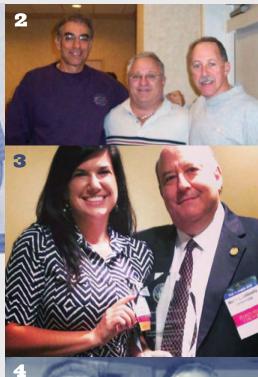


EWS & LLO Report &



EXPLORING EMERITUS STATUS









NEWS & 440 Report

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MESSAGEFROMTHECHAIR Mark A. Touby

Each new year brings to mind the close of the past year as well as the occasion to reflect on it. Last year was a year unlike any other. Your section and the Florida workers' compensation community continued to conduct business as "the new usual" allowed. It is important not to overlook that. In an era that has been repeatedly described as unprecedented and uncertain, the Florida workers' compensation community continued to fulfill the purpose of the law by adjusting claims, providing benefits, litigating disputes, and effectuating resolutions.

The WCI held its conference in December 2021 with the theme "better together." In addition to the educational aspects of the conference, the Judicial Nominating Committee met and recommended the reappointment of eight JCCs. The five Florida-based American Inns of Court chapters also met and were joined by members of the Workers' Compensation Section Executive Council, the First District Court, and members of the national organization. The gathering was highlighted by the presentation of the Jake Schickel Award for Professionalism to Rosemary Eure from Sarasota and a donation to Give Kids The World.

The Roman philosopher Seneca is credited with the expression "luck is what happens when preparation meets opportunity." For years, Deputy Chief Judge David Langham, DOAH, and the OJCC developed and improved our electronic filing system and incorporated a closed video telecommunication system (the VTC as we call it) to meet the needs of the time. When March 2020 came in like a lion, they were prepared. In what should be recognized as one of the greatest pivots, the OJCC incorporated Zoom usage and we did not miss a beat. Recently, the OJCC has rolled out the Zoom "hybrid" to allow some people to be physically present in the courtroom with the JCC and others to participate by Zoom. Imagine the efficiencies this will allow.

Looking ahead in 2022, the section will continue to provide you with opportunities to involve yourself and benefit from the events that are planned. I would like to reiterate my invitation that if you have never been

to a meeting (or it has been a while), I invite you to come to the live meeting on April 6, 2022, at the Omni Orlando Resort at ChampionsGate. If you can't make the meeting, try to attend The Forum on April 7-8, 2022. We have a great speaker lineup. This year will see the return of live oral arguments before a panel of judges from the First District Court of Appeal as well as the addition of a breakout session on day two on topics specifically appropriate for our JCCs. Click here for more information on the Forum.

After several years, I am pleased to let you know that on May 13-14, 2022, the section is again hosting the Trial Advocacy Workshop. This program is limited to 24 participants and has sold out. Anyone who has previously attended the workshop will tell you that the opportunity to prepare and present a case before a sitting JCC with the guidance of experienced attorneys is invaluable no matter what your experience level. We hope to offer this valuable program again in the future, so watch for another opportunity to participate.

We have faced uncertain times. We may face more. I continue to invite, encourage, and cajole you to join in what the section is doing. I do believe we are better together—wherever we might be.

Mark A. Touby Section Chair



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MESSAGEEROMITHEEDITOR Sean P. McCormack

Change can be refreshing because it helps foster creativity and fresh ideas. Several years ago, the Executive Council at the recommendation of then Chair Paul Anderson amended the section's bylaws to allow past chairs to take emeritus status and remain on the council while having a vote in pending matters. The purpose was to have seats available for past chairs and to allow for the introduction of new members on the Executive Council to bring in new ideas. It creates a balance of maintaining institutional knowledge and experience while bringing in younger members for involvement.

The spotlight of this edition is on our emeritus members who sometimes go overlooked and underappreciated after serving as chair. Past, present, and future perspectives from our emeritus members have been provided in this edition to keep you up-to-date on how they are continuing to impact the practice and remain involved. All district seats and all at-large elections are coming up soon and will take place at the Forum on April 7 and 8. We encourage you to fill out a nomination form, if interested. Be on the lookout for nomination forms from our section's communication emails. There will be 20 at-large seats available. Additionally, there are 10 seats available in each of the five districts, which include one for claimant and one for E/C.

Also, we include two articles regarding the sudden passing of Judge Robert Dietz who served as a JCC in the Sebastian/Melbourne District. Judge David Langham provides a wonderful article regarding his reputation and legacy as a JCC. Several members submitted their final thoughts about Judge Dietz, and we encourage you to read those. It takes years to build a reputation and one poor decision to ruin it. The former is true as evidenced in the positive comments and memories shared about Judge Dietz.

Finally, in addition to our regularly featured sections, we include an article from Kenneth Hesser about the role of bankruptcy proceedings in workers' compensation, an article about the ongoing importance of the 120-day rule from William McKnight, tips for handling a mediation by Robin Shaw, and an in-depth article regarding the use of expert medical advisors by Judge Erik Grindal and Jessica Carrier. There is a lot of content in this edition, which is only possible with ongoing contributions from our judges and members. As always, thank you to all the writers!

Sean P. McCormack has been licensed to practice law in Florida since 2005. Mr. McCormack received his undergraduate degree from Florida Atlantic University in 2002 and his law degree from Barry University College of Law in 2005. He is a member of The Florida Bar, and is a partner with the firm of Colling Gilbert Wright & Carter. Mr. McCormack has practiced exclusively in the areas of social security disability and workers' compensation since 2005. He is on the WCS Executive Council and serves as editor for the News & 440 Report. He is a member of the Orlando Inns of Court and chair of the Workers' Compensation Section of the OCBA. He is president of the Orlando division of the Friends of 440 Scholarship charity.

THE COVER...



On the cover page, several past chairs of the Workers' Compensation Section are featured. They have now taken emeritus status, and this edition's focus explores the importance of these members.

