regard to whether or not to approve a 25% fee; some apparently refuse to do so. (Since the seminar, legislative proposals on fees post-*Castellanos* have been advanced in the Florida legislature.)

V. A Top-Seven List of Further Points of Intrigue

Here are some further points I found intriguing and/or new from other panels at the conference:

1. Professor Emily Spieler of Northeastern University Law School posited that in this era of retractive reform, and outright reaction, it is often not unions that represent the interests of injured workers but, instead, low-wage groups. These enterprises, like those active in the restaurant work and housekeeping fields, have a concern about work injuries and how they are compensated. In a 2016 New Mexico case, the attorney challenging that state's agency's restriction on injured worker attorney's fees came not from the traditional labor movement, but from a social justice orientation. (As to the case, see *Rodriguez v. Brand West Dairy*, 378 P.3d 13 (N.M. 2016)).

2. One speaker suspected that under the Trump administration, Republicans will (just like the prior regime) want to keep the Social Security Disability Insurance (SSDI) program from going broke. As part of that goal, Congressional and White House actors alike may be hostile to systems like workers' compensation. This is so as they suspect that players in the workers' compensation system are deliberately seeking to shift costs away from workers' compensation and onto SSDI.

3. A member of one panel complained about a vacuum in leadership in workers' compensation to adequately address critiques of the purported atrophy of state systems. One of his panel members, however, rejected this analysis. He posited that when either Congress and state legislatures look at workers' compensation issues, employer groups and other business interests step up to the plate and educate lawmakers.

4. Another speaker – echoing virtually everybody else in the national workers' compensation community – posited that, with the advent of electronic medical and hospital records, the "quality of [such] records has gotten poorer and poorer." (This writer agrees; they can often be incoherent to the layperson.)

5. The chair of the conference, attorney Jane Stone of Texas, stated that her state was applying the *AMA Causation Guides* (the EBM-inspired text), as part of their law. A panel discussion which followed suggested

that many individuals are not aware of that book. (In my state, Pennsylvania, the courts, though not adopting the *Causation Guides* as authority, have referenced it in opinions addressing our firefighter causation presumption.)

6. One claimants' lawyer posited that in her state, many employers use, on their posted lists, "big box" orthopedic groups. The speaker took for granted that these physicians will be more likely than others to return workers to work as soon as possible; in her view, they are in effect leveraged by their employer/carrier contract partners to "cut them [that is, injured workers] loose" from disability in order to receive repeat business. While this may or may not be true, in her state, the treating/listed doctor's decision to have the worker "move on" causes him or her to solicit: a "claimant-friendly IME." (In Pennsylvania, this practice is rare.)

7. In a discussion about the role of insurance brokers, one prominent attorney in the audience opined that such players can be hard to deal with in the context of litigated cases. Brokers, notably, may have significant influence in states where an employer (as opposed to just the carrier) must agree to compromise settlements. Mr. Brian Francis, an insurance executive who attended the conference, explained, in any event, that "brokers are 'in' at the *front end* of the system, and they really don't understand what happens at the *back end* of the claim … when the money goes out the door."

VI. Conclusion

A tired axiom of workers' compensation lawyer talk in my jurisdiction is that what happens in other states is irrelevant. This dictum, however, constitutes egregious error. It is both educational and enriching for lawyers and judges to be aware of what is unfolding in other jurisdictions. As for *defense* lawyers, in particular, many insurance professionals can sniff out, at 300 feet, the attorney who possesses only superficial systemic knowledge. Of course, that hazard must be avoided. Attending seminars like ABA Phoenix 2017 will both take the lawyer to a warm and sunny venue and deliver to him or her the knowledge that will make for a well-rounded and sophisticated professional.

