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VIEW PHOTOS OF THE 13TH ANNUAL INDUCTION DINNER by clicking on the following link and using the password ARP031619

[College of Workers Comp Lawyers Convention - Photo Gallery](#)

PRESIDENT TOM DOMER'S FAREWELL MESSAGE

It's been a privilege to serve as President of the CWCL these last two years. To anyone who says that the College of Workers' Compensation Lawyers is merely a fancy dinner club where you can wear a tux and get some applause, I would like to present the State of the College.

We continue to recognize the nation's best and brightest workers' comp lawyers whether they represent employers, insurers, or workers, and the adjudicators who decide disputes between them. **Bob Wisniewski** of Arizona and his band of hardy cohorts continue that nomination process, as you saw in Coral Gables.

We sponsor a National Law Student Writing Contest on workers' compensation topics. Several former award winners are in active workers' compensation practice today and acknowledge the contacts made through CWCL. Thanks to Indiana's Terry Coriden and Committee for that effort.

We support, financially and through Board participation, the National Kids' Chance Scholarship. Some of us have heard the inspirational stories of Kids' Chance recipients. Board member **Ann Bishop** from Georgia leads that charge.

Our Outreach Committee, spearheaded by the indefatigable **Jim Anderson** from Mississippi, has coordinated efforts and provided speakers for WCI (Workers' Compensation Institute), the American College of Occupational and Environmental Medicine (where President-Elect **Kip Kubin** of Kansas will speak in June). Board Member Judge **Luann Haley** of Arizona (who also edits the College Newsletter) has coordinated efforts for joint programs with the International Association of Independent Medical Examiners conferences.

We formed a Certification Committee to review and certify training courses for workers' compensation professionals. Judge **Sheral Kellar** of Louisiana with my brother-in-arms **Chuck Davoli** and Judge **David Torrey** lead that effort.

Board member **Rick Johnson** of Chicago is tasked with revamping our website, so look for improvements there soon.

In March we voted to extend our services to the National Academy of Social Insurance effort in preparing the Workers' Compensation Annual Report. Since the funding from the Department of Labor has evaporated, several Board members including myself and Judge Torrey will likely participate in the panel on ongoing workers' compensation issues.

We are exploring possible collaboration with the National Conference of State Legislators, thanks to **Jim Gallen** of Missouri, in order to try to explain to State Representatives that workers' comp really does not come from taxpayer dollars.

And finally, we prepared a survey to see how you feel the College can grow in the next decade. Thanks to President-Elect **Kip Kubin** for that effort. We urge you to participate in the many committees and Board activities the College has to offer. While the College does not *make* policy (and in fact our bylaws preclude it), we *can*, however, influence policy through our educational and outreach efforts.

*Tom Domer
Milwaukee, WI*

CRYSTAL EASTMAN RECOGNIZED AS FIFTH WORKERS' COMP "LEGEND" AT THE 13TH ANNUAL INDUCTION DINNER – Alan Pierce, Salem, MA



Crystal Eastman is a true Legend in the field of Workers' Compensation. In 1910, she published "Work-Accidents and the Law" thereby earning a position with the New York State Commission on Employers' Liability and Causes of Industrial Accidents. In her position, she drafted the first workman's [sic] compensation law, which became a model for similar laws across the country.

Born in Marlborough, Massachusetts in 1881, she died in 1928 at the age of 47. Eastman was a graduate of Vassar College, earned a Masters in sociology at Columbia, and received a law degree from NYU in 1907. Both a lawyer and pioneer social worker, her first job was investigating labor conditions for the Pittsburgh Survey, sponsored by the Russell Sage Foundation.

Following her work in New York on the State Commission she continued to advocate for occupational safety and health for the U.S. Commission on Industrial Relations during the Woodrow Wilson administration. Among her other published works are "Employers' Liability, a Criticism Based on Facts" (1909). A labor lawyer, suffragist, feminist, journalist, and co-founder of the American Civil Liberties Union, Crystal Eastman stands tall as a Legend in the field of Workers' Compensation.

CRYSTAL EASTMAN AND WORK-ACCIDENTS AND THE LAW: RELEVANCE FOR THE PRESENT-DAY WORKERS' COMPENSATION LAWYER - Judge David Torrey, Pittsburgh, PA

The following are remarks given by Judge Torrey as the Keynote speaker of the 2019 Induction Dinner.

I.

As you know from your program, this year we honor, as a "Legend of Workers' Compensation," Crystal Eastman, a lawyer and social worker who was influential in identifying the great crisis of uncompensated work injuries and deaths that unfolded in our country in the late 19th and early 20th centuries.

We decided upon Eastman as the Legend about a year ago, a choice made on the motion of our colleague Alan Pierce, of Massachusetts, who will soon make the presentation.

I was pleased at the time, because I'm from Pittsburgh, where Eastman undertook her work. Importantly, that work is preserved in the classic book, *Work-Accidents and the Law*, published in 1910; and right downtown, in Market Square, a few blocks from my office, is a state historical marker to Eastman and the book – noting further that its publication was influential in the enactment of workers' compensation laws.

I have often had occasion to show colleagues and professional visitors this marker. It helps that it is also between two popular coffee houses, Nicholas & Starbucks!

I don't know for sure, but it may be that this is the only historical marker to workers' compensation in the country. Within a few hours drive of Pittsburgh markers exist to great industrial accidents, like Monongah (a mining disaster) and Hawk's Nest (an outbreak of acute silicosis during the excavation of a hydroelectric tunnel) in West Virginia, but nothing to my knowledge about workers' compensation.

In any event, when I was asked in August to make this year's keynote remarks, it made sense, as a Pittsburgher, to coordinate my commentary with the Legends Award.

II.

My topic: What was, and is, *Work-Accidents and the Law*, and what can we say is its relevance for the present-day workers' compensation lawyer?

I'll first note briefly what Eastman sought to undertake in her study.

