THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

NEWSLETTER
FALL 2017

IN THIS ISSUE

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

PRESIDENT TOM DOMER'S MESSAGE - CHARGE TO THE TROOPS: TAKE 2

Board meetings can be boring. Not ours. Nationwide perspectives from judges, workers' and employers' attorneys, and a collegial atmosphere produce significant results. Opinions differ, but fall short of the heated exchanges ("Jane, you ignorant s__t") of the Aykroyd-Curtin variety. Continued collaboration with the ABA Tort Trial and Insurance Practice Section (TTIPS) and the Labor and Employment (LEL) sections versus the College's own initiatives, sparked some animated discussion.

Composed of the nation's best and most experienced workers' compensation practitioners, the College is uniquely poised as a national voice honoring, elevating, and preserving the professional practice of workers' compensation. The College inaugurates its 12th Class next March. Consider nominating a worthy colleague from your state. Encourage a law student to enter the College's Law Student Writing Contest. Contact the Newsletter about your blog. Let us know of your interest in service on the Board. Suggest a speaker or topic for a future College symposium presentation.

More significantly, make plans now with your fellow Fellows to attend the March 3, 2018 College symposium and induction dinner in Nashville. See you there!

NOMINATIONS FOR FELLOWS IN THE CLASS OF 2018

The nomination process officially began on **September 1, 2017**. If you intend to make a nomination, please read all of the forms carefully as they contain the procedure to follow and the considerations you should keep in mind when choosing new members. The timeline is set forth below:

September 1, 2017	Nomination period opens
November 1, 2017	**Deadline for receipt of all nominations to Susan Wan**
November 8, 2017	List of Nominees sent to all Fellows for comments
November 20, 2017	**Deadline for receipt of comments from Fellows to Susan Wan**
December 8, 2017	Nominating Committee report due to the Board
December 14, 2017	Board decision on Nominees
December 18, 2017	Board decisions mailed to Nominees
March 1-3, 2018	2018 WC Seminar and Induction Dinner, Nashville, TN

It is our hope that we will soon have members in the College from all fifty states, and that we will increase the number of our members coming from the judiciary, academia, and among minorities and women in the profession. There are certain provisions of the College's Bylaws, which can be found on our website at www.cwclawyers.org, that you should keep in mind as we begin this years' nominations. You can also find nomination forms there, but feel free to email our Executive Director, Susan Wan, if you would like them in Word format.

If you have any questions about the Nomination process, please contact the Nominating Committee Chair – Tom Kieselbach or Susan Wan.

SPOTLIGHT ON A FELLOW

David B. Torrey
Workers' Compensation Judge
Commonwealth of Pennsylvania
Department of Labor & Industry
Workers' Compensation Office of Adjudication
Pittsburgh, PA

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

I am a Workers' Compensation Judge on a full-time basis. All Pennsylvania WCJs also act as mediators in our mandatory mediation program. Right now, I am not on the mediation assignment wheel as I hear a special type of case on a long-term special assignment. These are "medical fee disputes," that is, disputes between only the provider and carrier, often over technical issues that do not involve the injured worker. Some of these disputes are minor (how is an epidural injection guided by ultrasound, versus fluoroscope, to be compensated?), while some implicate tens of thousands of dollars (was the extraordinary burn care administered to a worker really so

afforded in an emergent context?). In that track of litigation, my title is "Medical Fee Review Hearing Officer." These cases were heard by WCJ's until a change in the law in 1993.

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

I have been a WCJ for 24 years. Pennsylvania WCJs are civil servants and serve indefinitely.

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

Before I was appointed a WCJ, I undertook, for six years, workers' compensation defense at a medium-size firm here in Pittsburgh. I started in the field in January 1984, as a law clerk, while I was a second-year law student. At that time, some of the great steel mills right within the city limits were still operating. The firm where I worked as a law clerk represented J&L Steel Corporation, and on occasion I would be dispatched to go down to the on-site occupational medicine clinic of J&L-Southside to pick up medical and other records. Those trips were very memorable. Now, a unit of the Cheesecake Factory stands on the former premises of the mill – which loomed up before the clinic facility.

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

No, I am a civil servant.

What is your case load like?

Technically, 372 "disputes" are pending before me. This number, however, includes the special type of case, "medical fee disputes," that I have summarized above. I hear about 60 cases per month. (A typical case, under our "serial hearing" practice, is heard every 90 days.)

On average, how many cases do you adjudicate in a year?

I believe the number for me is about 240 or so per year. In 2012, I carefully counted and analyzed the petitions I entertained and adjudicated. (They are typical for my 2017 situation.) I published my findings for the first quarter of 2012 in two places, one of which can easily be accessed. In that quarter, I adjudicated 60 cases. *See* David B. Torrey, *What do Workers' Compensation Judges Do All Day? Full Quarter Case Characteristics of a Pennsylvania WC Judge*, available at: http://www.nawcj.org/docs/newsletters/newsletter_2013-01.pdf. The title is a riff on the Richard Scarry books my younger sister used to read all the time. I tried to make this article about statistics readable! In any event, of the sixty cases adjudicated during the First Quarter of 2012:

A. Seventeen (17) were controverted petitions which, during the litigation, resolved and were subject to approval of a compromise settlement (C&R). In our state, an on-the-record hearing is required in each compromise settlement resolution to review the same with the injured worker. The number and nature of the settlements are hence easy to count, and analyze, respectively.

