THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

NEWSLETTER - SPRING 2020

IN THIS ISSUE

MESSAGE FROM KIP KUBIN, PRESIDENT

The Law of Unintended Consequences warns us that the intervention into a complex system tends to create unanticipated and sometimes undesirable outcomes. Although this idea dates back to the writings of John Locke, our current understanding of the concept is courtesy of sociologist Robert Merton who applied this analysis to deliberate acts of government to effect social change.

This is not to say that all of the unintended consequences of an action are undesirable. For example, aspirin was originally intended as a pain reliever, and eventually it was discovered that it served as an anticoagulant that could help prevent heart attacks and reduce the severity and damage from strokes. Favorable side effects are also recognized from some blood pressure lowering medications. (Figure that one out on your own.) However, there are also examples where intervention into a complex human system yields negative consequences. For example, when the British government became concerned about the number of venomous cobras in India, it offered a bounty for every dead cobra. Initially, the strategy worked well, as large numbers of cobras were killed for the reward. Eventually, entrepreneurial individuals created a cottage industry where they started breeding cobras for income. When the British government discovered this phenomenon, it promptly scrapped the reward program. This, in turn, caused the cobra breeders to release their cobras, increasing the wild cobra population. The original problem was exacerbated by the solution.

As we are all huddled in our home offices, I believe it is important to revisit this concept in the context of workers' compensation practice and COVID-19. This is not to say that all the consequence on our practices will be bad, or good, but it will certainly be different. The focus of this column is not on whether the condition should or should not be covered as a work-related injury. Rather, I want to focus on how it might impact our practices.

For years, we have ruminated on the impact of technology on our practices. We have speculated that hearings would be done remotely, witnesses would testify remotely, and doctors would conduct examinations remotely. That day is upon us.

As of the writing of this column, Kansas is conducting hearings using phone or video technology, as is the State of Missouri. I expect most states are now conducting some type of remote proceedings. What might that mean? Initially, it has appeal to the practitioners in this area of the law. The defense bar is happy because lawyers can handle more cases and that translates into higher revenue. The petitioner bar is pleased because it does not have to spend as much transactional time conducting hearings and increases their realization rate.

However, if you do not have to appear for a hearing in person, then you do not need an attorney in the locality of the court. If hearings can be handled by St. Louis counsel on a video link, why would you hire a local counsel to pursue or defend a claim in Joplin, Missouri? Why stop there? If you have a licensed Missouri counsel in your Chicago, Illinois office, why have a Missouri counsel at all? One unintended consequence of remote hearing attendance may be a centralization and specialization of practitioners who handle workers' compensation issues. If this comes to pass, I see equal disparate impact on the employee bar and the defense bar. Where defense firms will regionalize or nationalize in an effort to cover more jurisdictions and as petitioner firms advertise over a wider area, the consequence is to marginalize or eliminate the small firms and practitioners who currently handle these cases in less populated areas or less populated states. Taken to its logical conclusion, you could have just a few firms fighting over a finite pool of business. We could be viewed less as professionals, but more as vendors. Price competition, whether on hourly rates or reduced percentages on contingency fees, should be expected as those remaining firms jockey for market share. This impacts the professionalism of the practice.

But with fewer people specializing in the practice area, we should expect more competence in the practitioners who remain in workers' compensation. Right? Maybe not. As with the cobra bounty, initially, the well-trained attorneys will conduct those hearings, but what about the next generation of practitioners? Will defense firms steer their best associates to a practice that has a lower hourly rate? Will attorneys starting out wanting to practice from the plaintiff side be attracted to cases where to compete you need to handle the case on an artificially low contingency fee? I think not. The ultimate consequence could be the marginalization of the entire practice area.

These impacts will likely not come to pass in our professional lifetimes. But we should be cognizant that the decisions we make now, as leaders in this practice and principals in our firms, could have far reaching implications, even if we realize some short-term economic benefit. Chances are my predictions are not accurate, as few predictions of the future are, but they are not unreasonable and that is the most unsettling.

Kip Kubin
Leawood, KS

2019-20 LAW STUDENT WRITING COMPETITION - AND THE WINNER IS.....

Congratulations to George Flores who submitted the winning paper in this year's CWCL competition, entitled *Lewis and Bourgoin: The Growing Divide Over Reimbursement for Medical Marijuana in the Workers' Compensation System.* George is currently a second-year law student at Penn State Law, University Park. He graduated from the University of Louisville in 2018 after a decade-long career repairing woodwind musical instruments. He founded the PSL chapter of 'if/when/how: Lawyering for Reproductive Justice' during his first year. He currently works as a Research Assistant to Professor Megan Wright researching Health Law topics. During the summer of 2019, he worked as Research Assistant to Professor Michael Foreman in the PSL Civil Rights Appellate Clinic researching current topics in Employment Discrimination Law. After law school, George plans to practice public interest law in Augusta, Maine. Click here to read George's article -

JOHN KINNANE WAS TO BE RECOGNIZED AS SIXTH WORKERS' COMP LEGEND AT CANCELLED INDUCTION DINNER


John E. Kinnane

John Kinnane was born and raised on a farm in Southern Michigan. He earned a Bachelor of Arts degree from Kalamazoo College. After holding several positions, in 1912 he was appointed as a chairman of the Michigan Industrial Accident Board and was instrumental in creating the Michigan workers' compensation system. In addition, his desire to learn from and share ideas on system operation resulted in the founding of the National Association of Industrial Accident Boards and Commissions in 1914, which became the International Association of Industrial Accident Boards and Commissions (IAIABC) in 1915.

In his role as Chairman, Mr. Kinnane was instrumental in interpreting the newly adopted workers' compensation laws and creating a system of administration for their implementation. Workers' compensation laws were in their infancy and Chairman Kinnane recognized the importance of creating an administrative system that reflected the grand compromise between labor and management. In his own words:

> *"On account of the comparative newness of the system on this side of the Atlantic, the experience of our boards and commissions which have been engaged in the work is eagerly sought, and a comparison of experiences and a general interchange of ideas and views cannot fail to be of value to all."*

What began as a small gathering in Lansing, Michigan has grown and thrived over the past 106 years. Today, stakeholders from around the world continue the IAIABC's mission to reduce harm and aid recovery from occupational injuries, illnesses, and fatalities. This purpose has continued uninterrupted, as generations have responded to current challenges and changes in the economy, labor force, and workplace.

For this legacy, John E. Kinnane is honored as a workers' compensation legend.

REPORT TO THE COLLEGE OF WORKERS' COMPENSATION LAWYERS ON RESULTS OF MEMBER SURVEY - Kip Kubin, President-Elect, Overland Park, KS

Six months ago, many of you completed a computer survey regarding the College of Workers' Compensation Lawyers. That survey covered a number of issues and gathered demographic information on the College members. I have now had a chance to analyze some of the results and wanted to share that with you.

When I pitched this idea to Tom Domer and the Board about two years ago, I emphasized that we really did not know what our members thought or felt about the College. We all had our views of what the membership wanted, but no data on which to rely. I pitched the survey as a chance to gather data on rather specific issues.

Here is the information I hoped we could garner from the survey. Since the survey is closed, I can now share this information with you without influencing your answers.

There are specific things the questions were looking for:

Question 1 is designed to obtain some demographic information about the membership which will be used to cross tabulate with the answers to some of the later questions to see if patterns emerge.

Questions 2 and 3 are designed to get some more demographic information and also should provide some gauge as to the level of intersection between the ABA and the College. We are looking at the depth of commitment to either or both.

Question 4 looks at the cross membership between the College and the ABA and should give us some information on the viability of the College to create its own stand-alone conference.