The dangers of the industrial workplace after the Civil War were widely known and not unique to Pittsburgh. However, Pittsburgh was ground zero in terms of reformers' interest in calling this social crisis to the public's attention.

Pittsburgh, with its roiling industrial scene, became the focus of a broad-ranging study of work conditions in the first decade of the last century. It was called the "Pittsburgh Survey," and one of its several components was a review of work accidents and how they were treated by the law.

This was Eastman's assignment.

Eastman concentrated on describing the working conditions, from a safety and accident point of view, of workers in the railroad, coal mining, and steel manufacturing industries. She also reviewed the socio-economic costs of the deaths that occurred each year from work injuries.

And it is this latter item which gives rise to an astonishing statistic: for the fiscal year she studied, July 1906 through June 1907, 526 workers – all men – perished from accidents on the job.

The reason why Mr. Pierce will admit her as a Legend in a few moments is what Eastman, trained as she was as a lawyer, *continued on* to do: she described and critiqued, at length, the legal remedy for such deaths (and injuries as well): the then-current, usually hopeless civil action in negligence as filed in the Allegheny County (Pittsburgh) Court of Common Pleas.

Eastman, on that topic, studied court records and interviewed widows and other family members and officials and determined that recoveries of any substance were virtually unheard of – most costs of injuries were transferred to workers and their families (and charity to a lesser degree), with employers in most, though not all, cases, paying little or nothing.

What impeded most claims? We will recall that the defenses of the Fellow Servant Rule, Assumption of Risk, and Contributory Negligence doomed such actions.

In Eastman's view, this tort regime was both unjust and economically wasteful. She asserted that common law methods of recovery were not fit for conditions of work in modern industry. She also asserted that a social insurance scheme, to wit, workers' compensation, like that of England and Germany, should replace this unsatisfactory system.

Work-Accidents and the Law, however, was not just about risk and compensation.

Another key aspect of the book was its critique of the then-prevailing employer conviction that work deaths were predominately caused by careless workers, and that nothing could be done to prevent workers' unsafe habits. Eastman sought to explode this myth by studying precisely what happened in most of the fatal injuries, and trying to categorize whether each was caused by the worker, the employer – or simply an event which was unavoidable.

In the end, her call was roughly one-third each.

As a result of this analysis, Eastman asserted that industrial safety should be a top-down affair, with employers, who controlled the premises and the means of production, responsible for safety. Employers should be proactive but should also feel the cost of any injury or death that nevertheless arose out of and in the course of employment. Of course, today we call this the financial incentive of workers' compensation, as refined through experience-rating.

The book (as I have noted) publicized the crisis and is said to have hastened the enactment of U.S. workers' compensation laws. In Pittsburgh, notably, some pushback unfolded, with industry officials asserting that Eastman had exaggerated the dangers of work.

Pennsylvania, ironically, dragged in rather late in the reform game, enacting our workers' compensation law only in 1915. Even then, it was parsimonious by the standards of other industrial states.

So, returning to the study's relevance to *us*, in the present-day.

III.

Relevance for the Present-Day Workers' Compensation Lawyer

Work-Accidents and the Law serves:

1. As a dramatic reminder of where our workers' compensation litigation practice came from. It is notable that a nascent injured worker tort bar was forming, but Eastman saw no justice in that development; she instead perceived just more dysfunction. She criticized both this new plaintiffs' bar and its adversaries: the liability insurance company "claims agents." Eastman favored workers' compensation and hoped that disputes would be kept to a minimum.

2. As an example of a lawyer making a difference – Identifying an injustice and seeking to remedy the same. This example we see repeated in efforts like those of the Workers' Injury Law and Advocacy Group (WILG), relentlessly promoting, on a national basis, resistance to retractive reform; and Oklahoma's Bob Burke, a dyed-in-the wool hero who has aggressively challenged what seems to have been remarkable excesses in withdrawing rights from injured workers in his state of Oklahoma.

3. As a piece of literature – *Work-Accidents and the Law* is beautifully and stylishly written, even approaching poetry at times: a legal/sociology book that you can put in your lap and enjoy. And, notably, a top-notch copy is available via Google books and one can download it as a PDF and print it out. See https://www.russellsage.org/sites/default/files/Eastman%26Kellog_Work%20Accidents_0.pdf.

You will find that the book is not so much an academic or other dry tract but an early form of investigative journalism. Add to this fact that it is copiously illustrated with photographs by the great Lewis Hine and you will have an enlightening and enjoyable read.

Eastman is even capable of the occasional ironic comment. Addressing the 526 deaths, she remarks, at page 12, "526 men dead does not necessarily mean 526 human tragedies. We all know men who would give more happiness by dying than they gave by living."

4. As an example to us of how we can, by writing ourselves, contribute to the field. Of course, writing briefs (and decisions) is the essential grist for the mill of the lawyer and judge, but I am speaking of writing in an extracurricular manner. That is, after all, what Crystal Eastman did so brilliantly with the fruits of her research: she wrote it up in a successful book which won her renown, changed history, and gave her a historical marker in downtown Pittsburgh.

I hope this thought can serve as a take-away – it's about writing.

Workers' compensation lawyers do not write much in an extracurricular manner about our field. I noticed this in 1983, as a law student, and it is still largely true.

So why is this the case?

1. Part of the reason is that workers' compensation lawyers are litigators, and litigation is exhausting.

2. Part of the reason is that workers' compensation is not taught in law schools (at least by full time professors¹) and hence the academics who must research, write, and publish for a living are simply not writing about the field.

3. Part of the reason is that workers' compensation programs are state-governed, and hence the practical value of what we might write up is limited. The law reviews are filled these days, for example, with articles about whether an Uber driver can be an employee for FLSA and other employment law purposes, a topic as viable in Key West as it is in Anchorage. It can be hard to identify many workers' compensation topics that are so trendy and universal.

It seems to me, however, that lawyers should undertake more writing and more contributions to the field, particularly veteran lawyers such as those in the room – for whom workers' compensation is not just a mercenary undertaking but a passion and a vocation.