B. Seventeen (17) meanwhile, were petitions, all but one controverted, that were discontinued and adjudicated "withdrawn" during the proceedings. These petitions reflected the employer reconsidering the contest and agreeing to pay, often simply because the injured worker had sought counsel. That dynamic (we'll deny unless he gets a lawyer), is one that is under-appreciated by policy analysts who try to gauge the utility of injured workers' counsel.

C. Thirteen (13) were *controverted cases* that required full-blown adjudication. One of these, however, reflected an employer hoping to secure Supersedeas Fund (a unique overpayment fund we maintain in our state) reimbursement after having gone to C&R on the underlying case, and two were adjudications based on

stipulations. (The former required as much decision-preparation time and effort as a full-blown adjudication, but the latter two were *pro forma*.)

D. Thirteen (13) of my adjudications, finally, were approvals of C&R agreements that did not arise out of controverted cases. These were *non-adversarial* proceedings.

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

I believe that a little bit of both dynamics were at work. During my second year at Duquesne Law School (Fall 1983), one of my classmates, who had been a Liberty Mutual claims adjuster in Binghamton, NY, approached me and told me of an opening of a law clerk position at the firm where he was working. He said he would recommend me. He cautioned me, however as follows: "I must tell you, however, Dave, that all they do is workers' compensation." That was no problem. I knew about the field. In this regard, when I was 15, working my first job as a dishwasher, I cut my palm open on a broken Old Fashioned glass. I still remember the maraschino cherry rolling across the dish table, mixed creepily with my own blood. The manager grabbed my hand and put it under running water. I told him, "I think I better go to the hospital. I am sure that my Dad will pay the bill." To this he responded, "Don't worry about it kid, we have workers' comp." Yes, and the hospital bill and stitches were paid for.

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

I was a member of the first class, so 2005. The induction dinner was in Naples, FL. In the ABA CLE sessions which came first, Jim Reiter (MI) was the Master of Ceremonies and Kim Martens (KS) moderated an excellent session on workers' compensation and undocumented workers.

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

I have enjoyed meeting and interfacing with other veterans of the system. It is very enriching to hear about the law and practices of other states from the leading and most thoughtful practitioners from such other jurisdictions. The old received wisdom in Pennsylvania was that the laws and practices of our field as they exist in other states was and is irrelevant. "It's a lie," I was told, also, that going to ABA and other national programs would get you referrals and clients. Plus, "you can't cite that stuff you bring back to the Pennsylvania WCJ." I sensed that such advice was uninspired, the language of the "can't-do" types, and disregarded it. (As to whether you can get clients, I will leave that to my lawyer colleagues.) Anyway, connecting with lawyers and judges via ABA, the National Association of Workers' Compensation Judiciary, and now CWCL, has definitely enriched my knowledge and sophistication – and the sanguine hope that I can be considered an expert.

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

Yes, I have been chairman of the Pennsylvania Bar Association Workers' Compensation Law Section (1999-2000), and have written the Section's quarterly since 1988. I published issue #131 on Labor Day. I author and update annually a four-volume law and practice treatise on Pennsylvania workers' compensation, now in its third edition, published by Thomson-Reuters. I am the examination draftsman of the Pennsylvania Supreme Court's Workers' Compensation Lawyer Certification Committee. I also teach the two workers' compensation law courses at Pitt Law School (1996-present). I usually hire my best student as a paid legal research aide and if the student works out, I seek to connect him or her with an opening in the field. This winter, in connection with that role, I took on a brilliant student from the law school, Justin Beck, who undertook an internship-for-credit here at our office, and who wrote an amazing paper by way of a law school-endorsed independent study. He was able to secure a job offer in workers' compensation. I mention this detail as it has been an ambition of mine to try to connect top-notch Pitt Law students who specialize in workers' compensation with opportunities in this fashion. I am also a member of both ABA workers' compensation committees: TTIPS and Labor & Employment Law.

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

I was volunteer president of my distance running club for fifteen years and have prepared the club's newsletter since 1995. I am still on the Board but, fortunately, a younger guy who is also an elite runner has taken over the leadership from me. The use of websites, Facebook, and Twitter, meanwhile, have displaced the urgency of a monthly newsletter.

Tell us what activities you enjoy outside of work.