11TH ANNUAL INDUCTION DINNER

The Induction Dinner in Phoenix, Arizona did not disappoint. With warm weather, bright sunshine and blue skies, Fellows and their guests enjoyed a lovely evening. Keynote Speaker Dr. Christopher Brieseth, *CEO, Franklin and Eleanor Roosevelt Institute*, spoke about the legacy and impact of Frances Perkins, and Secretary Perkins' grandson, Tomlin Perkins Coggeshall, accepted the College's 2017 **LEGENDS AWARD** on her behalf. Thanks to Fellows Terry Coriden, Sally Voland and LuAnn Haley who assisted with the first ever **KIDS' CHANCE** step and repeat! Guests were able to have their picture taken, Hollywood style with a Kids' Chance background, for a small donation to this wonderful organization. *And most importantly, welcome to our newest members – the CLASS OF 2017!!* Click here for a listing of these distinguished attorneys.

Photographs from the evening's celebration can be found at these links:

CWCL Induction: https://www.dropbox.com/sh/4fpmxpy0ebh3qep/AADutJ8710ziVG-Qfs1eQbgma?dl=0

CWCL Induction Dinner: https://www.dropbox.com/sh/63asludf357mngn/AABQi6yut_BjUqMRmt9Bf8cba?dl=0

Kids' Chance Photos: https://www.dropbox.com/sh/w4lscjembvzipn4/AAD5_qDT09mcmDOP4Ch_aXeEa?dl=0

Watch Fellow Alan Pierce's latest podcast on Frances Perkins:

http://www.cwclawyers.org/index.html

2016-17 LAW STUDENT WRITING COMPETITION WINNER – Tom Domer, Milwaukee, WI

As a former History Prof, when I review writing contest entries, I am always impressed by a relevant and illustrative historical reference. Alex Lonnett, this year's Writing Contest winner, began his paper on "Employee Waivers of the Right to Sue Third Party Tortfeasors" with this prefix: "Tales of trouble like these are worth telling, as they reveal the spirit of the people who suffered."

That was a quote from Crystal Eastman, a progressive era lawyer whose 1910 report, "Work Accidents and the Law" on Pittsburgh labor conditions help set the stage for the first workers' compensation law (which she drafted in New York state). Alex followed this eloquent beginning with a compelling argument that employee waivers were void as against public policy.

One of the symposium speakers at our annual conference posed this question "Where will we find the next Crystal Eastman?" The answer, perhaps, is among our contest entrants (several of whom, by the way, are pursuing careers as workers' compensation lawyers. I should also note that several winners, like Alex, are former students of Judge David Torrey, the College Board Secretary who also teaches Workers' Comp at Pitt Law School.). So, on behalf of the College and the Writing Committee, I am pleased to announce the Law Student Writing Contest First Prize to Alex Lonnett. Alex received a $2000 prize, and his law school (Pitt) received $1000. In addition to posting on the College website, Alex's essay will be published in the Work Injury Law and Advocacy Group national magazine *Workers First Watch* and the National Association of Workers' Compensation Judiciary Newsletter (edited by College Board member LuAnn Haley), posted on the CWCL website and an additional podcast posted by Board member Alan Pierce.

The Second Place winner was Zach Hadler of Missouri Law School. Congratulations to the winners and thanks to all who participated.

KIDS' CHANCE OF AMERICA: CELEBRATING 10 YEARS AS A NATIONAL NON-PROFIT ORGANIZATION – Vicki Burkhardt, Kid's Chance Executive Director

Built upon the core values of integrity, passion, inclusion and alignment and led by our guiding principle of more **money for more kids,** more than 135 supporters celebrated the 10th anniversary of Kids' Chance of America. In 2007 when Kids' Chance of America received its IRS designation as an official non-profit charity, there were 17 Kids' Chance state organizations in existence. Today, we are pleased to share that there are 35 Kids' Chance state organizations, 3 affiliate state organizations, 7 states that are officially launched and working toward their designations – all in all, Kids' Chance has a presence in 45 states across the country, approaching our goal to be present in all 50 states!

As our national footprint grows, there continues to be a need for visibility, funding and outreach to help identify potential applicants for the individual state scholarship programs. Through several national initiatives

including Faces of Kids' Chance, Planning for the Future, and Kids' Chance Awareness Week, we heighten visibility and increase awareness of the mission of kids' Chance.