In this regard, we are the experts; we are in the trenches; we're holding the hands of injured workers and adjusters; we're hearing the cases; we're training the law students and the young lawyers. We should be the dominant voices in the literature – not the industry thought leaders and bloggers, however ingenious and provocative these members of the larger workers' compensation community may be.

Here are some items I've taken a stab at –

1. A 50-state review of how jurisdictions have regulated compromise settlements, past and present; how we in Pennsylvania undertake that task; and what the data showed about two years' worth of settlements which I reviewed and (usually) approved.²

2. A 50-state analysis of how jurisdictions assign the final fact-finding function – to the first-level ALJ or hearing officer who has actually seen the witnesses, or to the Board or Commission on appeal.³

But I don't mean to make this all about me and monster projects.

My students (now lawyers) at Pitt Law have published top-notch papers on current issues that can and will help inform the debates that surround the same. A couple examples:

1. Attorney Kyle Black researched and authored a paper on whether injuries sustained by employees in violent hate crimes arise in the course of employment.⁴

¹ Professor Michael C. Duff of the University of Wyoming College of Law is a major exception. Most workers' compensation courses in law school are taught by adjuncts.

² David B. Torrey, *Compromise Settlements Under State Workers' Compensation Acts: Law, Policy, Practice and Ten Years of the Pennsylvania Experience*, 16 WIDENER LAW JOURNAL 199 (2007).

³ David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 JOURNAL OF THE NATIONAL ASSOCIATION OF ADMINISTRATIVE LAW JUDGES 21 (2012).

⁴ Kyle D. Black, *"Haters Gonna Hate," But will Workers' Compensation Pay? An Analysis of Whether Injuries from Hate Crimes are Compensable under Workers' Compensation Laws* (2015), http://www.cwclawyers.org/2015_Writing_Competition_-_Kyle_Black_Article.pdf.

2. Attorney Justin Beck, meanwhile, researched and authored a paper on the law and ethics of nurse case managers⁵ (an area of universal dispute), scholarship that has raised awareness and a project that he will continue to develop to further inform the debate over this delicate topic.

The two items of mine were formal law review articles; to date, the two other papers are high production-value seminar papers that can be read on line.

And, notably, as we all know – in the present day, it is easy to get our writing out there by way of postings on the internet, to wit, websites and blogs.

Of course, many firms already undertake such strategies as part of marketing via displays of scholarship and expertise.

Recently, the Pennsylvania Supreme Court ratified the traditional, odd rule in our state that a workers' compensation carrier/subrogee has no ability to bring a subrogation suit when the injured worker/compensation claimant refuses to do so. Within a week, the law firm of White & Williams in Philadelphia had posted on its website an intricate article summarizing the case, stating the issues, and providing meticulous strategies for how carriers can best deal with the rule.⁶ This is an amazing development in how lawyers write and publish about the law.

IV.

By coincidence, I was finishing an inspirational doctor book, Atul Gawande's *Better* (2007), as our Induction Dinner approached. Here is Gawande, a top-rated surgeon, providing his physician readers a recommendation (one of five) for them to follow to be *better* as doctors. It's a similar admonition to mine – *to write* as part of professional excellence:

My fourth suggestion is "write something." ... You should not underestimate the effect of your contribution, however modest.

And you should also not underestimate the power of the act of writing itself.... [A doctor can be overwhelmed with work, and] you can lose your larger sense of purpose. But writing lets you step back and think through a problem. Even the angriest rant forces the writer to achieve a degree of thoughtfulness.

Most of all, by offering your reflections to an audience ..., you make yourself part of a larger world. Put a few thoughts on a topic in a newsletter, and you find yourself wondering nervously: Will people notice it? What will they think? Did I say something dumb? An audience is a community. The published word is a declaration of membership in that community and also of a willingness to contribute something meaningful to it.

V.

It is unlikely that we – like *the Legend* Crystal Eastman – will achieve a historical marker, next to Starbuck's or otherwise, for our contributions, but we can nonetheless vindicate our professional responsibilities, achieve excellence, and enhance the workers' compensation field by writing.

⁵ Justin D. Beck, *Nursing the Wound: The Law and Ethics of Disability Management in Workers' Compensation*, PBA WC Law Section Newsletter, Vol. VII, No. 133 (PBA 2018), www.davetorrey.info.

⁶ See Robert Caplan, *How the Pennsylvania Supreme Court's Decision in Kamara Changes the Legal Landscape for Workers' Compensation Subrogation and Successfully Moving Forward*, blog post, <https://subrogationstrategist.com/2018/11/29/bad-kamara-good-karma-life-after-hartford-v-kamara/>.

FELLOWS' SURVEY - Kip Kubin, President-Elect, Overland Park, KS

I remember distinctly at the age of 12 my great-uncles asking me: "What do you want to be when you grow up?" Being the oldest boy in my generation of an old-line Czech farming family, I suspected they thought they knew what my answer would be. Needless to say, they did not get the answer they expected.

Now that we have inducted our thirteenth class of Fellows, the natural question to ask is "What do we want to be when we grow up?" Unlike my great-uncles, the Board has no expectation as to how we might choose to answer that question. In our initial discussions on the future of the College, we have explored roles as varied as being an honorary social club that meets once a year at a nice resort and drinks expensive Japanese Scotch, to being the thought leaders in this area of the law. The former is more fun, the latter more fulfilling. The former requires low commitment, the latter concerted energy. The first leaves a mark, the latter creates a legacy.

These questions are too big for the Board to decide on its own. To help us better plan the future of this organization we are seeking the input of our membership. In the next several weeks you will be receiving an online survey. It is eight questions long. Please do not ignore it. Please answer it. There will be no prize given to the first to complete it. There will no winner drawn at random from the completed surveys for a complimentary trip to next year's meeting. The only thing you will get is the satisfaction that someday, when and if this organization turns sixty, the then members of the organization will appreciate what we have done.