Cover Photo Captions

Members George Cappy, Gerald Rosenthal, Alfred Deutschman, and David Mitchell, 2007

- 2. Chairman-elect Ramon Malca, Gerald Rosenthal, and Fred Deutschman at the 21st annual Winter Meeting and Seminar in Lake Tahoe, California, 2005
- 3. Dawn Traverso and Martin Leobowtiz, 2013
- 4. Outgoing Chair Ramon Malca and Tom Conroy, 2007
- 5. Past, present, and future chairs of the Workers' Compensation Section, Dennis Smejkal, Martin Leibowitz, and Rafael Gonzalez,
- 1. Outgoing Executive Council 6.Standing: Gerald Rosenthal, Joe Kaplan, Arnold Hessen, and Richard Sicking; seated: Mark Zientz and Bob Shugarman, 1974

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REMEMBERING JUDGE ROBERT DIETZ

It has been a tough 2022. January 8 brought unwelcome news, a phone call in the mid-afternoon. Calls like this are surreal, and I often struggle to accept that I have heard the caller correctly. In this instance, they stated simply, "Robert Dietz died last night." The statement surprised me, and for a moment I was literally speechless.

I have known Judge Dietz for many years. As I type, I cannot recall when we first met. I am fairly certain he was a defense lawyer at that time, and I recall some involvement in a defense attorney association was the precipitation of our acquaintance. That is a mile-marker for me because Robert later evolved to an exclusively mediation practice. Notably, though he focused solely on mediation for several years, he remained board certified in workers' compensation for the last 30 years. Remarkable, simply remarkable.

I remember when he came back to my attention with the formation of the Professional Mediation Institute (PMI). Jim McConnaughhay had decided that the WCI needed a breakout focused on mediation. State mediator Stuart Suskin was heavily involved in that initial effort. I recall some conference calls and Stuart's repetitive "we have to get Bob Dietz." There was a sentiment that his presence was critical to success. Robert was welcomed into the fold and became the leader of the PMI. I feel confident he was given the title of "president" of the Institute, but the current leader uses the title "chair." I am not sure which is the correct vernacular, but there is no question Robert was the inaugural leader and responsible for much of the early success of PMI.

Back in those days, he was heavily relied upon as regards the program, topics, and other resources. He had a broad experience with other mediators and many marketplace connections. Although my experience with PMI has waned in recent years, I am confident that he

remained an integral and important part of its ongoing success. He has remained engaged in that programming persistently. He spoke at the PMI 2021 not a month ago. And when the PMI began, Robert proofread every one of the PMI newsletters, which unfortunately are no longer available on the website. Suffice it to say that they were extensive and informative. Proofreading them was undoubtedly a significant challenge. He never uttered a discouraging word though.

Through our work in that era, I became familiar with Robert Dietz the mediator. Then, in 2013, when Judge Remsnyder retired in the Melbourne District, Robert was interested in the vacancy. That interview still sticks in my mind. The Nominating Commission interviews were at the Orlando airport, and I anticipated discussion of his former practice and his mediation activities. However, the interview focused instead on topics like pro bono service, the Guardian Ad Litem program, Legal Aid, and the Civitan club. His passion for community was patent, and his conversation with the commission was telling. I recall at the time thinking the choice for that vacancy was pretty obvious.

Shortly after he was appointed judge, he called with questions about the Code of Judicial Conduct and whether various community activities would remain permissible. Judge Dietz believed in those activities, in community, and in contributing. He had talents and interests, and he poured himself into them like few people I have known. Over the years, he was devoted to groups like the local bar association, the Inns of Court, the PMI, and others. He served as judge of compensation claims since 2014 and was nominated in December for reappointment to a third term.

My blog is about the law and workers' compensation. So, turning attention in that direction momentarily is apropos. What kind of a judge was Robert Dietz? Well,

without a doubt he was a teacher. Barry University School of Law had him teach workers' compensation for the last decade. I was honored to meet some of his students, and suffice it to say he was revered there. But he was undoubtedly also a student throughout his career. He had a curiosity, an inquisitiveness, and an interest that was persistent and infectious. He enjoyed studying the law, its underpinnings, purposes, and interpretations. Any conversation with him would invariably lead back to either workers' compensation or mediation, likely both.

Judge Dietz knew much about the law. He was a repository of odd bits of knowledge, and he recalled appellate holdings with apparent ease. He relished discussion of the intricacies of this law, and many a judge discussed challenges and interpretations with him. In a perhaps overused description that is simply too accurate to ignore, he was "a judge's judge." Lawyers appreciated him, mediators followed him, and judges consulted him. His presence on the bench in Sebastian will be sorely missed.

In fairness, however, neither workers' compensation nor mediation were his favorite topic. Robert spoke often of his children, his wife, and his activities. Judge Dietz was immensely proud of, and focused upon, his family. He was also involved in sports as a referee and was an avid follower of professional soccer. More than once, he tried without success to explain soccer to me. I was, undoubtedly, his worst student.

One of my fondest memories of Judge Dietz was in January 2017 when he was inducted into the Florida Workers' Compensation Hall of Fame. It was an honor for Judges Lazzara, Rosen, and me to welcome Judge Dietz and former Judge Richard Thompson to that group.

Their induction was recognition of careers devoted to this strange little corner of the law, too often dismissed or overlooked. I recall struggling at the time with understanding why it took us until 2017 to recognize him.

I have written repeatedly recently of the disturbing trend of deaths in this community. Each of those brings pain and challenge, Douglass Myers and Robert Barrett (also a Hall inductee); certainly 2021 was tough. Still fresh, however, are passings such as Jack Langdon in 2019 (also a Hall inductee). I grow weary of the pain of these departures. I strive therefore to remember each for their contributions and values. Each is a loss worthy of note and acknowledgement. Judge Dietz is only the second sitting JCC to pass during my tenure. I still struggle with the loss of Honorable Joseph Farrell in 2002. Judges Farrell and Dietz shared much, a love of the law and an incredible passion for being a judge.

Indeed, thus far it has been a tough 2022 as well. Many will miss Judge Dietz, and I am in that number. He was reliable, relatable, and industrious. He was a jurist, a mediator, a teacher, a student, a father, a husband, a contributor, a thinker, and more.

God speed, judge. May you rest in peace.



Judge David Langham is the deputy chief judge of compensation claims for the Florida Office of Judges of Compensation Claims and Division of Administrative Hearings. Contact him at david.langham@doah.state.fl.us. This tribute was originally published on Judge Langham's blog on January 9, 2022.



COLLEAGUES PAY TRIBUTE TO JUDGE ROBERT DIETZ

Robert was a good friend and an exceptional colleague. I consider myself lucky to have had the chance to know and work with him. He inspired me to be a more thoughtful judge and a better human being. Mark Twain said, "Let us endeavor so to live so that when we come to die even the undertaker will be sorry." Judge Robert Dietzlived that way.