Question 5 looks for the satisfaction/dissatisfaction of the membership with the Midwinter meeting. Answers to this question should provide information helpful to projecting success of a College stand-alone seminar and dinner.

Question 6 builds on Question 5 by soliciting specifics on why a majority of the College does not attend the full seminar. We are looking for roadblocks in participation at the Midwinter meeting which may give us information about how to address any negative aspects of planning or holding a stand-alone conference.

Question 7. I know I told you I would not make this a "push poll", but this question is designed to let the membership know that we are at least considering a stand-alone conference and induction dinner.

Question 8 is designed to take the pulse of the membership on ideas that we have discussed at one time or another. It should provide us information on what are important issues to the membership and also information as to issues which may divide the membership. It may, as an unintended consequence, stimulate some members to become more involved if they see an issue on the list about which they are passionate. We might even solicit an idea that we have not considered.

Finally, I believe that it is important that we share the results of the survey with the membership, good or bad, pretty or ugly. We now have the results of the survey. What did we learn, if anything, from the answers?

First, by way of overview, we have a very engaged population in the College. We had 256 responses to the survey. Given that we have 475 members in the College, that return rate of 54% is almost never seen. The normal response rate for an email survey is 24.8%. We can have a heightened level of confidence in the findings because of the high return rate which was over twice what would have been expected. What that means is we can have confidence that the percentages of response for those who did not respond to the survey are close to the percentages of the responses from the persons who participated in the survey.

QUESTION 1: How long have you been a member of the College of Workers Compensation Lawyers?

a. **Less than 3 years (29%)**
b. **Between 4 and 8 years (40%)**
c. **9 or more years (31%)**

In this question we wanted to learn something about the distribution of the answers over the experience the participants had in the College. In other words, we were looking for a bias as to whether the members answering the survey were new or old. The experience groupings were determined because they each represented about one third of the members of the College. If the survey had too many responses from new members, for example, we would have some questions about whether the responses were accurate. Fortunately, there was a good distribution of the answers over the entire College membership. It does not appear that the survey responses were unreasonably weighted by the length of time the person had been a fellow.

QUESTION 2: How many times have you attended the induction dinner?

a. **One time (when I was inducted) (34%)**
b. **2-5 times (49%)**
c. **More than 5 times (17%)**

The information from this question was rather encouraging. It looks like about two-thirds of the members who have been inducted to the College come back to the induction dinner another time. This would seem encouraging for the continued viability of the organization, if people continue to come to the dinner because they want to, not because they have to.

QUESTION 3: How many times have you attended the ABA Midwinter Workers Compensation Conference?

a. **0 (33%)**
b. **1 (19%)**
c. **2-5 (33%)**
d. **More than 5 (15%)**

The numbers which were encouraging in the answer to Question 2, are not nearly as hopeful when you look at the responses to Question 3. It appears that you are not very likely to return to the ABA Midwinter Meeting, even if you come for the induction dinner. While about two-thirds of the participants return to the induction dinner, only about forty-eight percent return for the seminar. That would seem to indicate that the attendance at the induction dinner does not seem to increase the attendance at the Midwinter Seminar.

QUESTION 4: Are you a member of the ABA, and if so, to which section do you belong?

a. **Not a member (55%)**
b. **Yes, and I belong to Labor and Employment Section (10%)**
c. **Yes, and I belong to TTIPS (15%)**
d. **Yes, and belong to both LEL and TIPS (12%)**
e. **Yes, but I do not belong to either of these sections (8%)**

The responses to this question were striking in showing that the majority of the College members do not belong to the ABA. Drilling down, we wanted to know if we had unequal participation from either of the sections which

sponsor the seminar. The numbers do not appear to show any strong interdependence between the College dinner and the ABA seminar or section membership.

QUESTION 5: Do you find the date of the induction dinner for the CWCL (usually during Spring Break) to be convenient?

a. **Yes (71%)**
b. **No (7%)**
c. **No Opinion (22%)**

One of the items discussed by the Board was whether the timing of the induction dinner in March of most years was inconvenient for the members, given Spring Break, and other competing seminars at that time of the year. If we had any notions that the timing of the dinner was not convenient, those were dispelled. Our conclusion is that the Spring still seems to be the best time for the induction dinner.

QUESTION 6: If you do not regularly attend the ABA Midwinter Workers Compensation Conference, why is that so:

a. **Seminar is too costly (10%)**
b. **Timing of seminar is inconvenient (8%)**
c. **Travel to the seminar is too costly (7%)**
d. **Seminar is not worth the cost (10%)**
e. **Don't like the location of where it is being held (2%)**
f. **Too many days away from the office (29%)**
g. **Other (22%)**
h. **(11% of participants did not answer this question)**

The answer to this question may have been the most revealing of any of the survey responses. We listed as many reasons as we could think of as to why you would not attend the seminar, even if you planned to attend the induction dinner. The winner by a three to one margin was the seminar required too many days out of the office. The next tier of answers seemed to deal with value (too costly and not good value). I think we need to keep this in mind, and the ABA if they continue to hold the seminar, that a two day seminar would seem to be preferable and starting the seminar late enough on day one, so attendees can come to the city without having to incur an extra nights' stay at the hotel. Cost does seem to have some impact on attendance. There were a number of comments attached to (g). All of them seemed to either focus on the lack of value they received for their practice, that the topics at the seminar did not address their concerns in their state, or that they did not like the ABA for various reasons (usually a perceived bias to the other side of the practice).

QUESTION 7: Would you be more or less likely to attend the induction dinner and symposium if it is not at the same time as the ABA Midwinter Workers' Compensation Conference?

a. **More likely (20%)**
b. **Less Likely (21%)**
c. **Would not make any difference (59%)**

The answers to this question indicate there is not a strong link between the seminar and the induction dinner (consistent with the answers to Question 4). Roughly the same percentage of respondents indicated they are more likely (20%) to attend if we have the symposium at a different time as those who indicated they would be

less likely to attend (21%). The overwhelming majority (59%) indicated it made no difference to them. If we decided to have the symposium and induction dinner at a different time, it would not be expected to affect the numbers we would draw.

QUESTION 8: What focus should the CWCL have over the next 5 years: Please rank your top 3

a. **Functioning as an honorary society that meets once a year to induct members (56%)**
b. **Education, by conducting and participating in seminars and symposiums (59%)**
c. **Outreach to Law Schools to assist in the instruction of W/C curriculum (35%)**
d. **Education of Legislators and Appellate Judges on issues of W/C (41%)**
e. **Developing a Speakers Bureau, based on state and regional locations (32%)**
f. **Development of a Model Workers' Compensation Act (12%)**
g. **Development of Standards for certification of legal specialists in W/C (30%)**
h. **Other suggestions**

This was an opportunity for the survey participant to give some information on what they believe the goals and purposes of the organization should be. Many of the enumerated received support, with one glaring exception. There was relatively low support for the College working on a Model Workers' Compensation Act. It garnered little support as a suggested focus for the group. There were relatively few comments in the comment box. Either we did a good job of outlining the goals for the group or the respondents did not much care (as may be consistent with the percentage that believed that the major purpose of the College was as an honorary society). One comment did catch my eye. There was the suggestion on one of the responses that we needed to make our type of business more profitable. They pointed out that on the defense side, workers' compensation attorney had the lowest hourly rates, and on the employee side, the contingency fee arrangement in some states are capped at low levels. I have not given much thought to the issue, but for the furtherance of this practice area as a desirable career, the respondent makes an interesting point. Maybe this should be explored at an upcoming seminar.

What are the takeaways from the survey results?