As I start my term as president of the College on June 1st, I would be remiss in not saying a few words about my predecessor, Tom Domer. I first met Tom through the College and we have become friends. Tom, being an employee attorney, and I, being a defense attorney, have very different world views, and there are issues on which we do not agree. However, I have never questioned or doubted Tom's commitment to his clients or his passion for the law of Workers' Compensation. When I think of Tom, I think about those traits and not our areas of disagreement. One thing I will tell you about Tom is that he has left the College better than when he started. That is the aspect of Tom I admire and to which we should all aspire.

The Board will again meet in August in Chicago, to review and interpret our survey results. You will hear from us after that meeting concludes. If you would like to be involved, please send me an email or contact our Executive Director, Susan Wan.

SPOTLIGHT ON A FELLOW – LUANN HALEY



Hon. LuAnn Haley is an Administrative Law Judge for the Industrial Commission of Arizona and also is on the Board of the College of Workers' Compensation Lawyers. She answers the following questions to allow our readers to get to know a bit more about the CWCL's Board members:

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

Currently, I work as an ALJ in Tucson, Arizona and have been with the State of Arizona for almost 20 years. Before I moved to Arizona in 1998, I worked for 18 years as a defense lawyer in Pittsburgh, Pennsylvania representing employers and insurers in workers' compensation cases.

What is your case load like? As an ALJ in Arizona, my case load includes all types of workers' compensation claims; including issues of: compensability, permanent impairment ratings, MMI, appropriateness of medical care and treatment guidelines. We do not have mandatory mediation in Arizona, therefore, as an ALJ I am also

called on to mediate complex cases from time to time. Since Arizona requires live medical testimony in all cases with medical issues, most of the cases I handle require multiple hearing dates with medical experts appearing after the injured worker testifies. With multiple hearings in almost every case, it generally takes several months to complete the record although cases without medical issues may be completed in one day. In general, I will have 120 cases on my assignment docket and will generally close up to 35 per month by decision on the merits. I have been practicing primarily in the area of workers' compensation for over 30 years.

Did you choose the practice of workers' compensation law or did it choose you? Workers' Compensation chose me, or perhaps more succinctly, the law firm I started work for in 1981 chose comp for me. After law school, I signed on to a law firm in Johnstown, Pennsylvania, which handled workers' compensation cases for employers and carriers. There were not many women lawyers in workers' compensation litigation; however, the partners were happy to place me in their comp group. In Johnstown, I started representing employers in the local coal mines and steel mills and was happy to do so as I come from a family of steelworkers. I have worked in the field of workers' compensation since 1981 and have always loved working in this field.

What is the best thing about being a Fellow in the CWCL? I was inducted in the CWCL in 2012 and since that time have enjoyed being a part of this group of dedicated workers' compensation lawyers. The CWCL provides all Fellows with top notch educational opportunities that include a national perspective on important issues in workers' compensation. Also, the College allows all Fellows to interact with the best and brightest workers' compensation lawyers in a collegial setting.

Are you active in the legal community? I am active in a number of national groups including the CWCL and the NAWCJ as I serve on the Board of both organizations. I also work as one of the editors of the newsletters for both the CWCL and the NAWCJ. In addition, I work on the CLE committee for the Workers' Compensation Section in Arizona. I also speak at a number of CLE conferences in Arizona as well as for the CWCL and NAWCJ.

Are you active in the general community? I am active in the community and am involved with activities in my church as well as with a women's art group. However, my favorite volunteer activity has become my work with international students who are studying at the University of Arizona in Tucson. I have mentored over 30 international students and volunteer on the Board of International Friends.

Activities outside of work? In Arizona, access to outside activities are endless and I take full advantage of the outdoor sports opportunities in Tucson. I also work part time as a "walking guide" at a local health spa which allows me to access many exercise classes and wellness opportunities.

Please share some words of wisdom with our readers. I wish I could offer an eloquent quote from one of my many comp decisions; however, nothing that could be called particularly wise comes to mind. Instead, I would offer a quote by Ralph Waldo Emerson that I like to think of as I begin each day: "Nothing great was ever achieved without enthusiasm." Although any workers' compensation practice at times can appear overwhelming because of the sheer volume of the practice, I try to approach each day's assignments with enthusiasm and as a result I am frequently entertained and always satisfied by my work in this field.

CWCL SPEAKERS' BUREAU – Richard Johnson, Chicago, IL

The College of Workers' Compensation Lawyers is in the process of creating a "Speakers Bureau" for the purpose of making Fellows available to other organizations to comment on relevant workers' compensation topics in every State. If you are interested in being a volunteer speaker to help educate the public in a balanced way and would agree to have your contact information made available on the College website, please email Fellow **Richard Johnson**, who is spearheading this committee. Richard can be reached at rjohnson@kfeej.com.

CWCL and CWCL Fellows Play Vital Role in Kids' Chance Nationwide - Ann Bishop, Atlanta, GA



The College of Workers' Compensation Lawyers continues to be a major supporter of Kids' Chance and CWCL Fellows continue to play vital roles in Kids' Chance organizations in every state. Kids' Chance appreciates the annual donation of \$5,000.00, which CWCL makes to Kids' Chance of America to enable the national organization to assist the various state organizations. Kids' Chance credits the College of Workers' Compensation Lawyers support and the visibility generated through that support with the phenomenal growth of Kids' Chance over the past six to seven years.

In 2012, when the College of Workers' Compensation Lawyers adopted Kids' Chance as the charity which it wished to support, there were only 23 state organizations. Thanks to the tremendous help of myriad CWCL Fellows, there are now almost twice that number.