- Wilbur Anderson, JCC, Daytona Beach

Shock, disbelief, and grief were the feelings I immediately felt when I heard the news that Robert had died. I had to catch my breath. It couldn't be true! If you knew him, you not only revered and respected him, but more important, you also loved him. How could you not? He was special. A huge success in every sense of the meaning: a smart, well-educated, outstanding attorney; mediator extraordinaire; an even-tempered, fair, and respected jurist; honest, ethical, and giving; a terrific husband and father; but most important, a genuine friend. We became friends in the early 1990s, working in collaboration on various mediation projects that ultimately culminated in forming PMI (Professional Mediation Institute), which provided attorneys, dedicated mediators, and other professionals valuable information and continuing education credits. Robert was undoubtedly the backbone of that project. No pretenses, respectful, down to earth, never condescending, always willing to volunteer, and the most prepared and first to arrive at any speaking event. To me, his passing was not arbitrary and happenstance. Not a quirky medical abnormality. It was planned. God noticed him. Clearly he was too valuable, and God needed him and has great plans for him. Robert, I will miss you more than words can describe! God bless you! - Stuart Suskin, Esq., Gainesville

Robert Dietz was recognized by the Florida Supreme Court on January 28, 2010, when he received the Florida Bar President's Pro Bono Award for his pro bono work at the Legal Aid Society of the Orange County Bar, Inc., participating in its pro bono panel for more than 20 years while additionally providing service as a guardian ad litem for children in the juvenile dependency system over the last 23 years. His giving back to the community, especially children, was very important to him. Because many of the children suffer cognitively and psychologically; lack parental and familial care; and were abused, neglected, and harmed in various ways, they become extremely close to the guardian ad litem. Over the years, Robert Dietz served as a guardian ad litem for more than 100 children, bringing joy to the guardian ad litem children by doing things such as taking them roller-skating, organizing Christmas gift drives, going out for pizza, and providing a group trip to Sea World. He used his skills as a litigator to free children from dangerous and harmful households. He donated more than 1,130 hours to guardian ad litem pro bono work and was responsible for recruiting other lawyers to do pro bono service. Robert Dietz also participated in several organizations such as Open House Ministries, Touching Miami with Love, ABA TIPS Workers' Compensation and Employer Liability Committee, the Florida Defense Lawyers' Association, and a fellow of The College of Workers' Compensation and Civitan International where he organized and ran golf tournaments to assist developmentally disabled children. He also served on the PTA/SAC committee at the middle school where his wife works and was active in church ministries. He has been a judge of compensation claims since August 2013 and was highly respected for his fairness, integrity, and professionalism with all persons who appeared before him. He was also an adjunct professor at Barry University School of Law teaching workers' - Glen Wieland, Esq., Orlando compensation law.

I never met Judge Dietz, maybe in passing. Certainly, I never had a hearing in front of him. That said, when I passed the certification exam, I received a personal card and note of congratulations in the actual mail. Such a seemingly small gesture, but it meant a lot to me. It sounds like my experience was not unique, either, with him. — **Anonymous**

Robert was a sneaky good athlete. I played softball with him for 4.5 years on ZSKS teams, and we won several COED championships in those years. Robert always wore long leggings, a huge knee brace, and Kareem Abdul-Jabbar sports glasses, a sight to be seen. He could hit for average and was the team pitcher, the toughest position in slow pitch. He was always good for ordering one of the weird pizzas after the games, BBQ or Hawaiian, etc. He was very decent to my wife and me, and supportive when I struck out on my own. After my ZSKS years, I would see him at the softball fields where we would heckle each other with smiles on our faces, knowing life was great at that moment. We were playing sports like little leaguers, happy to be there sharing fellowship. Robert always had time for a kind word and a smile at the various functions and conventions we attended. Robert's passion for service was well known, but it was in the small unheralded moments that I caught glimpses of what set him apart. He would visit members of our community at the hospital, help their families without being asked, living a life of faith. I will miss knowing he is out there helping - Charles Leo, Esq., Orlando people.

He touched everyone and taught us all to be better. All his efforts will continue on.

— Anna Marie Kim, Esq., Altamonte Springs

Judge Dietz was an exceptional jurist but an even better person. He was insightful, intelligent, and wise as a judge. He also loved to mentor. Whether teaching or officiating soccer, he loved to help people. Judge Dietz was instrumental is helping us start the Robert D. McAliley American Inns of Court on the Treasure Coast. We simply could not have done it without him. I spoke to Judge Dietz frequently while we formed our Inn and really got to know him well. His guidance was incredibly beneficial. He was really funny, too. He will be sorely missed.

— Michael K. Horowitz, Esq., Vero Beach

He was such a gracious jurist, even as I lost the only case I ever tried in front of him. Incredibly smart and a great wit. He wrote very thoughtful and thorough orders. He was a great friend to the Zehmer moot court competition held at the comp convention annually, and he never failed to volunteer his time to assist for the entire time he was on the bench.

— Tracey Hyde, Esq., Tallahassee

I have known Robert since I began practicing law in 1987. Back in the late 80s to early 90s, we had many cases together, several in Polk County. Robert would have his mother drive him to the depositions, and he would work in the front seat of the car. After I observed that a couple times, I made fun of him, saying "What, you have to have your momma drive you around?" He laughed, dbq explained how it was cherished time he got to spend with his mother, and then invited me to lunch with them. I went and really enjoyed the lunch. After that, I looked forward to those lunches, which we did several more times. I would always check to see if his mother would be joining us. He made me think about time I should spend with my mother in those hectic, busy times, and it touched my heart. Robert was an outstanding athlete, which was very deceiving when you saw him show up with braces on both knees, one elbow, and his wrist, glasses, and a big headband. The first time we played tennis was at a workers' comp convention at the Peabody Hotel. There were two tennis courts out back, so we decided to play. When he showed up dressed like I mentioned above, I again laughed and thought to myself, this will be quick. Well an hour and a half later, I was exhausted, and humiliated; he just laughed. Robert loved food, more than most people I know. Eating with him was always an enjoyable and entertaining experience; however, I could never keep up. With every bite, he would make this umm, umm sound, thoroughly enjoying the meal. Wherever we were, he knew of all the best places to eat, especially places that had great desserts. We last spoke at the comp convention, right after a breakout where an important case on appeal was discussed for nearly an hour. He asked me if I watched the discussion of his case, and I said, "Your case, that is my case." He laughed as he walked away and said, "Not till you win it." I think he was headed to lunch, LOL. Like everyone that knew him, I too am heartbroken with his passing. Not only was he a great lawyer, mediator, and judge, he was a great human being. RIP, my friend. — Dennis D. Smejkal, Esq., Orlando