As foreshadowed above, running is my principal hobby. However, I would have to say that workers' compensation is also a hobby of mine. I also collect the stamps of Gibraltar (particularly those before 1954), seeking to obtain every issue. I usually have two books going. Right now, I am reading Holly Folk's *The Religion of Chiropractic: Populist Healing from the American Heartland* (UNC Press 2017), which details the founding of the chiropractic profession; and Andrew Porwancher, *John Henry Wigmore and the Rules of Evidence: The Hidden Origins of Modern Law* (U. Missouri Press 2016). I recently finished Philip Roth's first novel, *Letting Go* (1962). It was and is a riotous read, and featured, to my surprise, an alarming scene where a corrupt plant physician, treating our protagonist for a work injury (the venue, a Detroit Chevrolet plant), refers him and his wife to an abortionist. Their ensuing encounter with the doctor (a drunk, and no less corrupt), and their unwise decision to go through with the procedure, gives rise to utter calamity.

Please share some words of wisdom with our readers.

If you don't already mentor law students (I know that many, many, CWCL Fellows do!), consider doing so. They will appreciate it more than you know. Further, many in the present day are facing calamitous debt (I'm told that $200,000.00 is not unusual), so any leg up that they can be afforded is very important. Also, from the point of view of a judge, it is very gratifying to see, in court, young lawyers who have learned the basics of workers' compensation during law school, and from the internships and clerkships that are facilitated by law school. If you don't already take *pro bono* workers' compensation cases (many do, of course), consider doing so. The practice in virtually unheard of in my state, but when a lawyer does do so he or she makes a mark (nay, a *bang* goes off), with the judge. It is the right thing to do and, as I have submitted above (#7(A)), sometimes just the appearance of the lawyer on claimant's side leverages the adjuster to pay on the claim. A typical case (in the Pennsylvania practice, in any event), is the medical-bill only claim, where the poor devil of a workman is stuck with $10,000.00 of bills but did not lose any time from the accident. Such workers often appear before me without a lawyer, stating, "I talked to lawyers, but no one will take my case, as I lost no time." Often, with relatively little effort, the bills will prove payable, one's reputation will be burnished, and in some far corner of the industrial accident world, justice will have been done.

Watch Fellow Alan Pierce's latest podcast *How the Pawlosky Case Redefined Workplace Injury*:

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

2017-18 LAW STUDENT WRITING COMPETITION

Papers for the 2017-2018 Writing Competition for Law Students are now being accepted. Fellows who are adjunct professors at accredited law schools are encouraged to distribute, discuss, and promote this wonderful opportunity with their students. View the complete announcement and rules for this year's competition. Prizes awarded by the College include: First Place: $2,000, Second Place: $1,500, Third Place: $1,000. A $1,000 check will also be sent to First Place winner's law school. In addition, the first-place article will be published in the College Newsletter and on the website, and the author will be honored at the Annual Induction Dinner of the College of Labor and Employment Lawyers. Deadline for papers is January 15, 2018. Please contact **Terry Coriden** or **Tom Domer** if you have any questions.

Writing Competition Winner Alex Lonnett's Thoughts on Participating in the College's Law Student Writing Contest

When I entered the University of Pittsburgh School of Law in 2014, I didn't know what workers' compensation was. Needless to say, as a naïve 1L, I would have never had been able to imagine myself winning a national writing competition centered on the law and policy of workers' compensation. But, two years later there I was, on stage at the Hilton Tapatio Cliffs Resort in Phoenix, receiving the CWCL Writing award from Mr. **Thomas Domer**, a Fellow of the College and a national authority on workers' compensation.

It all started when I entered the first day of Judge **David Torrey's** workers' compensation course at Pitt Law in January of 2016. Through that class I saw a fascinating area of law that served a grand societal purpose, an area and practice of law that both provides relief to our working men and women while ensuring that businesses can keep their doors open and thrive.

I was honored in August of 2016 when Judge Torrey suggested that I consider authoring a paper for the College's student writing competition. I set to and started researching potential topics. After finding one that both Judge Torrey and myself found to be satisfactory, I put pen to paper (well, finger to keyboard) and got writing. After 3 months of drafting, re-drafting, re-drafting once more, editing, editing again, editing once more, and thumbing through the dreaded "blue book," I had a polished paper that explored an emerging issue in workers' compensation and took a reasoned position. After I submitted my paper to the College in January of 2017, I was nervous, but I knew if nothing else that I had a piece of writing to be proud of, and more importantly, Judge Torrey seemed proud of it (that makes it all worthwhile, right?). Needless to say, I was elated to have won. I enjoyed visiting Phoenix and meeting with esteemed workers' compensation practitioners from all around the country. Winning the CWCL Student Writing Award was one of my proudest moments as a law student.

The College's writing contest also opened doors to me. A week following my return from Phoenix, I had an interview with a prestigious Pittsburgh workers' compensation defense firm, Dell, Moser, Lane & Loughney. The better part of my interview was spent discussing my paper and the writing process. A month later, I would accept a post-graduation job offer with that firm. Upon (what will hopefully be) a successful passage of the bar examination, I will begin to practice with Dell Moser as an associate in the workers' compensation and civil

litigation departments. Workers' Compensation has introduced me to some truly wonderful people. I am immensely proud of my participation in the College's writing contest and would recommend both the contest and exploring workers' compensation to any law student I met.