Fellows of the College of Workers' Compensation Lawyers, including **Sally Volland, Dan Pope, Stacy Tees, Cathy Surbeck, LuAnn Haley, David Moskowitz, Ann Bishop, Jim Anderson, Keith Kasper** and so many more, assisted with a Kids' Chance fundraiser in conjunction with the ABA Workers' Compensation Mid-Winter Seminar and Conference. Efforts like those spearheaded by Fellows in the College of Workers' Compensation Lawyers to raise money so that Kids' Chance can achieve its goal of more money for more kids played a part in Kids' Chances' ability to distribute almost 2.4 million dollars in scholarship awards in 2017-18, the last year for which the final data is available.

Kids' Chance acknowledges the assistance of the College of Workers' Compensation Lawyers in not only helping create state organizations and assisting with vital fundraising, but also helping the potential scholarship recipients learn about Kids' Chance. Kids' Chance asks all Fellows to be mindful of opportunities to refer children of injured workers to Kids' Chance. Kids' Chance of America has created a program known as "Planning for the Future." For more information, go to www.KidsChance.org. Kids' Chance of America will maintain information about children whose parent has been fatally or very seriously injured and will remind the student and student's family at the appropriate time of the potential availability of the Kids' Chance Scholarship to assist the child in meeting educational goals.

Kids' Chance continues to grow and strengthen through the efforts of the College of Workers' Compensation Lawyers and hopes for a long and close relationship over the years to come.

**Listen to Fellow Alan Pierce's latest podcast:
*Subrogation and Workers' Compensation
Liens on Third Party Settlements*
featuring Fellow Cathy Surbeck:**

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

ARTICLES OF INTEREST

When Does TTD Overpayment Actually Occur in West Virginia?

By Fellow **H. Dill Battle, III**, Charleston, WV



In *Reed v. Exel Logistics, Inc.*, No. 17-0864, 2018 WL 2769041 (W. Va. June 6, 2018), the West Virginia Supreme Court of Appeals clarified the circumstances necessary for an employer to claim overpayment of temporary total disability (TTD) benefits. The question arose after the employer's claims examiner paid a claimant for an additional 156 days past the 104-week limit. The Court held this type of "overpayment" lacked the requisite statutory elements, and therefore, the employer could not seek reimbursement.

The primary directive of this case is twofold. First, claim administrators must be vigilant in recognizing TTD overpayment. The Court will not sympathize with a carrier who has paid out more than is required. Second, claim administrators must issue the correct protestable orders to force the overpayment issues into litigation. The Court has made it clear without the satisfaction of certain procedural elements, overpayment cannot occur. A practical caveat may be of most importance - a claims administrator controls TTD under W. Va. Code § 23-4-7a(e). Claims administrators should develop a system to "red flag" TTD at 104 weeks, when TTD can be terminated, or a claimant can request rehabilitation TTD if participating in an approved rehabilitation program. The facts of the *Reed* case are instructive.

The claimant worked as a shuttle driver for the employer, when he stepped on the frame of a truck and slipped, fracturing his left ankle. After numerous surgeries, the claimant continued to have instability in his ankle. After two-and-a-half years of physical therapy, the claimant's doctor declared the claimant had reached his maximum degree of medical improvement (MMI) and was a candidate for vocational rehabilitation services. In response to this report, the claim examiner halted the benefits and refused to approve further physical therapy or vocational evaluations. In addition, the claimant was granted a 4% permanent partial disability award, valued at \$7,553.44. Roughly six months later, the claim examiner discovered the TTD benefits should have been terminated two years after the claimant's injury, and the insurer had improperly paid the claimant for 156 days beyond the statutory limit of 104 weeks. The claim examiner maintained the insurer had overpaid \$10,509.72 and refused to pay claimant's permanent partial disability, declaring the claimant had an overpayment of \$2,956.28 to be credited against any future award.

After the claims examiner notified the claimant of the overpayment, the claimant protested the overpayment order to the Office of Judges (OOJ), which reversed the order. The OOJ found the examiner failed to timely seek termination of the benefits, or otherwise comply with the laws regarding modification or overpayment of TTD benefits. The Worker's Compensation Board of Review reversed and reinstated the examiner's decision. On review, the Supreme Court of Appeals recognized the Board of Review's decision involved the interpretation of law and, therefore, analyzed, *de novo*, the question of whether an "overpayment" of TTD benefits occurred.

The insurer insisted the law governing TTD benefits was clear, "no person may receive temporary total disability benefits under an award for a single injury for a period exceeding one hundred four weeks." W. Va.

Code § 23-4-6(c). The insurer argued any benefit paid to the claimant in excess of the 104-week limit should "automatically" qualify as an overpayment. The claimant countered the workers' compensation scheme expressly limits an examiner's ability to declare overpayment of TTD benefits. The claimant asserted overpayment only occurs in a certain circumstance. First, the examiner must try to modify or terminate TTD benefits. Then, during an adversarial proceeding, which later results in a decision favoring the employer, the carrier is required to continue payment. Therefore, the overpayment only consists of the benefits awarded between the date of the attempted modification or termination and the ruling. More specifically, the claimant argued because the examiner never objected or sought modification to the claimant's TTD benefits, the excess benefits do not qualify as an overpayment.

The Court analyzed the TTD statutory scheme, recognizing W. Va. Code § 23-4-1c(h) governs overpayment of TTD benefits, and requires two circumstances must occur for an employer to overpay a claimant. First, an employer must timely object to an order denying an application for modification or termination of TTD benefits. Second, there must be an adversarial proceeding which results in an order that the claimant was not entitled to TTD benefits.

However, before the court could dismiss the employer's argument, the employer asserted that the overpayment statute was "a meaningless relic of a bygone era." *Reed*, at 9, 2018 WL 2769041 at *5. The employer claimed that employers no longer object to the decisions of private insurance carriers, but instead, the carrier has sole authority to act on the employer's behalf in all litigation related aspects of the claim, and enter final decisions. The claimant responded to this argument by asserting that a claims representative for an insurer is still the representative of the employer, and that the workers' compensation scheme allows the representative to make applications for a modification of any award made to an employee of the employer, including to modify or terminate TTD benefits. The claimant reiterated that W. Va. Code § 23-4-1c(h) delineates a clear process for overpayment which requires the employer or its representative to object to an order denying modification or termination and a final decision in the employer's favor. As neither the employer nor the claims examiner gave notice, objection, or an appealable order indicating the benefits should be terminated, an overpayment did not occur.