The earliest and best story I can recall about Judge

Dietz is when I was a young lawyer. I was representing the claimant, and Judge Dietz represented the employer/carrier. We were attending a mediation. The claimant, who was a young gentleman, was dressed impeccably for the mediation. Judge Dietz walked in, looked at me, and said, "I hate it when the claimant is better dressed than me." That statement illustrates the sense of humor and quick wit that Judge Dietz possessed. — Gregory J. Johnsen, JCC, West Palm Beach

I have known the Honorable Robert Dietz for about 40 years, beginning in 1982 when he was a defense attorney for the company that I worked for. Over the years he was a leader in the field of Florida workers' compensation law, where I became his colleague. One of my earliest memories of him was when he sent out an announcement regarding the newest addition to his law firm, which was in actuality a birth announcement of his first son. This was not only innovative, but creative as well. He handled cases for my company before I became a lawyer, and I worked alongside him later in cases in which our clients had a common interest. Judge Dietz later mediated cases I was handling, and I also appeared before him on a number of occasions after he was appointed a judge of compensation claims. His principles of fairness and integrity were hallmarks of his legal career before he was appointed to the bench, which carried on through his very last day, with one of my partners remarking that he appeared before Judge Dietz the day before he passed away. He will be greatly missed. - Alan D. Kalinoski, Esq., Orlando

Robert lived a "well lived life," at least as I would define it. I want to say that he lived with an intention to serve and make a contribution to others, but I honestly believe that it was not really intentional; it's just who he was. He deeply cared for others and was always the first to help, to fulfill a need, or to simply be present when action couldn't or wouldn't suffice. He was truly one of the kindest persons I have ever known, and we are all richer in having known him. I am hoping heaven has Beefy King cherry milkshakes waiting for him. — Pam Foels, Esq., Orlando

We wish to express our heartfelt condolences to the family, friends, colleagues, and the Florida workers' compensation community on the passing of Judge Robert Dietz. In the passing of Judge Dietz, the workers' compensation community has lost a brilliant legal mind who served the bench with dedication, humility, and

very often with well-timed humor. We recently had the honor and privilege of participating on a panel with Judge Dietz. During the process of preparing and presenting, we were so impressed by his professionalism and love for the practice. We have tremendous gratitude for the opportunity to develop an instant friendship with Judge Dietz, whose warmth and sense of humor made everyone feel at ease in his presence. In this time of grief, we pray for those who mourn his loss.

Henry Roman, Esq., Miami, and Diane Castrillon, Esq., Ft. Myers

On behalf of the Broward County Bar Association Workers' Compensation Section, we would like to offer our sincere sympathies on the passing of Judge Robert Dietz. Judge Dietz was a highly respected member of the workers' compensation practice in our state, and he handled his cases with professionalism, integrity, and compassion. Judge Dietz's memory will continue to be an inspiration to us all.

Broward County Bar Association Workers' Compensation Section

I knew Bob throughout his entire legal career as a workers' compensation lawyer, mediator, lecturer, adjunct professor, and finally, judge of compensation claims. I was fortunate to be involved in several organizations with Bob. He had deep knowledge, a quick mind, a scholarly approach to issues without condescension, and most important, a fantastic sense of humor that combined wit and sarcasm. He was never full of himself no matter his degree of authority. Words cannot express. — Steve Rosen, Retired JCC, St. Petersburg

Judge Dietz was my first boss, mentor, and friend of 33 years. He talked, walked, drove, and thought fast. I always struggled to keep up with him, and he always made me feel lazy. In fact, I blame him for my coffee habit, but I needed something to help me keep up. He never had a negative word to say about anyone and was always the ultimate optimist. When our career paths separated, he remained my "legal lifeline" that we all need from time to time. He was extremely hardworking, honest, professional, and just a wonderful human being, despite his love for the Miami Hurricanes. But then again, nobody is perfect. When I heard that Robert had passed, my first thought was "They are going to need a bigger church." We should all be so lucky to have lived life like Robert did, dedicated

to his God, family, community, and profession. There was no better man put on this earth, and I will miss him dearly. — Rick Thompson, Zenith Insurance Company

Robert Dietz, quiet giant, untimely ripped from us. Undoubtedly there are younger attorneys coming up the ranks to fill the enormous gap left by Robert's disconcertingly sudden absence, but their qualities are not yet fully known whereas Robert's prodigious qualities were fully blossomed and benefiting all who encountered him. Though my contacts with him were far too few, each was memorable: he did me a great service on one occasion simply by recommending meunder circumstances arguably not in his best interests but that was the measure of the man. The pinnacle of professional integrity. Quiet, perfect duty; supreme collegiality; complete reliability—the list of accolades goes on. A man's man, an attorney's attorney, a judge's judge. And of course, severe regrets now for our all too few contacts. I can't believe he is gone. But I know he will rest in peace. — George Kagan, Esq., Gulf Stream

This is the 1977 Eckerd College tennis team. JCC Dietz is on the left, front row. My husband, Michael, is second from the right in the front. He met JCC Dietz in August 1975 when they were freshmen at Eckerd. It was ironic when I started in workers' compensation that Bob was already a player. Michael got started in workers' compensation in 1989, and it was fun for them to see each other again after so many years. Everything you've heard about Bob is true—just the nicest, most giving guy on the planet. A special memory of mine is the 2017 induction of JCC Dietz into the Workers'

Compensation Hall of Fame. Michael was in New Jersey dealing with his elderly parents, and my son Chris drove me to Orlando for the dinner. The next morning (after a fabulous dinner honoring Bob's contributions), he and his wife Laura joined me, Chris, and my daughter Courtney (who lives in Orlando) for breakfast at Hash House A Go Go. We had a great time—Bob regaling my children with stories of their dad in college and talking with Courtney about the fun they both had at Orlando City soccer games. Bob rooting for the team and dressing as the mascot. Courtney drinking beer and socializing! Chris was in law school, so Bob chatted with him about that. It was a very special morning for me. For Bob, that was business as usual-shining his light on whomever was lucky enough to be hanging out with him, making every moment magical and meaningful. He will be missed by so many people because he touched so many people. - Karen M. Gilmartin, Esq., Miami Lakes



This is the 1977 Eckerd College tennis team. JCC Dietz is on the left, front row.