In conjunction with the 2017 Annual Meeting and Anniversary celebration, Kids' Chance has launched yet another initiative, the Distinguished Service Award. Presented annually to a member of the national Kids' Chance community, this award will recognize one who embodies the passion for helping children, impacted by a parent's workers' compensation injury or death, secure the financial assistance needed to advance their education as epitomized by founder, Bob Clyatt; supports the Kids' Chance mission in their everyday personal and professional life; connects members of the Kids' Chance community across the country to improve our collective impact and; and infuses uncompromising integrity into everything they do.

In this our inaugural year, we could not be more humbled by presenting this award to the man who inspired it all: **Bob Clyatt**. Bob founded the first Kids' Chance organization in Valdosta, Georgia in 1988. Through his work, he has witnessed the life-shattering impact that a serious workplace injury could have on the children of seriously or fatally injured workers, especially financially, often leaving these children with little hope of advancing their education on the college or vocational level.

As we celebrate ten years of amazing growth nationally, and almost thirty years since the first state organization was established, Bob's continued and unrelenting commitment to our mission deserves recognition and his service the denotation of Summa Cum Laude. Heretofore, the award will be named the Robert M. Clyatt Distinguished Service Award.

And ' hats off ' to our growing network of passionate volunteers sprinkled throughout every corner of the United States who carry the message, support the programs, find the students and raise the funds! It's all of you who have helped this effort grow over the last 10 years – allowing us to provide the much-needed scholarship support to kids' who need it most. Thank you!

ARTICLES OF INTEREST

The "All About Me" Client: Client Selection and Client Rejection, by Fellow Robert Wisniewski, Phoenix, AZ

In today's world, the dilemma of client selection for an injured worker's lawyer is to identify the "All about me client". The conflict is between actual benefits and expected benefits. Lawyers representing injured workers have to insure that a client receives all the statutory benefits he or she should receive. There is no need to complicate the lawyer's office by representing clients who expect more than the statutory benefits.

Given my experience, client selection never gets any better than the first interview. At the first meeting, the client and the lawyer are both evaluating each other. The lawyer in representing a client has to decide to invest time and costs, which are finite resources. The client has to decide whether he/she can work with the lawyer to accomplish the end game. I have an axiom after forty years of representing claimants- 5% of the clients will run or occupy the entire office time of the other 95% clients. Considering this theorem, a lawyer must carefully screen and evaluate the client. Today, we have a society that demands instant gratification. Legal services become equal to a hamburger drive-thru. "Have it your way" we are told in the burger world, and we have it now in the legal world. This translates to clients who have a sense of entitlement well beyond the statutorily available benefits. No way can the lawyer meet this type of client's expectations. To accept this client will only yield a disgruntled and dissatisfied client, and probably lead to a Bar complaint.

When did the world change? Lawyers used to be respected. Now with advertising one lawyer is competing with the other lawyer, and the client believes he can negotiate a better deal as he selects a lawyer. We have become no more than couch salesmen. The "All about me client" believes they are the center of attention, demands to negotiate fees and costs. In addition, they can't believe that they are not getting immediately what they believe they are entitled to. Of course, in every case the lawyer has to evaluate the case, instruct the client, and manage the expectations of the client against what is statutorily available. The "All about me client" can't believe that the system doesn't immediately satisfy him. They have a sense of "now" entitlement despite what the evidence proves. Their attitude is "Why I was hurt, where is the settlement?" when the case has hardly been filed. Perhaps, this is a function of too much advertising and especially too much personal injury advertising. Nonetheless, this client has no patience, no staying power, and no sense of time line for the workers' compensation process. This client will call daily, have you repeat what you've told them several times, require over and over explanation and believe they are wronged –to them it is a personal vendetta of the insurance company. This client will occupy inordinate amount of lawyer/staff time as everything is immediate and urgent. While one client will say "what's next?" this type of client will say "what do you mean they're deposing **me**?" and take it personally that the defense is continuing discovery. They have an inordinate sense of injustice, are emotionally driven, and their perspective is they're being deprived of what they believe is their entitlement. In many cases, in their opinion, their entire life turns on the success of this case. When did we start to have this insistence on great expectations? Everybody knows that we just Google for lawyers and Google for answers. Generally, these clients have all of the answers and are generally abrasive, all knowing, and don't follow the lawyer's instruction because "they know better". Their expectations of value are often unreasonable. While most clients defer to the lawyer for the explanation of benefits, the marshaling of the expectations and understanding of the time frames, these "All about me clients" won't listen. They live in the digital society where less than 50% of the people work to pay taxes and the other half works hard to pay the taxes and meet the expectations of the non-working class. These clients have the same expectations which cross over to the workers' compensation client. The "All about me client" is annoyed on attending a normal defense medical exam, or normal defense deposition. Their attitude is "how can they do that to me?" rather than "what's the next step in the process?" They can't believe that the Judge would rule against them in their case, as they believe their case is a slam dunk and "why do I even need a lawyer, or have to pay the lawyer's fees and costs?