The court agreed with the claimant and outlined the legislative history of the TTD benefits modification process prior to 1974 amendment, currently enshrined in W. Va. Code § 23-4-1c(h). Previously, the payments of TTD benefits were halted immediately after an employer protested, which would cause substantial economic hardship on the claimant due to the extended adversarial proceedings. The Legislature amended the statute for the purpose of limiting the employer's ability to "stymie a claimant's receipt of temporary total disability benefits." *Id.* at 11, 2018 WL 2769041 at *6. Based on this history, the court held that W. Va. Code § 23-4-1c(h) provides a baseline that once a claimant has been awarded TTD benefits, the claimant continues to receive those benefits until the employer (or representative) properly seeks to modify or terminate them. Then, while the order is under review, the employer must still continue to pay the TTD benefits. But if the claimant is later found not to be entitled, only then does an overpayment legally exist. In the instant case, the Court found the examiner did not follow these procedures and, therefore, an overpayment did not exist.

Justice Walker dissented from the majority, claiming the majority conflated the overpayment of claimant's benefits pursuant to § 23-4-6(c) and the dispute of his initial entitlement to TTD benefits pursuant to § 23-5-1. The dissent argued that any discussion of § 23-4-1c(h) is unnecessary because the section applies only where the Commissioner, in a §23-5-1 proceeding, determines the claimant was not originally entitled to TTD benefits because the claim did not jurisdictionally qualify. The purpose of a protest under a § 23-5-1 proceeding is to dispute the claimant's original entitlement to TTD benefits, not the overpayment of benefits to an originally entitled award. "Exhausting one's statutory entitlement to TTD benefits is different from failing to satisfy the jurisdictional requirements necessary to qualify for workers' compensation benefits, initially." *Id.* at 3 (WALKER,

J., dissenting). Therefore, the claimant simply received TTD benefits to which he was not entitled and must repay those benefits.

The lessons of *Reed* are that a claims administrator should be proactive about TTD closures at 104 weeks, be mindful of W. Va. Code § 23-4-7a(e), and issue timely suspensions and closures where appropriate.

Is There a Doctor in the Courtroom? by Fellow [John Lazzara](#), Tallahassee, FL



Have you ever had that queasy sensation in the pit of your stomach when you visit a doctor? Just that anxious, nervous feeling about what the doctor might tell you about some of the problems you've experienced. Well, consider talking to about 150 doctors in the same room about your experiences as a workers' compensation adjudicator in evaluating the opinions of medical experts for admissibility and credibility. Surprisingly, it was a most pleasant and rewarding experience, as these doctors were genuinely interested in what I had to say and impressed me with their focus on providing tribunals with the most appropriate medical testimony to make our decision-making easier.

On January 16 – 17, 2019, The Honorable [LuAnn Haley](#), Administrative Law Judge, Industrial Commission of Arizona, and I were invited to speak before **International Academy of Independent Medical Evaluators (IAIME)** at their **3rd Session of IAIME Medicolegal Institute** in Tucson, Arizona.² The IAIME, formerly known as the American Academy of Disability Evaluating Physicians (AADEP), is a medical educational society devoted to promoting best practices in assessing impairment based on the AMA Guides for the Evaluation Permanent Impairment and the use of proper techniques in the treatment and evaluation of industrial injuries and conditions. Its membership encompasses the U.S., Canada, Australia and Europe, and many hold law degrees in addition to medical doctorates. Thus, their interest in disability evaluations and medicolegal matters.

The topics that Judge Haley and I were asked to address were “The Important Role of the Medical Expert in Workers’ Compensation” and “Finding the Medical Expert Credible: Perspectives of Two Workers’ Compensation Judges.” Working from our experiences as adjudicators, we both touched on the indispensable role of physicians in the field of workers’ compensation litigation and decision-making. Without the medical expert to assist adjudicators regarding injuries and causation thereof, and the residual effects of such injuries; rendering an appropriate and just decision would be next to impossible. Such medical evidence provides invaluable guidance to injured workers, lawyers and adjudicators in their effort to successfully navigate today’s disability benefit systems. The importance is especially significant for IME physicians, who are expected, as non-treating medical evaluators, to render an unbiased and objective opinion to resolve medical conflicts in diagnosis, causation, treatment and return-to-work issues.

The second topic dealt with ascertaining the credibility of medical opinions from the perspective of a workers’ compensation judge. Of course, judges have their own unique take on what factors are most important when determining which medical testimony deserves more weight over another. Surprisingly, the doctors said that they rarely know the basis why an adjudicator has rejected their opinions. Some of the more general attributes of credibility mentioned were the medical witness’s expertise in a specialty; whether a treating physician or one-time examiner; review of relevant medical records and diagnostic tests; consideration of past

¹ Judge Lazzara was the Inaugural President of NAWCJ and is a retired Florida Judge of Compensation Claims as of May 2018. He is currently available as a workers’ compensation mediator, speaker and consultant. He can be reached at: john.lazzara18@gmail.com.

² I was the replacement for The Honorable [David B. Torrey](#), PA Workers’ Compensation Judge, a former NAWCJ President, noted author, longtime adjunct professor and acknowledged expert in the area of workers’ compensation law and adjudication, who, to my good fortune, was unable to attend.

medical history; expert's bias; consistency of the testimony on direct and cross examination; opinion more consistent with logic and reason; and preparedness and demeanor of the witness. As Judge Torrey astutely noted in an article he wrote, "medical testimony comes down to persuasiveness more than credibility."³ In other words, as Judge Haley and I stressed, "what in the testimony tips the scale over another equally credible testimony." You could tell from the questions and comments we received during the follow up panel discussions, that these doctors were sincerely concerned about being objective and as unambiguous as possible when rendering medical opinions.