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Focus: EXPLORING EMERITUS STATUS

Past: Perspectives From a Retired JCC

As an emeritus member of the Workers' Compensation Section (WCS) of The Florida Bar, I often reflect on how I got to where I am today after nearly 48 years of practicing workers' compensation law in some form. It's kind of a "wow" moment.

I passed the bar and was sworn in on May 10, 1974. "Floundering" is too tame a word regarding my legal presence. A few months before I passed the bar, I was hired by a Miami firm with a Tampa office. I was the workers' compensation department in this firm for the Tampa office. A few months later, the firm hired Jim Smith, who had been running the Special Disability Trust Fund out of Tallahassee. This Fund reimbursed employers/ carriers under certain circumstances when an employee with a preexisting condition was injured again. Jim had been practicing law for about two years when he came down to our firm in his battered brown Plymouth Duster, which predated his bell bottom pants and disco shoes. With that little legal experience of two years under his belt, to say Jim was arrogant was an understatement. In fact, he was a brilliant tactician, just with little experience. Jim and I had a very give-and-take "Who do you think you are?" relationship. We lived nearby each other and developed a strong bond. Jim gave me confidence to go out and do battle with much more experienced claimants' lawyers through preparation and question-and-answer sessions. By the time I left that firm after two years to take over a claimants' practice with a large personal injury firm, Jim had given me the knowledge and confidence to follow a pattern in preparing a case for trial or settlement.

As I strode into the claimants' practice, my second mentor appeared. I had known Bill "Bubba" Douglas, Esq., peripherally while doing defense work. But as I came into a claimants' practice, Bill had been practicing for a few years and may well have been the top claimants' attorney in the Tampa Bay area. He had invited me to contact him if I had any questions about the claimants' practice, and I took him up on it. Bill guided me through preparing a case that basically gave the judge evidence to rule in my client's favor. Keep in mind that at that

point in history, "ties" in evidence went to the injured worker. Bill showed me how to prepare my client, secure medical evidence, and give the judge what the judge needed to rule in my favor. That simplicity stuck with me, and I credit Bill Douglas with that guidance. Bill was also extremely legislatively oriented, and I was able to learn how to approach Florida legislators to present workers' compensation requests on behalf of injured workers.

All of us who litigate in the workers' compensation field have cases to talk about, stories to tell, and things we wish we had done, etc. When I reflect, my mind instantly latches onto the 1993 legislative sessions here in Florida. I say sessions because there was the regular session in the spring of that year and, because workers' compensation was a "main dude" for legislative battles, then Governor Lawton Chiles called a special session for later that year with workers' compensation being the focus.

At the time of the main session in 1993, for better or for worse, I was chairman of our section, an officer in the Florida Workers' Advocates, and the chairman for life of the original Statewide Nominating Committee for Judges of Compensation Claims formed in 1990 (well, the life of that particular committee ended in the 1993 special session anyway).

In the main session, the battle was heated for what was called workers' compensation reform with, as usual, insurance companies and employer activist groups versus the representatives of the injured workers, and in this case, some injured workers themselves. The Florida Bar stepped in and used its influence to assist the Florida Workers Advocates and what was then the Academy of Florida Trial Lawyers (AFTL then, Florida Justice Association or FJA now) in staving off any drastic reform legislation. It was an appreciated victory for injured workers' advocates. When the special session began, the governor decided he would draft his own bill, much to the dismay and chagrin of both insurance company and employer advocates and injured worker advocates. The bill passed and resulted in the 1993 amendments.

Reflecting on my years of legislative involvement, I have

found that being a member of the Workers' Compensation Section of The Florida Bar is an imperative when it comes to legislative endeavors. Workers' compensation is purely a creature of statute, one that is affected by judicial determinations interpreting that statute. The WCS keeps its members informed of significant potential legislative changes that could impact our workers' compensation practice. Not all legislative changes are negative; the section also keeps us apprised of good potential changes, which allows section members to work proactively to secure beneficial statutory changes by explaining how the changes can benefit the workers' compensation system to the powers that be with whom section members are acquainted.

In 2008 at the age of 60, one thing led to another and I was appointed one of two judges of compensation claims (JCC) in the Jacksonville district. I looked at this appointment as an opportunity to give back to the system that had been so good to me. I pretty much knew all of the workers' compensation practitioners around the state, so going to a different jurisdiction from the Tampa Bay area was not stressful. After serving in Jacksonville for two years, I became the single judge in the St. Petersburg district until my retirement on December 31, 2020.

In 12 years as a JCC, I was fortunate to author several opinions on cases that meant something to the system after decisions from the First District Court of Appeal and the Florida Supreme Court.

As a JCC, the most significant interaction I demanded from the lawyers who practiced in front of me was professionalism. Lawyers must first be considerate of their respective clients' rights. At the same time as they protect their clients' rights, lawyers must be courteous and considerate of opposing lawyers who are also zealously protecting their own clients' rights. The workers' compensation bar is a relatively small bar and most everybody knows each other. Exhibiting professionalism while providing zealous legal representation of a client keeps our system rolling. We have time restrictions for

resolving cases and moving them through the system. Without professionalism, this simply cannot happen.

So much change, good and bad, has occurred in nearly 48 years of involvement in our W/C circle. Where did the time go? No tears, that's for sure!