Alex Lonnett is an incoming-associate attorney at the Pittsburgh law firm of Dell, Moser, Lane & Loughney, LLC. Prior to joining his current firm, Alex clerked at firms that practiced extensively in civil litigation, specifically personal injury, insurance defense, and insurance coverage litigation. Alex graduated cum laude from the Catholic University of America with a B.A. in Political Science and German Language in 2014. In 2017, Alex graduated from the University of Pittsburgh School of Law, where he received the Trial Advocacy Award and served as Notes Editor for the Pittsburgh Tax Review. He can be reached at aml@dellmoser.com.

Kids' Chance
Educating Children of Injured Workers

Mark Your Calendars for Kids' Chance Awareness Week 2017

Third Annual Awareness Week to Take Place on November 13-17, 2017

Kids' Chance envisions a time when all children affected by a parent's work-related injury or death can pursue their educational dreams without financial burden.

Working hard to achieve that goal, Kids' Chance state organizations across the country provide scholarships to children of injured workers to help make their educational dreams a reality. Every decision we make at the state or national level supports this guiding principle: **More money for more kids**!

In 2016, scholarship applications increased significantly but we know there are more students in need of assistance. Kids' Chance Awareness Week is designed to increase visibility through special outreach events in each state that will spread the word about Kids' Chance scholarship opportunities.

How can you help support Awareness Week? One of the best ways that you can help to support our mission is to watch and share our newest video, which includes the voices of longtime supporters, current leaders and of course, our students. Please remember to tag Kids' Chance at @KidsChanceInc.

You can also find out if there's a Kids' Chance organization in your state and contact them to learn what special Awareness Week activities they have planned. There are currently 39 Kids' Chance state organizations with several additional states in the planning stages, so the odds are good that you can get involved right in your home state.

Lastly, Kids' Chance established the national Planning for the Future initiative to help industry professionals identify families of injured workers with children who are not yet of college age and connect them to Kids' Chance. That way, when the time comes, they can be connected to their state organization to apply for a scholarship. If you or someone you know is eligible for a Kids' Chance scholarship, please contact us via our Planning for the Future form.

The College of Workers' Compensation Lawyers has been at the forefront of sharing Kids' Chance mission. Just recently, **Judges John Lazzara** and **David Langham** arranged to have a Kids' Chance representative speak to the judges gathered at the WCI event in Orlando. **Bob Wisniewski** arranged for Kids' Chance to speak to the NFL Players' Association. Kids' Chance community members have presented at CWCL

Induction dinners, and those presentations have helped to establish Kids' Chance organization in several states. Specifically, Fellows **Keith Kasper** and **Todd Kalter** are doing important work in Vermont, and **Michael McKnight** is active in South Dakota. Please continue your outstanding support during Kids' Chance Awareness Week. Let's work together to achieve our goal of More Money for More Kids! Our deepest thanks to the CWCL for their continued support.

ARTICLES OF INTEREST

Fellow Tommy Dulin And Colleague Kevin Marks Write On Ethical Considerations In Practice Under The Longshore Act

Reviewed by Judge David Torrey

In *The Ethical Obligations of Counsel Representing Parties Under the Longshore and Harbor Workers' Compensation Act*, an article co-authored by CWCL Fellow **Tommy Dulin** and published in the LOYOLA MARITIME LAW JOURNAL, we learn that many of the ethical challenges of litigation implicated in conventional litigation are similarly encountered under the Longshore Act practice. The authors treat a select group of ethical issues that arise under two categories: (1) dealing with unrepresented claimants; and (2) complying with ethical rules before the federal authorities, administrative and judicial, which oversee the law.

The authors tell a familiar story when addressing *pro se* claimants. Many can be overwhelmed and emotional, thus giving rise to the need for patience and "compassion" on the part of opposing counsel. This is especially the case under the Longshore practice, where not only the substantive law but procedural aspects are liberally construed to accommodate the worker. One authority declares that the law "eschew[s] interpretive nitpicking at the expense of the injured worker." The uncounseled worker is not, like the civil court litigant, left to swing in the wind once trial gets underway. Indeed, the federal authorities have the ability to secure, at the government's expense, assistance for certain claimants. The authors, on this point, describe a 2013 case where such a process unfolded after the claimant, on the record, threatened suicide.

In this same spirit, the federal authorities may exercise considerable paternalistic authority over proposed compromise ("8(i)") settlements.

How ethically to handle *communicating* with such litigants? The authors remind us that one needs to let the *pro se* claimant know that the lawyer does not represent his or her interests. Further, aside from identifying the law, the lawyer, under no condition, should give legal advice to the individual. (These admonitions are covered in Rule 4.3).

A related issue is the likely inability of many *pro se* claimants to identify to the judge the law (particularly precedents) which supports the claim. Under Rule 3.3, an attorney is obliged to disclose authority directly adverse to one's position. The authors submit that no real conflict exists here, as the obligation to communicate issues surrounding the law pertains to the lawyer's interface with the court, not the adversary. Still, the authors' discussion raises an old question: if the judge is not pro-active and/or not well-read in the law, is the lawyer in the *pro se* situation obliged to educate the court as to the basics of the feckless worker's case? When this writer was a defense lawyer, a judge advised a *pro se* claimant, in open court, that his pneumonia was an infectious disease, and hence non-compensable, even if work caused the condition. Yet, I knew that the state supreme court had held that such ailments were (and are) covered injuries. It seemed peculiar in the extreme that I was obliged to note to the worker and the judge the new precedent.