In the initial interview, when the client is not listening and ego and emotions are driving the case, the claimant's prospective lawyer would be better off saying "I can't meet your expectations" and not take that case. Many of these clients have vendettas against the employer because the employer treated them badly and they are in the case to "change the system, or right the wrongs of the employer's action". Unfortunately, they personize the case to the point they're not effective advocates of what may be a viable position. When the "All about me client" doesn't focus on answers to the questions in the interview but tends to ramble, that's the time for the lawyer to recognize he's not going to change that behavior and he would be wise not to accept the case. These clients much like a speech of the President of the United States on September 20th who said "it's all about me" (New York Times, 09/20/16) believe that it's <u>"all about them".</u> In their mind, they're your only client; they focus on all of the wrongs despite your respectful advice to shift the focus to the evidence and the issues in the case. They know better than the trained professional!

Here are some warning signs from these clients:

- Demand only to talk to the attorney "You are my attorney why can't I talk to you?"
- Interrupt the attorney, "My case is more important than whatever he's doing at the moment";
- "Why can't the Judges move my case faster?" "Why is it taking so long?"

- "If you don't talk to me, I'm going to call your State Bar";
- Drop in without appointments and insist on talking to the attorney, even on minor administrative details that have been explained repeatedly - e.g. change of address;
- Doesn't want to present any initial information to the lawyer as the staff is suggesting, they only want the lawyer to review the initial information in front of them; only want to hand it to the lawyer;
- Don't bring what they are asked, because they "Know better what the lawyer needs";
- Even after they have the "entire file" they turn documents over page by page like someone who is playing black jack;
- They abuse the concept of the free consultation, abuse attorney and staff time;
- Excessive emails and texts regarding the same question over and over again, the same issues over and over again;
- Want more than the statutory benefit provides;
- Want it faster than the typical processing time of the case in your State; ("I'm special")
- Won't listen;
- Blame all of the shortcomings in the file on the lawyer, the doctor, his staff and not the fact that they do not have sufficient evidence;
- They're nasty, they treat the lawyer and staff without respect;
- They hang up on the staff; (after all there's a lawyer in every block)
- They personalize the case;
- They are often passive in the office and understanding in the office, and then go home and text or email, complaint after complaint and focus on the wrong items and act opposite to the face to face activity (note: the text/email is the real personality of the person).

These folks are unhappy, perhaps they have been unhappy in their lives before they had a workers' compensation claim, and now superimposed on what was a preexisting less than positive life comes the workers' compensation case as the focus of their entire life. These are the folks who want to consume every moment of the lawyer's time, are abusive to staff, not respectful to the staff, and demeaning. They want loans even though they're told that they can't do a loan, they never read or appreciate any of the information on the office rules and procedures, and they're rude to the staff. They're attitude is "I'm hurt, scared and broke" and "You must be my priest, rabbi, and counselor" "I'm special so I have to talk to my lawyer about <u>all</u> aspects of my life" – Now!