Judge Stephen Rosen graduated from Hamline University in St. Paul, Minnesota, in 1970. After a year of work and travel, he entered South Texas College of Law in Houston, from where he graduated in January 1974. He became a member of The Florida Bar in May 1974. He spent two years doing

insurance defense work with Marlow, Mitzel and Ortmeyer, a Miami based firm with an office in Tampa. In May 1976, he accepted a position at the plaintiffs' personal injury firm of Wagner, Cunningham, Vaughn and Genders heading up their workers' compensation division representing injured workers in on-the-job injuries under Florida law and the federal Longshoreman and Harbor Workers' Compensation Act. In 1980, he formed the firm of Morris and Rosen PA, which then became Stephen L. Rosen PA in 1993. He was a practicing attorney until 2008 when he was appointed judge of compensation claims in Jacksonville, Florida. After two years, Judge Rosen became the sole workers' compensation judge in St. Petersburg, Florida, until his retirement on December 31, 2020. Judge Rosen served on the initial Workers' Compensation Board Certification and the initial Judicial Nominating Committee for Judges of Compensation Claims and was chair of the Workers' Compensation Section of The Florida Bar, chair of the Workers' Compensation Section of Academy of Florida Trial Lawyers, and a founding member of Florida Judicial Advocates. He received the W. L. "Bud" Adams Award for Excellence. Judge Rosen was a member of the charter class of the Workers' Compensation Hall of Fame in Florida. He has also been a frequent lecturer and author on workers' compensation subjects for over 45 years.

Is your Bar contact Information up-to-date?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information. After logging in, Florida lawyers may update their contact information as well as upload a profile photo and handle other Bar business.

Focus: EXPLORING EMERITUS STATUS

Present: Spotlight on Past Chairs of the Section

















Kagan

Rosenthal

Malca

Smejkal

Zientz

Thompson

Rogner

Anderson

To learn more about our WCS emeritus members, we asked past chairs of the section to respond to the following questions:

- 1. What is your current occupation?
- 2. Which location did you select for your long-range planning retreat and why?
- 3. What are your favorite memories of being involved in the WCS Executive Council and why?
- 4. Why should members become involved in the section?
- 5. What advice do you have for newer attorneys entering the workers' compensation practice?
- 6. How has your service on the WCS Executive Council enhanced your practice and life?
- 7. Why did you decide to take emeritus status?

H. George Kagan, Chair, 1984-85

- 1. I left my firm of 42 years and set up my little boutique practice, H. George Kagan PA, very happily concentrating solely on workers' compensation appeals and consultations in this, my second act!
- Pensacola, in part because the area then seemed neglected, and more important, because it offered marvelous recreational activities along with meeting facilities (and invaluable inside information regarding sailboat ride and dining option afforded by Jim McConnaughhay).
- The exemplary collegiality and cohesiveness despite opposing interests, through good times and bad.

- Especially some of the earliest retreats, such as the one in Pensacola hosted by Jim McConnaughhay (great story or two there) and by amazing coincidence, being able to drop in on the meeting in Austin, Texas, a few years back during a buddy trip with Ray Malca, Tom Conroy, and Gerry Rosenthal; and again, a chance meeting at Joe's Stone Crab the next year, same group!
- 4. There is nothing better to prepare and expand the mind for the breadth and extent of our practice, and all the territory, folks, and customs it embraces—especially during perceived threats to it.
- 5. Many are the pressures, direct and indirect, in contemporary practice to squeeze out the most lawyerly of its functions—such as preparing for, gambling on, and attending trial. One will never become a true, complete attorney without these sharpest among the ways that focus the mind, including the scars that must also invariably come. Only through these can one begin to steep in the appreciation of mastering a craft and being compensated for it versus adapting to just flip cases for fees, a trap easy to fall into.
- 6. It has richly burnished my own sense of accomplishment and of having given back through my service and some of my innovations.
- 7. It sounds facetious, but I would say enough was enough. I had served in virtually all available positions, e.g., vice chair of certification, chair of rules, etc.,

and having also innovated (and named) the section newsletter. It was time to just enjoy the practice (but I did then go into the local WPB Inns of Court and became chapter president, the most gratifying non workers' compensation involvement I've had).

Gerald Arthur Rosenthal, Chair, 1987-88

- 1. Retired.
- 2. Unfortunately, I don't recall what or how we did long-range planning. As I remember, the Legislature was hot on our trail, so that consumed a good part of our time.
- 3. I was both fortunate and lucky to have been chair when we instituted workers' compensation certification. President James Fox Miller announced that I would be the first board certified workers' compensation specialist. And then he made me write a test for future applicants. I appointed three claimant and three defense members of the Executive Council to help me write the test.
- 4. I have always felt that workers' compensation law touches more citizens that almost any law, be they injured workers, companies and carriers, or medical staff and administration. The extent of the injuries are always dynamic and fluid, be they orthopedic or by occupational disease. It is incumbent on all attorneys who embark in workers' compensation to join the section and interact with others and be able to learn their craft from those who have gone before.
- 5. New attorneys by their nature have to be curious and ask questions. Workers' compensation claims are like treasure hunts. You go through a myriad of obstacles to get the result you hoped. Patience is the key to every case. I believe that workers' compensation lawyers turn out better practitioners than in any other section.
- 6. My tenure as chair and member for many years gave me wonderful friendships with lawyers on both sides. We still remain friends after many decades. It was always a pleasure to call a friend to give me some help on a case. All were respectful and always willing to help out. At age 75, they are always a call away.
- 7. My wife told me never to go to my grave only doing one thing. After practicing workers' compensation since 1974, it was time to retire and move on to enjoy my time on nonprofit boards and to help other people enhance their lives. I enjoy it tremendously.

Ramon Malca, Chair, 1989-90 and 2005-06

- 1. I'm still actively practicing.
- 2. I selected Key West for one retreat, and I do not recall the location of the other retreat.
- 3. Many memories, a lot of laughs of my years of involvement on the Executive Council. Developed friendships with a diverse group of great people.
- 4. Having a voice in the direction of policies and positions of our section of the Bar is vital.
- My advice would be to attend executive council meetings and show interest in participating in committees.
- 6. My years of involvement in the section as a member of the Executive Council resulted in my active involvement in efforts designed to enhance our practice and to some extent influence legislative activity. Merely handling cases without being actively involved in our profession I found to be unfulfilling. My professional involvement in this section had a positive impact on me personally and without doubt enhanced me professionally.
- 7. During my term as a member of the Executive Council, we created emeritus status as a method for encouraging active practitioners to no longer run for office, opening up the opportunity for other practitioners to become involved in the section. It was a great idea then and frankly a good idea.