Among the author's additional topics is disclosure of surveillance evidence. Under the Longshore Act practice (informed as it is by the Federal Rules of Civil Procedure), surveillance evidence which is relevant to the

substance of the case is discoverable and must be tendered before the claimant's testimony. On the other hand, such evidence, when used strictly for impeachment, need not be disclosed. Uncertainty may surround the issue, and the authors describe a Jones Act case where the Fifth Circuit ruled that, if a "party considers he has good cause not to disclose exhibits to be used solely for the purpose of impeachment, he may *ex parte* request a conference with the Court and make known his position to the Court *in camera*." *See Chiasson v. Zapata Gulf Marine Corp*., 988 F.2d 513 (5th Cir. 1993).

This approach is clever, but it is hard so to see how it would work when the judge is also the fact-finder. Surely the well would be spoiled.

Kevin A. Marks & Tommy Dulin, *The Ethical Obligations of Counsel Representing Parties Under the Longshore and Harbor Workers' Compensation Act*, 14 LOYOLA MARITIME LAW JOURNAL 251 (2015), available ($22.00), at LexisNexis.

Mr. Dulin (http://www.dulinlawfirm.net/biography.html), is an attorney in Gulfport, MS; and his co-author. Mr. Marks (http://mmkfirm.com/team/kevin-a-marks/), is in practice in New Orleans.

Functional Capacity Evaluations: Issues and Concerns by Fellow Glen Wieland, Orlando, FL

Functional capacity evaluations also known as FCE's are being used more and more in an attempt to better define work restrictions and limitations for injured workers. When I first started practicing law in 1982, many functional capacity evaluations were done over 3 days and the injured worker spent 8 hours per day performing a variety of tasks. After 3 days of performing a variety of typical day to day work tasks, the evaluator was able to document how the person was likely to perform in an actual work setting. Today, the evaluations are done in about 4 hours with at least one hour of interview between the patient and the physical therapist.

Some doctors are hesitant to just state what restrictions and limitations should be assigned and want to simply following the recommendations of a "therapist" who has performed some type of series of timed tasks performed by the injured worker. Most doctors do not participate in the evaluation, rarely do they ever see the patient going through the FCE and rarely know the specific tasks or time spent in each task. The rarely understand how much time is spent on the individual tasks and the formula utilized to extrapolate that into a 40 hour 5 day work week.

In addition, there is a subjective element on the part of the therapist seen throughout the report. Sometimes the FCE is not performed by a licensed physical therapist but is performed by an "examiner" who is then making determinations as to whether the effort put forth by the patient is full effort. This has created controversy as to the validity and reliability of functional capacity evaluations.

The American Physical Therapy Association has created standards for measurement and documentation. Not all rehabilitation facilities that perform functional capacity evaluations use the same measurements and criteria. Many are not C.A.R.F. (Commision on Accredidation of Rehabilitation Facilities) certified. A quick internet will tell you if the facility is certified. Go to http://www.carf.org/Consumer.aspx?Content=ConsumerSearch&ID=7 Many states require C.A.R.F. certification for the facility to perform these types of tests. If the facility is not C.A.R.F. certified, it may be grounds for the Judge to strike the evaluation and the medical testimony that relies upon it.

Other issues to consider regarding the FCE include the qualifications of the "examiner", the reliability and validity of the testing, the length of the testing, the formula used to extrapolate the length of testing to an 8 hour per day and 5-day per week job. The shorter the time of the actual testing may make the FCE less reliable and allow for challenging its validity. Lechner DE, Roth D, Straaton K. Functional capacity evaluation in work disability. *Work*. 1991; 1:37-47; Isernhagen SJ, Advancements in functional capacity evaluation. In D'Orazio BP, ed *Back Pain Rehabilitation*. Boston Mass: Butterworth: 1993: 180-204.

An FCE administered over a two or even three-day period will provide much better indicators as to what a person can do in a true work environment. Some vocational schools may perform these more extensive tests. Testing over several days will provide some of the best data regarding a person's actual work ability and the effect each day had on the persons abilities. However, this increases the cost and most insurance carriers do not want to pay for multi-day evaluations and rarely do we see testing done over several days or even for more than about 4 hours. I have seen some evaluations being done in 1 to 2 hours with some of that time being an interview with the injured worker. These evaluations can and will likely be subject to being discredited and the physician may not even want to defer to the results.