I would offer a couple of observations that seem to be supported by the survey. First, I believe that having the induction dinner in conjunction with the ABA Midwinter Seminar, although nice for the College and for the ABA, is not critical to the continued viability of the College. It appears many of the Fellows attend the induction dinner without going to, or ever going to, the seminar. The ABA was instrumental in the formation of the College, and for that we should be grateful. However, there does not seem to be any particular benefit for the ABA to have the induction dinner in conjunction with the mid-winter meeting, because it does not seem to increase their attendance at the seminar. From the College perspective, it is convenient for us to rely on the ABA to get the venues, book the room blocks and handle (at expense to the College) the logistics of our induction, but the midwinter meeting does not seem to increase our attendance at the dinner. It remains to be seen how long the ABA continues to sponsor the midwinter meeting.

Second, our members like value and don't like to be away from the office. As noted earlier, that was the biggest impediment to Fellows not attending the seminar. If we get to the point that we have a free-standing symposium and induction dinner, we may want to consider having a reception for the new Fellows on Friday evening, the Symposium on Saturday and the dinner on Saturday night. That would seem to address some of the issues with Fellows not attending.

Finally, it appears that if we have it, they will come. I know we have had some concern that if we have the Symposium and dinner separate from the Midwinter Seminar, then our numbers would suffer and we would

lose money. Based on the responses, that would not seem to be the case. The Fellows seem to have a great affinity for the College, demonstrated by the fact that over half of the fellows return for the dinner in the years after their induction. There also seems to be some appetite for education and outreach on behalf of the Fellows that can certainly be cultivated by the College.

I will leave it to the individual readers to come up with other observations, but those are the ones which struck me. Please feel free to contact me if you have any questions, want to have an argument, or want to look at the raw data.

SPOTLIGHT ON A FELLOW – ROBERT WISNIEWSKI

Bob Wisniewski represents plaintiffs/claimants in Phoenix, Arizona. He is on the Board of the College of Workers' Compensation Lawyers and currently serves as the chair of the Nominating Committee. He 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? I represent injured workers in 99 plus percent of my practice. Occasionally, I will represent an uninsured employer and once in a while, a workers' compensation carrier. However, I prefer representing injured workers. At times, I am called upon to be an expert witness in Arizona Workers' Compensation Bad Faith, Standard of Care and Damages and Arizona Workers' Compensation Malpractice cases.

How long have you been working representing the same segment of the workers' compensation industry? Following a clerkship with the intermediate Appellate Court in Arizona in 1976- 77, I began representing, at that time, insurance companies in a defense firm. I continued to represent insurance companies and self-insureds and governmental entities in workers' compensation as a defense lawyer for approximately the next 10 years, and since then I have worked exclusively representing injured workers with the reservation expressed in the first question.

Have you worked in any different segment of the workers' compensation industry in the past and, if so, which one? As I set out above, I was a law clerk for a Division at the Court of Appeals in Arizona, which did workers' compensation cases initially, and then began working in the defense side for several years and then migrated to solely injured workers.

Are you in private practice? If so, how many lawyers are with your firm? I am in private practice and I have one other lawyer in this firm.

Are you in-house counsel for an employer or insurer? No.

What is your case load like? My case load fluctuates, but at this time, from an active litigation basis, I handle approximately 100 files, but manage and oversee others.

For practicing attorneys, on average, just how many cases do you try in a year? In Arizona, most of our cases are litigated in some fashion. There is rarely mediation. Over my 44-year career, I have probably handled and attended over 12 to 13,000 industrial hearings. I typically try several cases a week.

Did you choose the practice or workers' compensation law or did it choose you? Please explain. I never heard the word workers' compensation while I was in law school! While I was clerking for Division 1 of the Arizona Court of Appeals, at that time, that court had a department that handled all of the workers' compensation appeals. I was fortunate to have a judge who sat me down and explained workers' compensation

to me and I am always indebted to that individual, Judge Eino Jacobsen. Following the clerkship, I got a job in a defense firm which was looking for someone to assist one of the senior partners in workers' compensation. I was very happy to have a job and enjoyed getting into workers' compensation and the trial work.

When were you admitted to the College of Workers' Compensation Lawyers? I was admitted to the College at 2015 at Naples, Florida.

What is the best thing about being a Fellow in the College of Workers' Compensation Lawyers? The best thing about being a Fellow is to learn how the states handle workers' compensation to perhaps impact on changes in Arizona law. I also have the opportunity to meet skilled practitioners from other jurisdictions. I am able to cross-refer to them or cross-question them about certain aspects of the law. I have also met a variety of very, very well-respected and intelligent lawyers that I would not have met without the community and collegiality of the College.

Are you active in the legal community? If so, how? I am active in the legal community. For many, many years, I have been involved with Kids' Chance of Arizona on the executive board and recently, I have stepped down to the advisory board. I funded and support an educational scholarship for Hispanic students unable to get financial assistance at the local community college system. I often speak at seminars for educational associations and the State Bar of Arizona. For over 23 years, I have taught a seminar on Arizona Workers' Compensation Lien Law to Arizona Trial Lawyers.

Are you active in your general community? If so, how? Most of my free time now is spent with seven grandchildren under eight years of age. Typically, I will be involved with them in their school activities and Cub Scout activities. I assist the Cub Scout activity as my resources, my skills and my time allows. With the Kids' Chance of Arizona, I often assist in fundraising in their activities.

Tell us what activities you enjoy doing outside of work. Outside of work, I primarily enjoy spending time with my family, my wife and my grandchildren. In addition, I like outside activities, hiking, running and any form of exercise – Pilates, hot yoga, etc. I also read as much as I can and travel as my schedule allows.

Please share some words of wisdom with our readers. For the College members, it would be daunting to try to give the College members advice. However, for young lawyers, I would tell everybody to simply be nice and do what your mother taught you to do in terms of respecting other people and doing what is right. The paramount focus in my practice is that we try to represent nice people with nice cases or good people with good cases, however you'd like to say it.

Listen to Fellow Alan Pierce's latest podcasts:

Impacts of COVID-19 on Workers' Compensation

Workers' Comp Clients: When to Seek Counsel

Defining Employment Relationships in the Gig Economy – Can it be Done?

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

KIDS' CHANCE OF AMERICA CALL TO CWCL MEMBERS - The Kids' Chance Community Seeks a Few Good People

"Losing a parent unexpectedly is never easy, but having family, friends, and the community rally to support you helps ease the pain and shows you that there is so much good in this world. The Kids' Chance community supported me throughout my college education, and for that, I am extremely grateful."

Molly C., Kids' Chance of Louisiana, Scholarship Recipient

The past year was indeed a landmark year for Kids' Chance of America. We continue to expand our reach and now have a presence in 48 states, including a new affiliate in New Mexico.

We also had an endowment created through the generosity of a workers' compensation industry leader who contributed $1 million, the largest gift ever received by the organization.

Our annual scholarship program continued to grow nationally. More than $447,000 was provided by the national to support state scholarship programs, realizing an 8% increase in the number of student scholarships awarded and a 14% increase in the dollar amount of those awards. Looking ahead, we want to focus on one of our strategic goals: building and engaging our volunteers, donors, and partners.

Building Our Volunteer Community

A core element of the Kids' Chance of America strategic plan is to expand the Kids' Chance community. We believe that this effort starts with the leaders and volunteers that support each of our states as well as those that work with the national organization.

The CWCL has long been a part of our community. There are a few members who already support Kids' Chance in various roles.

As part of engaging our community, we want to invite more of you to consider working with the Kids' Chance organization in your state. Opportunities range from board membership, to active committees and special initiatives, to event planning groups.

Kids' Chance of America is also looking for engaged volunteers.

As noted by Suzanne Emmet, Board Development Committee Chair, "For those interested in the broader mission of Kids' Chance of America, we invite you to contact us as you consider serving on a committee, a task force, or possibly even the board of directors.