Dennis D. Smejkal, Chair, 2003-04

- I am in my 35th year of practice, and except for a very short (two months in a defense firm) period, I have been representing injured workers exclusively. I have the pleasure of having both of my children, Dena and James, practicing with me.
- 2. One of the first things I said upon taking over as chair was to tell the Executive Council to mark their calendars because we were going to Key West for the long-range planning retreat. Key West is one of my favorite places in Florida; it has great food, entertainment, and weather, not to mention a fun place to people watch. It definitely was one of the more fun trips I went on with the EC.
- 3. My favorite memories start with the camaraderie I enjoyed with many of the best workers' compensation lawyers in the state that were also on the Executive Council: David Levine, Dorothy Clay Simms, Vince Lloyd, Mark Zientz, Richard Sicking, Mac McCarty, Jim Smith, Mary Ann Stiles, Wendell Kiser, George

Kagan, Tom Conroy, Richard Chait, Steve Rosen, Al Frierson, Herb Langston, Ray Malca, and Gerry Rosenthal, to name just a few from back then. Sorry to those I overlooked. The Executive Council then, unlike now, was so politically divided that we nearly resorted to secret votes on routine issues because the vote would be used against the defense lawyers, for business purposes, if they voted the "wrong" way. We had several intense debates followed by some controversial votes. As you can imagine, that division made for some very intense meetings, but as we worked through those times, we set the groundwork for the unity the Executive Council enjoys to this date. We also enacted term limits, for which I was the first to term out, making room for new members. By far my favorite memory is when, as chair, I went to Tallahassee to give the State of the Section report to the BOG. Unbeknownst to me, it was also Supreme Court day at the BOG. As I sat at a table having BBQ for lunch by myself, a gentleman sat down across from me and we struck up a conversation. He asked me what type of law I practiced, and I explained why I was there. He asked me what I thought of the new changes to the statute, and I candidly told him while others joined us at the table. Quickly a gentleman sitting next to him was trying to divert the conversation to another topic. I did not understand what seemed to me to be rude. Within moments of that, they announced it was Supreme Court day and asked for the justices to stand up. Much to my surprise and embarrassment, the gentleman I was conversing with about how bad the law was going to be, and was maybe unconstitutional, was one of the justices. The gentleman next to him who interfered with our conversation was a BOG liaison. I realized then I had just ex parted a justice of the Florida Supreme Court. In retrospect, I was right; parts of that law were much later found to be unconstitutional.

- 4. I do believe and recommend that all lawyers practicing workers' compensation should become members of the section (I was the membership chair for many years) as there is no greater resource of information than through the section, from the newsletters, the various seminars, and the trial practice seminar, which is soon approaching.
- My advice to new attorneys entering the practice is to get a mentor. This practice can be very rewarding,

- and challenging, as it is a very complicated system with so many changes in the law having taken place over the years. Section 440 is one of the largest (179 pages) and most complicated sections in Florida law. We also have a multitude of rules, administrative and procedural. Very few new lawyers can successfully navigate all of what they need to know, without help. Get a mentor, inside your firm or outside your firm; mine was David Parrish.
- 6. My service on the Executive Council spanned from 1991 to 2006. During that time, I was closely connected with many of the best lawyers in the system. It was invaluable to me to learn from many of the folks listed above and to be on the cutting edge of what was happening in and to our area of law. I learned so much from those folks and my experience on the Executive Council.
- 7. I believe I was the first to accept emeritus status once the status was created. At first we could just attend and make comments, but could not vote. Once the vote was given to emeritus status folks, it made participation much more meaningful, and I encourage all that are eligible to take it.

Mark L. Zientz, Chair, 2007-08

- Supreme Court Certified Circuit Civil Mediator. But I still accept workers' compensation cases!
- 2. Dallas—Because my son, daughter-in-law, and three grandchildren live nearby.
- 3. Joe's Stone Crab luncheon meetings, which I can still attend when there are no pandemics. And some law stuff.
- 4. Some things can be controlled and others not. The section's Executive Council has a voice through the Bar to comment on our destiny.
- 5. Stick with it. In the not too distant future, you may be the sole workers' compensation lawyer in the state. Whether you are claimant or defense, comp has always been a small but usually nonaggressive type of lawyering. Further advice: Get involved in peripheral organizations, like the Friends of 440 Scholarship Fund, which Richard Sadow (deceased) led the 440 organization to start and also contribute to the fund. It was the year I was president of 440, and I am very proud of its success.
- 6. The Executive Council, which is made up of claimant and defense is a way to serve all the people in the system and not just your practice.

7. To give younger lawyers a chance to take the helm. I pushed a much younger Richard Chait to become active. And I was termed out, too.

Richard S. (Rick) Thompson, Chair, 2010-11

- Vice President, Claims-Legal, Zenith Insurance Company.
- 2. New Orleans—I was looking for a fun city in the South with a little history. Being from the Carolinas, I totally "whiffed" by not selecting Charleston or Asheville, but my successors made up for my mistake!
- 3. Getting to know other lawyers from around the state that care about our practice. Also, being able to put down our swords and shield of our everyday practice for the purpose of solving problems that impact all workers' compensation lawyers. Also, after the 2003 reforms, we faced the hardest time in Florida workers' compensation history. As scary as it was, I am proud of our section in that it survived a very rough time.
- 4. If you care about our practice and want it to survive and thrive, this is where you can help and make an impact. You get out of it what you put into it.
- 5. Our practices can be shuttered with the stroke of the legislative pen. Why leave your future in someone else's hands and not your own? Be involved and help improve the practice.
- 6. I feel that I have contributed to the practice and have made many strong friendships along the way. We have some really smart people in our section, and you are missing out if you do not take the time to get to know them and learn from them.
- 7. As important as it is to contribute, it is also important to mentor and allow younger attorneys to grow. By taking emeritus status, I opened the door for someone else to experience what I had and to contribute to the practice, while still being able to stay involved and, more importantly, attend the meetings!

Bill Rogner, Chair, 2014-15

- 1. Shareholder, HR Law.
- 2. Austin, Texas. I love two things—great food and live music. Austin excels at both. Also, the retreats were almost always in NYC, Chicago, Boston, etc. I wanted to take us someplace we'd never been.
- 3. Becoming a new council member along with Stewart

- Colling. Attending the retreats and ski trips. Meeting and becoming friends with lawyers from other parts of the state who I would have otherwise never known. My year as chair.
- 4. Because it's fun and rewarding.
- First and foremost, learn the law. Get involved in the section. Seek out a mentor. Join an Inn of Court. Go to every WC Forum.
- 6. It allowed me to develop a reputation and relationships statewide because of the nature of the council lawyers from every part of the state. Service on the Executive Council was also a way for me to give back to a practice that has given me so much.
- To allow new members to contribute. I personally believe that staying on indefinitely is inappropriate.
 The Executive Council needs the new ideas and renewed energy that new members bring.