Some of the other informative session workshops I attended included: Evaluating First Responders; Medical Mimics of Musculoskeletal Conditions; Causation Analysis; IME/Testimony; Apportionment and Causation; and Evidence-Based Medicine: Evaluating the Evidence. The names of some of the speakers that NAWCJ members will recognize were: Robert Barth, Ph.D.; James Talmage, M.D; and Mark Melhorn, M.D., who have presented at past judiciary colleges at one time or another. It was interesting to hear medicolegal issues discussed from the perspective of physicians.

A special shout-out to Dr. Marjorie Eskay-Auerbach, M.D, J.D., IAIME President, who was kind of enough to invite me at the suggestion of Judge Haley. As an aside, I mentioned to her that IAIME and NAWCJ should explore the possibility of a joint educational venture in the future, as I noted that the doctors were as interested to hear what judges had to say about medical testimony as judges are interested to know more about the IME process. I believe that there are many interests the two groups have in common.

In conclusion, a very comprehensive and informative conference, and I was honored to present along with Judge Haley who did the heavy lifting for our panel. I know that I got more out of the program than what I contributed. Finally, I am most appreciative of all the courtesies and camaraderie extended to this lawyer by the IAIME, Dr. Eskay-Auerbach and the doctors in attendance.

The IAIME 2019 Medicolegal Institute brochure referenced in this article can be found at:
https://iaime.memberclicks.net/assets/docs/IAIME%20Jan%202019%20Req%20Bifold%20Tuscon_final.pdf

What Does the Future Hold for Workers' Compensation Insurance Rates? **By Fellow Don DeCarlo, Fresh Meadows, NY and Roger Thompson**



The National Council on Compensation Insurance (NCCI) reports that workers' compensation insurance rates will again dip in most states in 2018. The report attributes this continuing decrease to two factors: (1) declines in the frequency of claims; and (2) improvement in the area of workplace safety on the part of employers. Tony Gillespie with the Property Casualty Insurers Association of America observed that "When you couple the claims frequency still going down and you have more stable medical costs and very stable indemnity costs, then you are going to keep seeing a progressive reduction in loss costs and rates."

As background, NCCI is an advisory organization for the development and promulgation of workers' compensation rates in the majority of states. In most states, the NCCI and other rating organizations no longer

³ 32 Journal of Nat'l Ass'n Admin. L. Judiciary, Iss.1, p. 156 (2012).

file final recommended rates. Instead, they file actuarial “loss costs” or pure premium rates. Companies then gross up loss costs for their own particular expenses and rating policies. These insurance rates and loss costs reflect the cost of the product being insured. In the case of workers’ compensation, insurance rates and loss costs reflect the costs associated with wage replacement (indemnity benefits) along with the cost of medical care and other incidental expenses associated with workplace accidents.

Click here to read the entire article: <https://www.insurance-advocate.com/2018/12/15/what-does-the-future-hold-for-workers-compensation-insurance-rates/>

What I Learned About Adjusters and Insurance Companies Along the Way as a Former Defense Attorney and Presently a Claimant’s Attorney

By Fellow **Robert Wisniewski, Phoenix, AZ**



- Adjusters are human (well, most are). Claims representatives have a job and for many, it is a career. Treat them as humans and they may actually reciprocate in a similar manner.
- Adjusters want to do the right thing (well, most do). The professional adjuster has parameters within which he/she has to operate. Empathize with them and maybe you will be able to work within the parameters to assist your client securing the most benefits within the parameters.
- Insurance companies’ adjusters can be rational (well many can and at many times). As with any large bureaucracy that has its own agenda, their actions

may seem irrational. For example, you may wish \$500 for maintenance care for your client and the carrier spends \$2,000 to \$2,500 for an “Independent Medical Exam” which actually confirms your position. Nothing you can do about it. They have their own protocol. Sometimes the adjuster will do nothing, which actually is doing something. For many, doing nothing is a decision.

- Everybody wants to be a hero (some even want to be superheroes). In every claim, everyone wants to come out with the best result. The insurance company, the insurance lawyer, the claimant’s attorney and the claimant. The real purpose of negotiating is to compromise with a goal where everyone gives a little and gets along and everybody hurts a little and gets along so that a compromise is reached. The matter then moves forward for each side. Everybody perceives themselves as a hero.
- Adjusters are overworked and overburdened (probably all of them). They have way too many cases and the amount of cases dictate that they work off the top of the deck. So, do what you can to do their job. Get them medical records and bills to support your request, provide them the financial data they need (wage, payroll, etc.) and they may actually move the case along if you provide them what is needed to make a decision. Many years’ ago, I had a situation where I sent a lot of information to a local adjuster without any action. So I called. She answered the phone and was rather gruff. I asked her if she needed chocolate and she said, “Yes”. I had chocolate delivered that afternoon and the case moved much more smoothly thereafter. Of course, every other adjuster on that floor wanted chocolate. I was very happy to provide them chocolate and get good results for our clients. You shouldn’t have to do that, but do what it takes to single yourself out as the more reasonable of all the claimant’s lawyers they are facing. You may get what you are asking if you are more polite. Acknowledge that they are trying to do the best for their client and let them concede you are trying to do the best for your client and work towards some common, compromised goal.

- If you reach an impasse and have to go see a judge, it's better not to threaten that you're going to hearing, but simply advise the adjuster that you've reached an impasse and rather than polarize her/him. Advise you have to let the judge make the decision since both sides have reached the extent of individual authority. That allows the adjuster one more opportunity to resolve the conflict, short of judge involvement and short of the defense lawyer getting involved. The defense attorney involvement often takes a case to more delay.
- Also, recognize that these rules and lessons above may never apply, so forge on with your own plan and customize the best result for your client.