I assure you that a leadership role with Kids' Chance will bring both personal and professional rewards as we look to create a strong Kids' Chance presence in all 50 states by providing national visibility, financial support, and best practices to each state Kids' Chance organization."

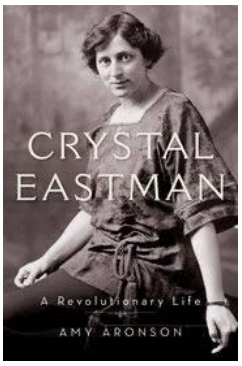
Join Us

Kids' Chance can assist in connecting potential volunteers to respective state organizations. We need "a few good people" to help us reach our goal of More Money for More Kids. For more information on how to get involved with Kids' Chance of America or the organization in your state, email us at admin@kidschance.org.

BOOK NOTES by David B. Torrey, WCJ, Pittsburgh, PA

CRYSTAL EASTMAN: A REVOLUTIONARY LIFE

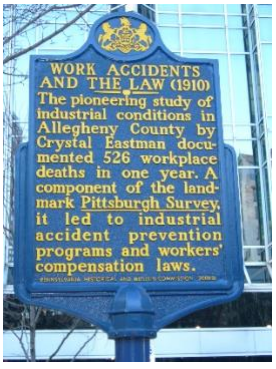
by Amy Aronson, Oxford University Press. 391 pp., 2019.



This new biography of Crystal Eastman, said to be the first, shows that her memorable role in the Pittsburgh Survey, at the conclusion of which she published *Work-Accidents and the Law* (1910), was just the start of an amazing professional career.

After her work in Pittsburgh, interviewing the widows of hundreds of workers fatally injured in the city's mines, mills, and railroads; and studying the results of wrongful death suits at the courthouse, she was appointed to the New York commission which drafted one of the country's first workers' compensation laws. Thereafter, she was an activist in – and often a journalist reporting on – various egalitarian and socialist causes, the suffragist movement, founding what is now the ACLU, and in the anti-war efforts that preceded World War I. Eastman also teamed with her equally famous brother Max to own and operate the radical socialist magazine, *The Liberator*.

The variety of Eastman's activist efforts after she left Pittsburgh for New York and, later, England, is dizzying. Much of the book is devoted to her role as a vigorous leader in the nascent feminist movement. Here one learns of an interesting tension within that movement, nationally and internationally, over whether women should embrace legislation which protected women in the workplace, or whether they should reject such measures in the name of complete equality with men. "Equalitarian" feminists like Eastman argued for industrial rights and freedom from laws which, though solicitous of women's interests, had their genesis in the "age-old patriarchal idea of female protection." Eastman, who drafted an equal rights amendment to the U.S. Constitution, was, along with her colleagues, not "opposed to laws improving … labor conditions; they merely claimed they should apply to men and women alike."



A long preface to this excellent book is the chapter, "Searching for Crystal Eastman." Here, the author ponders why Eastman is not better remembered. With this biography, the case has been made that she should indeed be more prominent in our understanding of a variety of early progressive movements. It is also pleasing to learn that Eastman, fresh out of law school and without a job, gained early fame and respect for her socio-legal study which produced *Work-Accidents and the Law.*

While Eastman may not be as well remembered as she should, it's worthy to note that the national bar association, The College of Workers' Compensation, honored her as a "Legend" of the field in 2019. And, of course, in Pittsburgh she is remembered with a state historical marker in downtown's Market Square, commemorating her famous study, her renowned book, and her contributions to raising awareness of the crisis of uncompensated work deaths. That raised awareness, of course, was a major contributing factor to the enactment of workers' compensation laws in Pennsylvania and around the country.

WORKERS' COMPENSATION EMERGING ISSUES ANALYSIS 2019

by Thomas A. Robinson, Matthew Bender. 208 pp., 2019.

I. Introduction

LexisNexis has, for the seventh year in a row, published its annual book, the *Workers' Compensation Emerging Issues Analysis.* The text collects essays published throughout the year by Tom Robinson, the editor of the Larson treatise, and his colleagues. The book leads this year with eighteen essays and is supplemented by a state-by-state "trends and case survey" section.

A major essay by Robinson is a comprehensive sketch of how the *AMA Guides* operate (or do not) among the 50 states. A 50-state chart featuring jurisdiction, edition used, authorizing statute, and commentary appear after the introductory discussion.

The book also notes that both Kentucky and New York have now adopted drug formularies. To date, of course, Pennsylvania has resisted this trend of workers' compensation reform. One wonders, however, whether the resistance can possibly endure.

The state survey portion, authored by contributors from the National Workers' Compensation Defense Network (NWCDN), makes up the bulk of the book this year. Most of these state summaries are neutral in tone, but a few are opinionated.

The *Emerging Issues Analysis* is getting unmistakably slimmer over the years. The 2014 edition was 392 pages, but over the last five years it has shrunk steadily, so that it now has only 208 pages.

Still, much is to be learned from this one-of-a-kind annual. It is especially valuable for teachers of workers' compensation law. A reading cover-to-cover constitutes total immersion in all of the issues we review with our students. Furthermore, many of the cases selected in the state analyses are welcome, thought-provoking, brain teasers.

II. Pennsylvania References

The Pennsylvania section is fairly brief, featuring a report on Act 111 by Philadelphia lawyer Kevin Connors, and brief summaries of what the authors believe to be the interesting cases from our state. Oddly, only three from late 2018 to late 2019 are featured.

The case of true import is the leading *Hartford Insurance Group v. Kamara,* 197 A.3d 229 (Pa. 2018). There, the Supreme Court "reiterated its prior holding that a workers' compensation claim may not maintain a third-party civil action against an alleged tortfeasor unless the injured employee has either assigned her cause of action to the carrier or voluntarily joined the litigation as a party plaintiff." Thus, "where the carrier filed the lawsuit on behalf of the injured employee and sought not only to recover its workers' compensation outlay, but any other damages to which the employee might have been entitled, it was not error for the trial court to dismiss the case." Notably, this case affirmed the law and practice of nearly a century, but came under withering criticism from national subrogation expert Gary Wickert. *See* https://www.mwl-law.com/pennsylvania-supreme-court-destroys-compensation-carriers-ability-to-initiate-filing-of-third-party-action/.

III. Themes of the 2019 Annual

A. Post-Traumatic Stress Disorder in First Responders

The *Emerging Issues Analysis* leads, appropriately, with an essay by Robinson reviewing the trend of legislatures amending their laws to make it easier for first responders (police officers, firefighters, EMTs, and on occasion certain others), to secure workers' compensation for post-traumatic stress disorder (PTSD). Facilitating recovery, of course, is particularly needed in jurisdictions where mental stress causing mental disability is

completely barred. Robinson identifies, in particular, the 2018 and 2019 enactments in Washington, Connecticut, Idaho, New Hampshire, New Mexico, and Oregon. Robinson points out that most versions of this trending PTSD legislation features a requirement that the responder must be diagnosed with PTSD by a physician or psychologist in order for the first responder to qualify for benefits. Thus, less severe mental health diagnoses may be excluded. In any event, once the claimant receives such a diagnosis, the worker enjoys, in most statutes and proposed legislation, a rebuttable presumption of causation.

Both Robinson and Cleveland attorney Donald Lampert (in the Ohio section) question the disparate treatment that is created by these statutes and proposals. Robinson ponders:

> [O]ne might imagine that in Florida, Connecticut, Kentucky, Washington, Idaho, and any other state that limits PTSD to so-called "first responders," it is the long-haul truck driver who is actually the first on the scene at many serious auto accidents. It is a teacher who was first on hand [at the Sandy Hook massacre] to hold the hand of a dying child shot by a crazed assailant. It was a bartender or other wait staff employee [who] was the first to comfort a wounded customer or co-employee at Pulse, the Orlando nightclub.