When the claimant's lawyer starts to sense that he has in front of him this type of its "All about me client" from a pursuit of sanity the lawyer needs to reject that client. Otherwise, the lawyer will be consumed by one of these "5% clients" and will never meet that person's expectations. The attorney will never satisfy what these clients believe is their just due.

It is far easier to evaluate the case initially and avoid these kinds of clients than to be stuck in the middle of the case with costs, time, and then recognize that you need to get out of this case because it's not going to be beneficial to anybody's sanity, much less your professional reputation. Avoid the "It's all about me client".

Bad-Faith Failure to Pay Workers' Compensation Benefits; Supreme Court of Oklahoma addresses "crafty gamesmanship"

By LexisNexis Workers' Compensation eNewsletter Staff

We have asked our expert in Oklahoma, **Jacque Brawner Dean**, Esq., at Jacque Brawner Dean Law, PLLC, about the recent decision in *Meeks v. Guarantee Ins. Co*. In that case, the Supreme Court of Oklahoma, in a divided decision, held that an employee could maintain a bad-faith action against a workers' compensation insurer alleging that following an award of compensation benefits by the state's Workers' Compensation Court (WCC), the insurer withheld employee's benefits on 26 separate occasions. The insurer's contention that the district court lacked jurisdiction to hear the case since the employee had failed to obtain a WCC order stating the amounts remained unpaid or that benefits had otherwise not been provided as ordered was misplaced, said the majority of the state's high court. The majority added that under the rule established in *Summers v. Zurich Am. Ins. Co.*, 2009 OK 33, 213 P.3d 565, an order of the WCC that clearly identifies previously ordered benefits and finds that an insurer failed to demonstrate good cause for its delay in, or noncompliance with, providing court ordered benefits satisfies the certification requirements. The majority concluded that barring the injured employee from pursuing a bad-faith claim against the insurer for the latter's "crafty gamesmanship" clearly violated *Summers* and the policy rational underlying the Oklahoma Workers' Compensation Act. See Meeks v. Guarantee Ins. Co., 2017 OK 17, 2017 Okla. LEXIS 18 (Feb. 28, 2017)

LexisNexis: What would be some valid reasons that would justify an insurer's refusal to pay an employee his workers' comp benefits?

Dean: A legitimate dispute as to the injury itself, the major cause for the need for treatment, whether or not the injury was in the course and scope of employment, and if there truly and employer-employee relationship. However, in this case, the bad faith action is against the uninsured motorists carrier. In Oklahoma, a bad faith action can be maintained against a workers' comp carrier only if an order of the Court or Commission has not been followed. However, the tort of bad faith in a UM claim is based upon case law.

LexisNexis: Here, it appears that the insurer did not give any valid reasons for doing so. Do you believe that, pursuant to *Summers*, the court made the correct decision in this case in allowing the injured worker to pursue his bad-faith claim against the insurer?

Dean: The Supreme Court obviously believes that the UM carrier never gave a legitimate reason for denying the claim. Bad faith is subjective, but the majority of Oklahoma's Supreme Court did not believe Liberty Mutual put forth any reason for not paying a reasonable value for the UM claim.

LexisNexis: What are the implications of the *Meeks* case for your state?

Dean: It appears that the Supreme Court will be tough on insurance companies who do not reasonably evaluate their exposure and the value of a claim. The concurring opinion of Vice Chief Justice Gurich (who will be the Chief Justice next year) is strong, "Based on the record, Liberty Mutual acted in bad faith." Justice Gurich suggested sending the case to the jury simply on damages.

Fellows are encouraged to submit articles 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

The College mourns the passing of two Fellows during the last year:

- Commissioner **Roger L. Williams**, Virginia Workers' Compensation Commission http://www.vwc.state.va.us/press/commissioner-roger-williams-memoriam
- **Richard Zapala**: http://www.legacy.com/obituaries/lsj/obituary.aspx?pid=183375842#sthash.xVCpXLgp.dpuf

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