Functional capacity evaluations may be subjected to a ***Daubert*** test or challenge as well. It has been reported that measuring a client's abilities in this short time manner is not a predictor of the ability to work in an 8 hour day. The attempt to extrapolate data from a 1 to 2-hour assessment to an 8 hour workday creates major errors in the design of the FCE. Abdel-Moty E, Fishbain D, Khali T, et al. Functional Capacity and residual functional capacity and their utility in measuring work capacity. *Clin J Pain* 1993; 9:168-173

In August of 1998 Phyllis King, Nicola Tuckwell and Tanya Barrett published a detailed article "A Critical Review of Functional Capacity Evaluations" in Physical Therapy Journal Volume 78 number 8. This is an excellent article to assist the practitioner in the understanding of a functional capacity evaluation. They concluded that a functional capacity evaluation must include an interview and client history, a physical examination, testing components, and a comparison of the injured worker's abilities with the demands of the job. The examiner must include in the evaluation results of monitored blood pressure, heart rate and biomechanics. Through their examination of FCE's, they determined that the systems and various testing lacks comprehensiveness and objectivity in the collection of data. They also found that there are large errors in the formulas to predict the weight a person can lift by the results of the FCE testing.

The reliability and validity of the test which is administered over a two-day period provides the most reliable format. It allows for retesting for accuracy and for assessing the person's abilities on day two after they worked their body on day one and allows the examiner to determine the effect of the day one testing on the body. Isernhagen SJ, *Work Injury Management and Prevention*. Gaithersberg, Md: Aspen Publishers Inc. 1988; Advancements in functional capacity evaluation. In D'Orazio BP, ed *Back Pain Rehabilitation*. Boston Mass: Butterworth: 1993: 180-204.

The National Institute for Occupational Safety and Health determined that continuous 8-hour expenditures should not exceed 33% of a worker's aerobic capacity. *Work Practices Guide for Manual Lifting*. Washington, DC: National Institute for Occupational Safety and Health, Astrand I, Rohahl, K. *Textbook of Work Physiology*. New York, NY: McGraw-Hill; 1970. Sometimes the FCE is videotaped and this allows everyone, including the treating physician, to see how the patient performed in various tasks. This is a good tool to also show the judge and can lead to either strengthen or weaken the credibility of the patient much like surveillance films.

You should consult the website www.ergoscience.com to determine if the assessment that was done on the paitent has been peer reviewed for reliability and validity.

If the functional capacity evaluation describes or relates in the report any psychological descriptions of your client, the qualifications of the "examiner" can be brought into play especially if a ***Daubert*** challenge is being made.

It should also be noted as to whether the patient had taken her or his medications prior to the evaluation. If they will not be allowed to take those medications while on the job site, an FCE performed while the patient is on the medications may invalidate the results.

Be careful about the use of FCE's. It can assist the physician in determining restrictions and limitations that may help prevent further injuries to the patient, but if the patient is pushed too far on testing and has a re-injury or a new accident, the testing facility may be subjected to a civil lawsuit. FCE's are not medical tests. They are not medically necessary for the physician to treat the patient or diagnose a condition. Some attorney's will object to them even being done in the first place, but without them some physicians refuse to assign permanent restrictions and limitations. This may lead to additional costs of getting an IME to simply determine restrictions and limitations.

A functional capacity evaluation is not necessary to determine what restrictions and limitations should be assigned to a patient. They can play a role to assist a physician, the judge, and the parties in determining what type of work a person might be able to perform without increasing the risk of re-injury which should be the goal for everyone involved. An FCE should not simply be used as a litigation tool.

Enhancing Credibility
By Fellow Robert Wisniewski, Phoenix, AZ

As the injured workers attorneys' old saying goes – our clients are their own worst enemies. Enhancing client credibility in the threshold case of compensability is the goal of this article.

As injured worker's lawyers, we have to manage expectations and often control our clients, own testimony, directing it so the judge understands the case, likes the claimant, and thus believes the claimant.

Clients approach a case with their own unique agenda. Often, this hampers the attorney's presentation of the case. At the initial interview and subsequent deposition preparation, the injured worker's attorney should try to determine the injured worker's agenda and see if it conflicts with the lawyer's strategy to prove a compensable claim. For example, the worker may think he has a wrongful termination case and that misconception clouds the development of the workers' compensation case, as he is revengeful towards the employer for terminating his employment. Under this misunderstanding, the injured worker spends most of his testimony displaying bitterness towards the employer, frustrating the development of proof in the workers' compensation case.

With these conflicting expectations, the injured worker's attorney must advise the injured worker to abandon peripheral themes, which distract from the central purpose of the case. Often, this is difficult for the client to understand and even harder to accomplish.

Often injured workers believe that they have a "slam dunk case" and will not listen to their own attorney who is managing their misguided agenda, thus trying to direct them towards purposeful proof.

Some suggestions from more than 40 years of representing injured workers and litigating compensability claims:

1. Practice with the client to ensure a consistent history between investigative statements, initial interviews and the claimant's deposition, with the ultimate hearing testimony. Otherwise, the client will be made to seem not only inconsistent, but perhaps be impeached, thus not likeable or believable.

2. Advise the client to use simple words to briefly describe the accident using non-medical terms to describe the injury. For example, the worker should say, "My pain is four inches above my belt line at the center of my back, not "I broke my back or I injured my disc. That's what it says on the MRI". Claimants should learn to speak as if they were telling their neighbor about their injury, rather than parroting the medical phrase they heard only for the first time when they went to their doctor's office.