Lampert, noting that in his state a PTSD bill was submitted but never enacted, posits, "Police and fire unions were obviously disappointed. Absent from the debate[, however], were the legal and constitutional issues that workers' compensation practitioners would recognize. What about non-public safety workers? An over-the-road truck driver and/or Good Samaritan can just as easily come upon a horrible scene causing PTSD."

Robinson, for his part, also raises whether it is "constitutionally permissible for a state to favor one subset of employees – e.g., so-called first responders – over all other employees in the state?"

B. <u>Third-Party Settlement Without Carrier Clearance</u>

At least two states maintain the rule that an injured worker's settling with a third party, without the workers' compensation carrier's permission, works a complete *forfeiture* of his or her workers' compensation claim. In Pennsylvania, we have no such rule. In any event, in an Alaska case, a taxi driver sustained work-related injuries in a vehicular accident and thereafter settled, for the policy limits, his tort action against the other driver's estate. He did so without obtaining written approval from the employer. There, "it was appropriate for the Workers' Compensation Board to dismiss the driver's workers' compensation claim…." The forfeiture, notably, is worked by a specific provision of the Alaska Act. The court was, meanwhile, unpersuaded that the employer's lack of prejudice made any difference. *Atkins v. Inlet Transp. and Taxi Service*, 426 P.3d 1124 (Alaska 2018).

C. <u>WCJ Power to Grant Summary Judgment</u>

In several states the ALJ has the power to grant summary judgment. Indeed, at least three cases are featured in the book where WCJs rule on summary judgment motions. These are cases from Louisiana, Nebraska, and Rhode Island. The Nebraska agency, notably, recently amended its summary judgment rules to ensure ample time for all parties to produce evidence and arguments. In Pennsylvania, summary judgment is foreign to our practice and sensibilities. Still, the latest changes to the Pennsylvania WCJ Rules definitely accommodate summary disposition of cases. That rule is found at 34 Pa. Code § 131.53b. It is subsection (b) that potentially allows grant of summary judgment:

> *Bifurcation and motions for disposition of a petition*
>
> (a) The judge may, upon request or upon the judge's own motion, consider bifurcation of issues to promote expeditious resolution of cases.
>
> (b) A motion which may result in disposition of a petition may be filed at any time. A response shall be made within a time specified by the judge. The judge will issue an order granting or

> denying the motion, or will provide reasons why the motion will not be ruled upon, within 30 days of when the response is due. If the motion will not be ruled upon, the judge will articulate in writing or on the record the reasons for not ruling on the motion. Pendency of the motion will not operate as a stay.

D. Set Aside of Compromise Settlements

Workers on occasion do seek to set aside their approved compromise settlements. The Lexis annual features cases on this topic from Michigan, Colorado, and Virginia. The Colorado case is of particular interest. There, the parties entered into a settlement which included funding of a Medicare Set Aside (MSA). Four years later, CMS requested additional funding for the MSA. At that point:

> claimant petitioned to reopen his settlement due to [employer's] failure to include the costs in the settlement. Claimant alleged [that] this amounted to fraud on the part of the respondent, or a mutual mistake of the parties. The [ALJ] determined that claimant had full knowledge of the agreement and was represented by counsel.

The ALJ further rejected the proposition that mutual mistake existed, as "both parties were fully aware of the contents of the settlement agreement." Accordingly, the ALJ denied the motion to set aside compromise settlement, and the appellate court affirmed. *Matus Industrial Claim Appeals Office*, 2019 WL 398848 (Colo. Ct. App., filed Jan. 31, 2019).

E. Human Trafficking and Workers' Compensation

Contributor Karen Yotis authored the essay, "Human Trafficking and Implications for Workers' Compensation." Ms. Yotis comments on this appalling phenomenon and explains that while the overall majority are victims of sexual exploitation, 22% are, in fact, victims of *labor* exploitation. Most such individuals are women and children, and "are among the most vulnerable among us: The physically and intellectually disabled, addicts, foreigners with no language skills, and sexually transgendered youths." As to the labor exploitation:

> The trafficked also perform menial tasks in low-skilled categories. As [one expert] explained, "they clean and cook for us, they grow and harvest our food, the do our hair and nails, they care for our children and elderly, and staff residential and nursing home facilities." The trafficked are found at truck stops and in residential brothels and are also found in manufacturing facilities that don't bother with safety protection.

Healthcare workers often encounter individuals who are victim of human trafficking. One 2017 study reported that "88% of trafficking victims came into contact with a healthcare provider at some point during their slavery, but none were identified or offered help to get out of bondage during the encounter." Another expert identified signs to recognize in labor trafficking cases, particularly for healthcare providers. Among these are "horrific injuries which suggest a patient worked on machinery with guards removed."

Of course, one problem with reporting is concern on the part of the victims themselves with regard to "criminal proceedings against their traffickers, fear of immigration and asylum procedure, the stigma associated with sex work, returning to families that are not aware of their activities while away, lack of basic life skills, and the inability to find a place to live that they believe is safe from their traffickers."

IV. Learning from and Comparing Rules of Other States

A. Colorado: MMI as a Matter for Expert Determination

A Colorado case points out the rule – surely that of Pennsylvania as well – that maximum medical improvement (MMI) must be proven by expert medical evidence. The determination of MMI is not, in contrast, for the layperson. Thus, an ALJ in the case was held to have committed error in concluding that the claimant

was at MMI when both physicians testifying in the case stated that claimant had not yet reached that point. *See Burren v. Industrial Claim Appeals Office*, 2019 WL 1087035 (Colo. Ct. App. 2019).

B. Course of Employment and the Incident versus Abandonment Dichotomy

The worker injured on the premises, working at the lathe, punched in, is the textbook case of a worker in the course of employment. It is the "gray area" cases which generate insurance adjuster phone calls to counsel and cases litigated before judges. Many of these cases, in Pennsylvania and elsewhere, can be analyzed by asking whether the worker's activity at the point of injury was caused by some activity "incident" to the employment or, in contrast, reflective of an "abandonment" of the employment. The book features at least four cases which are in this category. Two are of special interest

1. *Connecticut.* In a June 2019 Connecticut case, a worker on a business trip (and thus presumptively covered), sustained an injury after becoming intoxicated and leaving a *second* bar he had visited during an evening of his trip. "After leaving the bar around midnight," we learn, "the claimant was assaulted and sustained serious injury. The claimant alleged that notwithstanding a deviation[,] that at the time of the assault he was back en route to his car and hotel and that his injury should be compensable. The court disagreed and affirmed the dismissal on the basis that he made a [fatal] deviation from his business trip activities." *See Rouser v. Pitney Bowes*, 211 A.3d 124 (Conn. Ct. App. 2019).

2. *District of Columbia*. On the other hand, a 2019 District of Columbia case ruled that injuries sustained by a transit authority manager when she tripped and fell on a transit authority escalator, near an employee-only breakroom, during a two-hour unpaid break between her two scheduled shifts, did arise out of the employment. The court stressed that "with the manager working two shifts, and desiring to eat her lunch between those shifts, it was reasonable for her to be at the workplace at the time of her injury." *See Gaines v. D.C. Department of Employment Services*, 210 A.3d 767 (D.C. Ct. App. 2019).