Effective Communication in Workers' Compensation Litigation By Fellow **Edward M. Moriarty, Jr., Wakefield, MA**



I. COMMUNICATION: THE KEY TO EFFECTIVE AND CREDIBLE MASSACHUSETTS WORKERS' COMPENSATION LITIGATION

Effective communication by and between all relevant stakeholders in the workers' compensation system will promote, provide, and perpetuate an effective and credible litigation process for all parties.

Effective communication requires openness, transparency, fairness, due process, and equal protection of the law, by and between all relevant stakeholders in the system.

The relevant stakeholders include: employee, employer, insurer and medical provider.

All best practice management literature suggests that knowledge, communication, and transparency are consistent with the best and highest practices of all institutional processes, structures, properties, and out-puts, whether public or private.

If these communication best practices are brought to bear and are consistently utilized in the Workers' Comp litigation process, the end result will not only be fair and predictable, but that all stakeholders will have respect for and feel a part of the litigation process.

Let the sun shine in; it will illuminate the process; broaden the stakeholder's horizons; and elevate the result, as consistent with justice, fairness, due process, and equal protection under state law.

Click here to read the entire article: <https://www.linkedin.com/pulse/effective-communication-workerscompensation-ed-moriarty-jr-/?published=t>

NASI NEEDS YOUR HELP – Alan Pierce, Salem, MA

Several of the College's Fellows are members of NASI, the National Academy of Social Insurance, a non-profit which collects and analyzes data concerning various aspects of social insurance including workers' compensation.

Each year NASI publishes an invaluable resource entitled: *Workers' Compensation Benefits, Costs and Coverage*, a text which is relied upon by policymakers and administrators across the country.

In the past the Academy relied in part on funding from the Social Security Administration (SSA), the Centers for Medicare & Medicaid Services (CMS), and the Department of Labor (DOL). We have been advised that these sources of funding from the Federal government are no longer available and NASI has reached out to

the College for financial assistance. Several of our Fellows have stepped up to make a contribution toward this important and valuable work.

The Academy would welcome any tax deductible gifts from our Fellows and this can be done at www.nasi.org/support.

Please consider assisting NASI so as to allow the publication of future reports.

Honors and Accolades

- **Luanne Clarke** (GA) was selected by *Super Lawyers* as one of the “Top 50 Women Lawyers in Georgia” for 2019.
- Newly inducted Fellow **Elizabeth Costner** (GA) serves as the Chair of the Executive Committee of the Workers’ Compensation Section of the State Bar of Georgia.
- **Janet Frickey** (CO) was named a “2019 Lawyer of the Year – Specialty – Workers’ Compensation Law – Claimants” by *Best Lawyers*.
- **Thomas Herman** (GA) was elected to serve as the current President of Georgia’s Workers’ Compensation Claimants’ Lawyers (WCCL).
- **Tom Holder** (GA) was elected to serve as President of Workers’ Injury Law and Advocacy Group (WILG). WILG is the national non-profit organization dedicated to serving the interests of legions of workers and their families who suffer the effect of workplace accidents and occupational diseases.
- **Ralph Lorberbaum** (GA) served as co-chair of the Workers’ Compensation Law Institute ICLE seminar in October 2018, serves on the Advisory Board for Loyola University School of Law and was elected as a Super Lawyer in workers’ compensation for the 14th straight year.
- **Frank McKay** (GA), Chairman and Chief Appellate Court Judge for the Georgia State Board of Workers’ Compensation, was reelected President of the Southern Association of Workers’ Compensation Administrators (SAWCA) for 2018/2019. He serves on the Board of Directors for the National Association of Workers’ Compensation Judiciary and he is on the Board of Directors for the International Association of Industrial Accident Boards and Commissions (IAIABC). He is an Advisory Committee member of the Workers’ Compensation Research Institute (WCRI) and serves on Georgia’s Statewide Opioid Task Force. He also serves on the Board of Directors of Kids’ Chance of Georgia
- **Marci Rosenberg** (GA) is serving as Immediate Past President of Georgia’s Workers’ Compensation Claimants’ Lawyers (WCCL).
- The Pennsylvania Bar Association recently presented its *Irvin Stander Memorial Award* to **Matthew L. Wilson** (PA). The award is presented to an attorney whose dedication to the administration of workers’ compensation law, and whose professionalism and regard for clients and colleagues, serve as an example to others.

Fellows on the Move

- **Ann Bishop** (GA) has joined the firm of Hall Booth Smith PC as Of Counsel in its Atlanta, GA office.
- **Gary Kazin** (GA) retired from active practice of law in September 2017 and began to serve as a mediator. Of the twenty-five matters in which Gary has served as mediator, twenty-four were resolved successfully.

- **Jeff King** (KS) has been named the new Director of Workers' Compensation for the State of Kansas.
- **Paul Sighinolfi** (ME) has joined the Ametros Senior Leadership team as Senior Managing Director in Burlington, MA. Most recently, he served as Executive Director and Chair of the Maine Workers' Compensation Board.

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](#)

Additionally, if you are an author of a blog regarding workers' compensation issues, please send the editors the website of your blog. We would like to include a list of all blogs written by CWCL Fellows in our next edition of the CWCL Newsletter.

In Memoriam



Fellow **Mark Robbins** (MI), inducted a Fellow in the Class of 2013, passed away suddenly on December 11, 2018. Mark practiced workers' compensation law for over forty years, earning respect and admiration from all those he encountered. He was considered a skilled advocate with unfailing grace and courtesy and possessed the highest standards of professionalism. Mark is survived by his wife, Debra Henry. Donations in his memory can be made to Wayne State University Law School Scholarship Fund, Office of Annual Giving, 5510 Woodward Avenue, Detroit, MI 48202. His obituary can be read here: <https://www.legacy.com/obituaries/freep/obituary.aspx?n=mark-d-robins&pid=191037624&fhid=2510>

CWCL LOGO

Fellows are encouraged to include the College logo on their website. Please contact [Susan Wan](#) for a downloadable file or download the logo.