3. If your attorney gives you a "softball" – a question that he's prepared you for, "hit it". Say yes, if it requires a yes. Don't parry with your own lawyer!

4. Remind the client - all answers should be short and answer the question asked. Don't talk too much! As an example - Question. "Do you have a high school diploma?" is subject to only a yes or a no answer. Many injured workers will jump to the explanation, which is the next question, which has yet to be asked. "I didn't finish because my mother got sick and I had to quit high school and support the family". That is an entirely separate question and that's the answer to the next question, "Why did you not finish high school"? This should be used as an example for the injured worker to explain to him to answer only the question asked – do not jump ahead.

5. In addition to short answers, the answers should not be conclusory or embellished to "convince the judge that your answer yields a conclusion". There is a correct theme. Let the attorney develop the case and let the attorney, by question-and-answer, develop the purposeful answer to what he's attempting to prove. Do not appear so rehearsed. Try to establish a rhythm between the question-and-answer and maybe even jump around between the questions, so that the worker doesn't seem like he's responding yes, yes, yes to every question. There's a difference between talking too much, thus not developing a case at all. The judge must follow your theme.

6. Reinforce to the client not to answer until his lawyer is done asking the question. "Jumping" the question not only seems so rehearsed, but your lawyer loses control over the rhythm of the case. In addition, the judge wants to have a complete record, and he would rather have a record without interruption of the lawyers on both sides, when they are asking questions.

7. Advise the client in his testimony, not to magnify symptoms. Don't fall for the, "It hurts here; it runs down your leg; goes up the other leg and out the other leg", from the defense lawyer. Be concise. Be precise, and be somewhat stoical and don't take the bait of an exaggerated "global" injury. Explain your symptoms in layman's terms – not medical.

8. When they ask questions about whether you looked for work - don't fall for the trap of saying, "Will you hire me? I'm disabled". The worker should say, "I had to look for work. The law requires a good faith job search. I have an obligation to look for work. I looked within my restrictions to try to earn money to support my family and I kept a list only because I would have forgotten all the places I looked". This is more palatable than saying when he goes to a prospective employer, "I'm injured or I'm disabled. Will you hire me? And I only kept the list because my lawyer told me to".

9. Caution the client to try to remain in whatever time frame you're speaking. In other words, if you're talking about your injury at the time of the accident, describe your injury as best you can (the past). If you are then describing your later progression of the injury (present) and that it has improved, make sure the worker makes the distinction that I'm improved now (present tense). What I was telling you before was how I was hurt initially, rather than jumping back and forth between the initial injury and how you present yourself that day at

the courthouse. That confuses everyone. There is a chronological time frame development and many workers can't testify in chronological order and don't distinguish between past and present complaints, which confuses the judge, the record, making the worker seem less credible.

10. Often clients that are non-English speaking, who have been instructed only to answer through the interpreter, start to answer in English before the question is translated, which undermines the conclusion that they can't speak or comprehend English.

11. Make sure that your own client reads his own documents. For example, if he's given a written statement or he assisted in giving a statement, make sure he reads that information again before he testifies, so that it is consistent with his hearing testimony.

12. Advise your client not to spar with the other lawyer. The client will always lose.

13. There are certain obvious things. Don't be evasive. The last thing you want is a judge to turn to your client and say, "Answer the question, yes-or-no" because the client has been dancing around a direct answer. That does not help credibility.

Representing injured workers, from my perspective, is more challenging than representing defendants. Injured workers, because of the internet, family expectations, their own expectations, television shows and what they learn about the court from all these sources, colors how they are going to testify. They are also less educated and nervous. As an injured worker's lawyer, you're not attempting to present something other than the truth. It is simply a matter of how that truth is presented which can make the injured worker more credible, more believable, thus enhancing success of a compensable claim.

The Changing Nature of the Workforce: *Wall Street Journal* Essayist is a Calming Voice, by Fellow Judge David Torrey, Pittsburgh, PA

A staple of workers' compensation journalism – and seminar topics – is the dramatic change that has been occurring, and will continue to occur, in our country's job-makeup picture.

At the College of Workers' Compensation Lawyers Symposium (Phoenix, AZ, March 2017), for example, Peter Rousmaniere showed slides demonstrating how work injuries and deaths have continually declined in number, due in part to the changing character of the national workforce. One of his slides, for example, showed that in three high-risk occupational categories, sharp reductions of the same, as part of the overall employment marketplace, had taken place between the years 1950 and 2005. Another slide demonstrated impressive evidence of our country's continuing shift from a manufacturing economy to a service economy. Mr. Rousmaniere's complete slides can be viewed at this URL: http://www.americanbar.org/groups/labor_law/committees/wccom/archive/2017papers.html.

In some regions, of course, even the service industry is taking a hit. The *New York Times* recently featured a story about how Johnstown, PA, has suffered in this regard. Rachel Abrams & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs* (June 25, 2017), available at https://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html.