C. Rules of Evidence

1. *Missouri.* Pennsylvania is a state which once had many hearing loss cases. That phenomenon gave rise to many *rules*, one of which is that an audiologist cannot testify as an expert. *Lynch v. WCAB (Teledyne Vasco)*, 680 A.2d 847 (Pa. 1996) (following *Pare v. WCAB (Fred S. James & Co., Inc. of Pennsylvania)*, 509 A.2d 1361 (Pa. 1986)). In a Missouri case, however, the court decided to the contrary. There, the workers' compensation authorities have broad discretion in considering and receiving expert medical evidence. Thus, "it was empowered to accept the opinion of an audiologist (who had a Ph.D. in Hearing Science) as to the nature and extent of a worker's disability from tinnitus instead of the expert's opinion offered by a medical doctor who specialized in otolaryngology and in spite of the fact that the audiologist stated his opinion essentially upon the subjective description offered by the worker. The court stressed that a medical expert need not be a physician." *See Hogenmiller v. Mississippi Lime Co*., 210 S.W.3d 767 (Mo. Ct. App. 2019).

2. *New York.* An amendment to the New York Act raises the same issue of who can testify. Under the New York system, effective January 1, 2020, providers "authorized to treat workers' compensation claims [are, in an expansion] … nurse practitioners, physician assistants, occupational therapists, physical therapists, acupuncturists, and licensed social workers." Under the prior practice, those with the ability to treat were, other than allopathic physicians, chiropractors, podiatrists and psychologists.

Still, notably, under the revised law, "reports of physical and occupational therapists, acupuncturists and physician assistants cannot be used as evidence of causal relationship or disability. The nurse practitioners [on the other hand] seem to have been given nearly the same rights as physicians as they will be allowed to issue opinions on causal relationship, disability and degree thereof."

D. Indemnity Clauses

Under the Pennsylvania Act, the third party sued by an injured worker cannot join the employer. This is so even if the employer is alleged to have been negligent. The law was established in the landmark 1983 case, *Heckendorn v. Consolidated Rail Corp.,* 465 A.2d 609 (Pa. 1983). An exception is that joinder is allowed in the presence of a preinjury indemnity contract. Section 303(b) of the Workers' Compensation Act, 77 P.S. § 481(b). Of course, in our state the exclusive remedy is enforced with an *iron* fist. Thus, doctrine further holds that such indemnity clauses must be *explicit* before the employer is held to have waived its immunity. *Bester v. Essex Crane Rental Corp*., 619 A.2d 304 (Pa. Super. 1993).

Delaware has a special rule in this area that (I believe) we do not maintain in Pennsylvania. There, an indemnification clause can *only* be used against a *negligent* employer. In a 2019 case, an employer, Pacific Trellis Fruit (PTF), had agreed to indemnity its landlord, Diamond State, from any claim arising out of the lease arrangement. Unfortunately, an employee, Verbitski, was injured in the course of his employment and sued Diamond State. The landlord invoked the indemnification agreement.

The Delaware court, however, allowed PTF to escape the clause. "Noting that the landlord, and not the employer, was responsible for maintaining the nearby parking lot where the employee was injured, the court stressed that under prior court rulings, public policy dictated that the indemnity provisions could not be used to push responsibility from the landlord to the tenant/employer where the latter had not been negligent."

The court further declared, "public policy underlying the Workers' Compensation Exclusivity Doctrine prevents Landlord from requiring indemnity from Employer for Landlord's own negligence. An employer who provides workers' compensation benefits and is not negligent cannot be required to indemnify a negligent party even when the employer has expressly agreed to indemnify…. Rather, only when the employer itself is negligent will contractual indemnity defeat the Workers' Compensation Exclusivity Doctrine….." *See Verbitski v. Diamond State Port Corp.,* 2019 WL 1501111 (Del. 2019).

SCENARIOS FOR THE 2030s: THREATS AND OPPORTUNITIES FOR WORKERS' COMPENSATION SYSTEMS

by Richard A. Victor, Sedgwick Institute, 285 pp., 2019.

Dr. Richard Victor, the now-retired head of WCRI, has authored an intriguing book seeking to predict how the socio-economic landscape surrounding our field will look in another decade.

In this current period of extreme angst, Victor forecasts, by coincidence, an equally unhappy set of predictions for our system.

A downer, so why read it?

The book is of importance to lawyers as many states are singled out as having high injured-worker lawyer involvement and excessive fees by defense lawyers – Victor, on this point, asserts that it is likely that legislatures in the future will be forced to pare these "friction costs" from the system.

Aside from this *existential* concern, the book is of importance to the true specialist who desires 100% understanding of the field.

The future in this telling is, as foreshadowed above, an unhappy one. This is so as Victor predicts a threefold increase in the costs to employers of workers' compensation over the next couple decades, while benefits to workers do not meaningfully increase.

He identifies three principal cost-drivers.

First is the **coming labor shortage** as baby-boomers retire, millennials and others do not fill their roles, and a hostile administration doubles-down on preventing immigration, legal and illegal. (Those who *are* available for work will have more injuries, and when they do, are more likely to stay out of work.) Second is a great increase of **medical expense cost-shifting** (he uses the term "case-shifting") by both workers and providers away from commercial and other private health plans as (a) such payers institute higher deductibles; and (b) the administration and Congress continue to disassemble or repeal the Affordable Care Act. (Those whose injuries are ambiguous, in terms of causation, will be anxious to shift the costs of their care to workers' compensation, which Victor calls "free care.") Third is the likely action by Congress to **eliminate the offset** employers enjoy in many key states to account for injured workers' Social Security Disability payments.

Compounding all of this is an intensifying globalization, which will squeeze profits; and the debt coming due on baby-boomers' many decades of deficit spending and dishonest budgets, which will reduce the ability of government to innovate.

Victor predicts that those in power, in both business and government, faced with increased workers' compensation costs and these inevitable economic pressures, will in the 2030's rebel against the inefficient status quo – and radically (my term) look for *other methods* to address work injuries. He says that the traditional cost-cutting device, paring down workers' benefits, won't be cognizable. Neither will federalization or federal standards.

Indeed, politics is now so polarized (and it will get worse) that compromise – the traditional effort to address crises in our field – is impossible in order to address the coming cost crisis. In short, a governmental answer to addressing work injuries and deaths will no longer be workable.

As for the other methods. Victor at this juncture first describes the ERISA-based programs that many Texas employers utilize. There, workers' compensation is not mandatory, and some employers generate such plans and then, typically, oblige workers to arbitrate any dispute. Victor points out that many such plans pay only medical, and not disability. The author, second, and more enthusiastically, describes the so-called "carve-outs" that are authorized in several states, including New York, California, and Pennsylvania. Carve-outs are pacts between employers and unions, found in collective bargaining agreements, to specifically handle the issue of work injuries and their compensation. Benefits are in the same amount, or more, than in the workers' compensation law, but items such as medical care procedures and dispute resolution (typically arbitration) are arranged to be independent of the workers' compensation law.

Victor envisions carve-outs not just for union members but for all workers. These he calls "super carve-outs," and he ventures that they could be organized and administered by non-governmental organizations. Plainly this idea of carve-outs on steroids has seized his imagination.

Along the road to reaching these recommendations, Victor, as foreshadowed above, discusses the many friction costs, like attorney and judge involvement, that currently make most workers' compensation systems inefficient. They are thus, purportedly, the eventual target of heavy-handed reform.

In this discussion, defense attorney costs get special attention. The median defense cost per case nationally is $5,721.00, but Pennsylvania, notably (my state), is at $7,003.00. On this point, Victor makes an intriguing assertion: this level of per case charge shows, *objectively*, that certain systems are just too complex:

> Dispute resolution formality and complexity: In the median state, the average defense attorney fee is $5,721. In some states it is much higher – $9,311 in Louisiana, $7,589 in Minnesota, $7,644 in Georgia, $7,172 in California, and $7,003 in Pennsylvania. Defense attorneys are paid by the hour. Although there are some interstate differences in the hourly rate, large differences in average fees are driven by large differences in hours billed. Complexity and formality of dispute processes drive the number of hours billed. If the average number of hours billed in most states

is at least 20 percent lower than in the states named, it is likely that an acceptable level of justice for the parties can be achieved in the named states at lower costs using processes that are less complex and less formal.

Only the most intrepid reader will make it through Dr. Victor's book. This is no criticism: its length has it genesis in the economist's admirable desire to support his predictions with data and analysis. Still, it may be that the book is repetitive enough that a reading of chapters 1 and 15 (first and last) will give the reader most of the story. And a caution: the penultimate chapter is an imaginative allegory – a fiction – which is meant to bring the whole account to life. Some readers may wish to pass on this admirable experiment, which features a Senator Van Winkle and his adviser Irving Washington.

Victor cautions, in any event, that, while he is confident in his predictions, anything can happen. Indeed, commenting on the relentless pressures of globalization, he posits, ironically, "This momentum may be difficult to stop but for some dramatic event that interferes with the movement of people, capital, goods, and services. Such events include political revolutions, natural disasters, *plagues*, etc. Even then, the loss of momentum is likely to be temporary."

Access: https://www.sedgwickinstitute.com/book-2030/

All opinions are solely those of the author.

ARTICLES OF INTEREST

THE VANISHING PRESUMPTION OF COMPENSABILITY IN DEATH CASES

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

An employee dies at work. What was the cause of death? Is the death a compensable workers' compensation claim? If the "cause" of the death is unexplained, there is a presumption of compensability in Georgia. But rarely is the law so straightforward. A coroner's report may state "the decedent died of a gunshot wound"; that may be obvious. However, now the questions shift to why and under what circumstances was the employee shot? Was it for reasons related to work or for some reason strictly personal to the decedent employee? The higher courts have discussed what was the "precipitating" triggering event in such cases. Often times what is an initially unexplained cause of death is subsequently explained by an autopsy or other medical evidence. This routinely happens in fatal heart attack and stroke cases.

In 1932, citing cases from other states (including a general legal presumption against suicide), the Court of Appeals upheld an award of benefits to the widow of a night watchman who had been discovered dead from gunshot wounds, holding that "where a night-watchman is found dead in a place where he might reasonably be expected to be in the performance of his duties, the natural presumption arises that his death arose out of and in the course of his employment."[1] Presumably, had the evidence affirmatively shown that the gunshot wounds were self-inflicted or were otherwise the result of a purely personal cause, unrelated to the employment, then

[1] Standard Accident Ins. Co. v. Kiker, 45 Ga. App. 706, 165 S.E. 850, 851 (1932).

a claim for benefits arising from such an "explained" death would be denied. The rationale of what has come to be called the "unexplained death presumption" is that, while surviving claimants might rather easily prove that their decedent's death occurred "in the course of his employment," it is likely to be a much more difficult—often impossible—task to prove that his death "arose out of" his employment, especially considering that the employee is no longer available to explain the cause of death.

In analyzing these cases, our higher courts have distinguished between the precipitating cause of death and the immediate cause. In Zamora v. Coffee Gen. Hosp.,[2] for example, the body of a hospital's maintenance engineer was discovered in the office where he normally performed his work duties. He had been strangled, but the record on appeal contained no evidence that anyone had been charged with his murder. The court observed that the immediate cause of death was clear: the employee was strangled. The death was a homicide, but whether this was a homicide that did or did not arise out of the employment remained unknown. Accordingly, for the purpose of determining the applicability of the unexplained death presumption, the court considered the cause of death unexplained so that the presumption applied.

Meanwhile, a different line of cases developed in connection with heart attack and stroke cases. In 1962, the Supreme Court of Georgia held that the Board was authorized to make a reasonable inference from nonexpert evidence of facts and circumstances that an employee's physical exertion in the course of his employment resulted in a fatal heart attack, even where medical experts provided evidence to the contrary.[3] In response, the very next year the legislature amended the Workers' Compensation Act to provide that a compensable injury does *not* include "heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, or thrombosis unless it is shown by a preponderance of competent and credible evidence that it was attributable to the performance of the usual work of employment."[4]

This legislative response might not have affected the state of the law as much as intended. Fifteen years later, in 1978, the Supreme Court, noting the difficulty faced by finders of fact in drawing a line between compensable and non-compensable heart injury cases, held that the evidence described in the statute, as amended, might include (1) medical opinion; (2) lay observation and opinion; and (3) the natural inference through human experience.[5] The legislature stepped in again and amended the Act in 1996 to provide that the evidence described in the 1963 amendment "shall include medical evidence," more effectively raising the bar for claimants seeking benefits for heart attacks and strokes.[6] As the Court of Appeals has observed, "It is evident from this language that the legislature intended that the compensable heart injury be the exception rather than the rule."[7]

There have, of course, been occasions when the courts have been asked to reconcile the "unexplained death" presumption of compensability, with its attendant focus on precipitating *versus* immediate cause, and the particular evidentiary requirements of heart attack and stroke cases (as they have changed over time), often with mixed results. It is this intersection of "unexplained death" with "explained death" via a heart attack, heart disease, stroke, or thrombosis that is challenging for both the practitioner and the "fact finder" in applying existing case law and the 1996 statutory amendment and keeping track of what can be a shifting burden of proof between the parties, depending upon the type of evidence introduced at the hearing.

2 162 Ga. App. 82, 290 S.E.2d 192 (1982).
3 Thomas v. United States Casualty Co., 218 Ga. 493, 128 S.E.2d 749 (1962).
4 Ga. Laws 1963, p. 141, § 1.
5 Guye v. Home Indem. Co., 241 Ga. 213, 244 S.E.2d 864 (1978).
6 Ga. Laws 1996, p. 1291, § 1; O.C.G.A. § 34-9-1(4); *see, e.g.,* Save-A-Lot Food Stores v. Amos, 331 Ga. App. 517, 771 S.E.2d 192 (2015); AFLAC v. Hardy, 250 Ga. App. 570, 552 S.E.2d 505 (2001).
7 Phillips Corr. Inst. v. Yarbrough, 248 Ga. App. 693, 695, 548 S.E.2d 424, 426 (2001).

In 1969, for example, the Court of Appeals held that even though an employee was found dead from an apparent heart attack in a place where he might reasonably be expected to be in the performance of his duties, any presumption that the death arose out of the employment was successfully rebutted by evidence that the heart attack *could have* occurred in the absence of any work-related cause.[8] But four years later, in 1973, the Court of Appeals held that the widow of an employee, who "had a bad heart and was ripe for a heart attack" could successfully avail herself of the unexplained death presumption where circumstantial evidence only showed that the employee's job duties were strenuous, even while two doctors testified there was no causal relationship between the employee's work and his death.[9] And in 1978, the Court of Appeals held that a claimant could not rely on the unexplained death presumption when the deceased employee's cerebral vascular accident was due to hypertension. Hypertension, it reasoned, was the precipitating cause of death, rendering the death "explained" and, therefore, not presumptively compensable.[10]

The court took a stronger stance against the application of the "unexplained death" presumption in heart attack and stroke cases when, in 1988, it stated that if the cause of a death is known to be a heart attack, it cannot be said that the death was unexplained, and the presumption of compensability could not apply regardless of what may have caused the heart attack.[11] Additional evidence would need to be offered to prove a relationship between the work and the heart attack. This was not the central issue being decided, however, because in that case, the Board had rejected as speculative the assertion that a heart attack was the cause of death.[12]

Still, and perhaps in light of the more stringent evidentiary requirements imposed by the above-described 1996 statutory amendment, the courts have declined to apply the "unexplained death" presumption where the cause of death is known to be one of those identified in the statute as amended (heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis). Effectively, the presence of a heart injury or stroke cause removes a case from the "unexplained death" analysis due to the special treatment given to such cases by the 1996 amendment.