Perhaps the newest issue to be addressed in this discussion, meanwhile, is how artificial intelligence may render obsolete even more jobs. *See*, *e.g.*, Elizabeth Kolbert, *Our Automated Future: How Long Will it be Before You Lose Your Job to a Robot?*, THE NEW YORKER (Dec. 19 & 26, 2016), available at http://www.newyorker.com/magazine/2016/12/19/our-automated-future.

For the workers' compensation field, an implication of this type of data – and stories – is that the fewer injuries which will take place, because of the changing workforce, is a smaller volume of cases for litigation and

treatment by the system in general. While a country with fewer injuries is an inarguable good, of course, a reduced practice has practical implications for lawyers and agencies.

Often the message that jobs are being eliminated is delivered to workers' compensation lawyer audiences with the provocative (and perhaps mischievous) suggestion that even our *professional jobs* in the field are on the way out. To me, such predictions recall the *Saturday Night Live* skit from 1977 where a priest, played by Dan Aykroyd, eliminated a key confessor task by having it automated via with the "Penance 1000" computer. *See* https://www.google.com/?gws_rd=ssl#q=saturday+night+live+penance+dan+akroyd&spf=1501273234428. The provocateurs' suggestion is, after all, that justice – like a holy sacrament – can at some point be administered without human involvement.

In any event, in a new *Wall Street Journal* article, the author, an artificial intelligence expert, portrays as exaggerated recent reports that score of workers will soon be jobless because of advances in the field. In his opinion, hype attends many of these analyses. As the subtitle of the article declares, "Smart machines will replace some jobs, but they will create many more." Jerry Kaplan, *Don't Fear the Robots*, THE WALL STREET JOURNAL (July 22, 2017), available at https://www.wsj.com/articles/dont-fear-the-robots-1500646623 (subscription required).

Kaplan asserts that the alarmists are ignoring the historical record. He notes, among other things, that 57% of the jobs under taken by workers in 1960 – *e.g.*, office clerks, secretaries, gas pumpers, bowling alley pin-setters – no longer exist today. The alarmists recognize this phenomenon, but they argue, erroneously in his view, that the "coming wave of artificially intelligent computers and robots can do virtually any job that a human can do, so everyone's job is on the chopping block." Kaplan believes that this anxiety is nonsense. The core of his critique is that these innovations are simply the latest "wave of automation, and like previous waves, they reduce the need for human labor. In doing so, they make the remaining workers more productive and their companies more profitable. These profits then find their way into the pockets of employees, stockholders and consumers (through lower prices.)"

It is the extra money that is created through automation that will create new jobs. People will now have more money for vacations, apparel, eating out, going to concerts, and the like. This foreshadows, Kaplan asserts, "increased demand for flight attendants, hospitality workers, tour guides, bartenders, dog walkers, tailors, chefs, ushers, yoga instructors and masseuses, even as artificial intelligence reduces the need for drivers, warehouse workers and factory operators."

Kaplan concludes, "If history is a guide, this remarkable technology won't spell the end of work as we know it. Instead, artificial intelligence will change the way we live and work, improving our standard of living while shuffling jobs from one category to another in the familiar capitalist cycle of creation and destruction."

Honors and Accolades

- Fellow **Judge Elizabeth Crum**, will receive the *Irvin Stander Award* from the Pennsylvania Bar Association Workers' Compensation Law Section's fall meeting in October. This award recognizes 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.

- Fellow **Don DeCarlo** recently had an article published in *Insurance Advocate* on workers' compensation benefits for post-traumatic stress disorder. http://www.insurance-advocate.com/2017/07/24/workers-compensation-benefits-for-post-traumatic-stress-disorder-ptsd/

- Fellow (and Professor) **Michael Duff** was named University of Wyoming's Faculty Member of the Year for the College of Law yesterday at the Fall Convocation for his work in workers' compensation law.

- Pennsylvania Fellows **Barbara L. Hollenbach**, of Norris McLaughlin and & Marcus, Allentown, PA and **Thomas C. Baumann** of Abes Baumann, Pittsburgh, PA, recently presented a webinar at the Pennsylvania Bar Institute (PBI), "Paradigm Shift in Workers' Compensation: Implications of the Pennsylvania Supreme Court's Decision in *Protz"* regarding the recent Supreme Court decision.

- Three Fellows were honored at the NAWCJ Judiciary College in August for their service to the National Association of Workers' Compensation Judiciary. Judge **John Lazzara**, from Florida, was presented with the Lifetime Achievement Award for his service to the NAWCJ. Judge Lazzara has been on the board of the NAWCJ and has worked tirelessly each year on the College curriculum. Also, Judge **LuAnn Haley**, from Arizona, and Judge **David Torrey**, from Pennsylvania, were provided with *Outstanding Service and Leadership Awards* for their service to the NAWCJ Board as well as their work on the newsletter, *Lex and Verum*. The NAWCJ holds a Judicial College each August that provides an outstanding seminar for new and seasoned judges during the WCRI conference. During this year's meeting, three of CWCL's Adjudicator Fellows were honored for their service to NAWCJ.

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.

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.