In the 2008 case of Keystone Auto. V. Hall,[13] a route salesman was found unconscious in a place where he might reasonably be expected to be in the performance of his duties and died after three weeks of hospitalization. The medical evidence showed that the employee ultimately died in the hospital of cardiopulmonary arrest, but the evidence was inconclusive as to what caused him to collapse at work three weeks earlier from what ended up being a fatal condition: there was evidence of various possible causes, some of which were heart-related, but the Board ultimately found that no specific cause was proved. Emphasizing the courts' longstanding distinction between the *immediate* cause of death (cardiopulmonary arrest) and the *precipitating* cause of death (inconclusive), the Court of Appeals held that the "unexplained death" presumption applied and that the employer failed to rebut the presumption.[14]

In death cases, it often is an autopsy that gives the first indication of the cause of death. It is rare with advances in forensic medicine, science, and technology that a cause of death will remain unexplained by the time a case reaches a hearing. At the outset of a typical factual scenario, if an employee is found dead of no immediately obvious cause (such as externally inflicted trauma), in the absence of further evidence, the death is unexplained, prompting the application of the presumption of compensability. Once such an employee's death is determined to be caused by one of those conditions identified by statute, the death is no longer

8 Travelers Ins. Co. v. Davis, 120 Ga. App. 625, 171 S.E.2d 909 (1969).
9 Brown Transp. Corp. v. Jenkins, 129 Ga. App. 457, 199 S.E.2d 910 (1973).
10 Odom v. Transamerica Ins. Grp., 148 Ga. App. 156, 251 S.E.2d 48 (1978).
11 Lavista Equip. Supply, Inc. v. Elliott, 186 Ga. App. 585, 367 S.E.2d 811 (1988).
12 Lavista Equip. Supply v. Elliott, 186 Ga. App. 585, 367 S.E.2d 811 (1988).
13 292 Ga. App. 645, 665 S.E.2d 392 (2008).
14 Id., at 653, 665 S.E.2d at 398.

unexplained, and the presumption no longer applies—it effectively vanishes. This does not mean that a claim arising from the death is not compensable, however. The burden then falls on the claimant to show by a preponderance of competent and credible evidence, which must include medical evidence, that the fatal condition was attributable to the performance of the usual work of employment.[15]

This clearly places a heightened burden on claimants. On the other hand, these claims are not without potential pitfalls for employers. As shown in the Keystone Auto case, *supra*, employers and insurers must make sure the evidence establishes a clear cause of death. If the Board finds the evidence inconclusive as to the cause, the "unexplained death" presumption would still apply. Thus, for those fatal injuries arising from some internal cause, employers effectively carry an initial burden of proof as to the cause in order to escape the presumption of compensability. Only then does the burden shift to the claimant to prove a causal relationship sufficient to show that the injury arose out of the employment.

WHAT WILL WE TELL A YOUNG LAWYER GOING INTO THE AREA OF WORKERS' COMPENSATION?

by Fellow Robert Wisniewski, Phoenix, AZ

A young lawyer, whether a defense lawyer or an injured worker's lawyer, needs to be advised that workers' compensation is an important feature of personal injury law. Although important, the injured worker's new attorney should be advised it is a lot of client handholding and the defense attorney should know the insurance company may be a bit impersonal. There are many other things that not only make a good workers' compensation lawyer, but make a good trial lawyer and I will present them:

BE A LAWYER

- Be on time.
- Dress the part.
- Have your client prepared for the case and be prepared for any delay in the matter.
- Be respectful to all, especially the client, court, other counsel.

BE PREPARED

- Have all relevant documents available and filed with the administrative court/judge.
- Know your case strengths and of course, your case weaknesses.
- Be comfortable with your weaknesses.
- Don't be aggressive or argumentative with your case and particularly in presenting your positive points.
- Make your point and move on.

KNOW THE LAW. NOT ONLY KNOW THE LAW, DOUBLE CHECK THE LAW

- Present affirmative defenses that are real.
- Don't denigrate your opponent's presentation of law - you present the correct law respectfully.
- You have the burden of proof if you are the injured worker.
- Don't establish incorrect citations or misstate the law.

PRESENTATION IN THE COURTROOM

- Always respect the tribunal.
- Respecting the tribunal indicates professionalism.
- Even if you disagree with the judge or your opposing counsel, do it respectfully, concisely and professionally.

[15] O.C.G.A. § 34-9-1(4).

- Respect the courtroom personnel and the administrative law judge's staff.
- Rude is never zealous. Rude is never persuasive.
- No matter what side you are on, control your client.
- Prepare your client to present the same respect, diligence and professionalism (no rolling of the eyes while testimony is presented).
- If not going well, smile, be nice and proceed.

FINAL POINTS

- Know the other side's case better than you know your case.
- Always expect the unexpected.

Be nice.

Honors and Accolades

● **Joseph Amarilio** (IL) has been appointed to serve as an Arbitrator on the Illinois Workers' Compensation Commission.

● On February 18, 2020, Deputy Commissioner **Deborah Wood Blevins** (VA) was honored during the *Virginia Lawyer's Weekly's* second annual event honoring Virginia's top female attorneys and judges. She was recognized, along with thirty-four other honorees, for her commitment to the profession and her dedication to the community she serves.

● Honorable **Frank McKay** (GA) has been appointed to serve on the newly formed WCI Advisory Board of Directors and also serves on the Board of Directors for both the NAWCJ and the IAIABC.

● Last October, Judge **David Torrey** (PA) was presented with the IAIABC **2019 President's Award**. in recognition of his service to the IAIABC and the workers' compensation industry. Judge Torrey's extensive knowledge of workers' compensation law, both in Pennsylvania and across the country, has improved legal scholarship and understanding of the system. He serves as the editor of the *Pennsylvania Workers' Compensation Law Section Newsletter* and teaches workers' compensation law at the University of Pittsburgh School of Law.

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 **Donald Ducey** (MI), inducted a Fellow in the Class of 2008, passed away on March 20, 2020 at the age of 90. Don, who was still practicing law up until the beginning of March, had a career that spanned 60 years. He was a founding member of the Conklin Benham firm in Bingham Farms, MI where he practiced as a workers' compensation defense attorney. A recipient of many awards, including the Michigan Workers' Compensation Hall of Fame in 1998, Don also co-authored the Michigan Section of *Independent Contractor Status: State by State Legal Guide*, published by John Wiley & Sons, Inc. He was also a past President of the Workers' Compensation Section of the State Bar of Michigan. A graduate of the University of Michigan (BA) and the University of Detroit Law School, Don is survived by his four daughters, seven grandchildren and two great grandchildren. Click here to read his full obituary.

Fellow **William Rimmer** (DE), inducted a Fellow in the Class of 2014, passed away on December 26, 2019. Bill was a partner with the law firm of Heckler & Frabizzio where he specialized in the defense of Workers' Compensation matters on behalf of self-insured employers and insurance carriers in Delaware. He served as the Chair of the Delaware State Bar Association's Section on Workers' Compensation, was a member of the Defense Council of Delaware, the Delaware State and American Bar Associations and was a former member of the Justice Randy Holland Worker's Compensation Inn of Court. Bill routinely lectured on the subject of Workers' Compensation and was the Delaware representative for the National Workers' Compensation Defense Network (NWCDN). A graduate of Drew University (BA) and Widener University (JD), Bill was married and had two children. Donations in his memory can be made to The Leukemia & Lymphoma Society to help further research for a cure. Click here to read his full obituary.

CWCL LOGO

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

THE COLLEGE OF WORKERS' COMPENSATION LAWYERS