Paul M. Anderson, Chair, 2017-18

- Claimant attorney practicing with Anderson & Hart PA
- 2. Asheville, North Carolina. The hotel (Grove Park Inn) is a top draw, and the city/area offered many group activity options (river rafting, pub crawl).
- 3. Too many memories to mention, but I enjoyed the camaraderie of many leadership retreats, ski seminars, and January meetings at Joe's Stone Crab in Miami.
- 4. The section offers attorneys the opportunity to give back to the practice and to influence the practice in many positive ways.
- 5. Learn your craft first, then get involved and stay involved. Everyone has something to offer.
- It has made me a better attorney by allowing me to view the big picture when it comes to practicing workers' compensation.
- 7. The emeritus status came into being my year as section chair. I drafted a new set of bylaws for the section while serving as chair and wanted to encourage council members who had already served as section chair to step aside to allow younger section members the opportunity to serve on the Executive Council. Hence, we created the emeritus status to let past chairs step aside while affording them a continuing right to vote on any issues before the Executive Council.

Focus: EXPLORING EMERITUS STATUS

Future: Improving Our Members Skills With the Trial Advocacy Program



In 1987, I attended a trial program designed to assist lawyers in civil trial preparation. It was put on by the Trial Lawyers Section of The Florida Bar. In attendance as a student, like myself, was Richard Sicking. We both had tried many workers' compensation cases, but were there to try to improve our

skills. Shortly after attending the program, I became chairman of the section, and we created what has come to be known as the Trial Advocacy Workshop. Since that time well over 300 lawyers have attended and participated in the program.

Our original instructors included Steve Rissman, Gerry Rosenthal, David Parrish, and Richard Sicking. Through the years the judges and attorneys who participated in our program have included legendary members of our judiciary and profession. They include the Honorable Alan Kuker, John Tomlinson, Michael DeMarco, Deputy Chief David W. Langham, Henry Harnage, Daniel Lewis, Robert McAiley, Diane Beck, and W. James Condry.

Attorneys who have served as faculty members have included Steve Kronenberg, Mark Zientz, Glen Wieland, James Fee, Karen Gilmartin, Robert Rodriguez, Jeffrey Jacobs, Richard Thompson, and William Rogner, along with many other highly regarded leaders of the Workers' Compensation Section of The Florida Bar.

The program is designed to enhance the advocacy skills of the students/lawyers who are attending. It is not a substantive law program but rather a program designed to challenge students to consider what they need to do in order to be successful on behalf of the client, whether claimant or defense.

During day one of the program, a substantial amount of time is spent on direct instruction from highly

experienced faculty members to assist students/lawyers in formulating questions for both direct and cross examination of witnesses. Emphasis is placed on laying the foundation for the introduction of evidence and the proper way to exclude evidence. Advice is given on preservation of a record in the event of appeal.

Day two involves a trial put on by the students/ lawyers assigned to do both direct and cross examination of lay and expert witnesses with an actual judge of compensation claims (JCC) presiding over the trial. Each JCC is assigned a faculty member to assist by providing constructive recommendations. The uniqueness of the program is the willingness of the JCCs to share their thoughts on proper questioning and the strategies they regard as appropriate.

The program is a hands-on learning experience rather than a lecture. Faculty members and judges are selected to serve based on their common desire to improve the advocacy skills and professionalism of the students/lawyers attending our program.

The 2022 program will be conducted in Miami on May 13-14, 2022. The program is sold out. If you have an interest in attending next year, please contact Willie Mae Shepherd, program administrator of the Workers' Compensation Section, at 850-561-5624 or wshepherd@floridabar.org.

Ramon Malca is a primary shareholder at Malca Law PA in Miami. He was admitted to The Florida Bar in 1975 and the U.S. District Court, Southern District of Florida. Mr. Malca received his undergraduate degree from the University of South Florida and his J.D. from the University of Miami. He received the W. L. "Bud" Adams Award of outstanding service in advancing philosophy and practice of the Workers' Compensation system in 1992.

The How/When/Why of Asking Questions in Mediation

by Robin Carel Shaw

Mediators mediate in their own personal style, but the rules guide us and trial and error informs us. Although attorney mediators may fire questions at clients, witnesses, or the opposing party as a matter of course, and mental health mediators may pose questions to patients to explore perceptions, those approaches are not useful or appropriate in mediation. Mediators must learn when and how to ask questions.

If a mediator remembers that his role is to facilitate conversation between parties and not to take on the role of interrogator, the mediator avoids hijacking the mediation. Every mediator must find a way to actively listen and observe, being cautious before contributing, suggesting, or participating in the parties' negotiation.

Let me suggest the following approach: First, different types of questions are suitable for different stages of the mediation; and second, questions should serve specific purposes in furtherance of the particular stage of mediation.

People arrive in mediation front-loaded with emotion. It takes time—and a reason—to move them to a readiness to actually "hear" what the other side is saying, and they accomplish this by being shown how to listen to overcome the logjam that has brought them to mediation. Mediation gives them a chance to succeed, but mediation is a process that takes time.

To move parties from rigidity to malleability, they must be ready, willing, and able to accept new information. It is the mediator's questions—arising from statements made by the parties themselves—that help them hear and manage information.

Mediations have five stages:

Stage 1: Introductions with opening statements and initial information put "on the table"

Stage 2: Negotiation where positions and information are exchanged, explored, and expanded

Stage 3: Working toward an agreement where various positions and options are narrowed and organized into a resolution outline

Stage 4: Drafting the settlement agreement where details and language are refined and clarified

Stage 5: Executing the settlement agreement

Questions in each stage of mediation should be suitable for that part of the process and should prompt analysis, introspection, or narrative.

Stage 1: Why should a party change his position before any of what he perceives to be the "facts" are disproven or challenged? Questions at the beginning of mediation should draw out new information, details on perspectives, or changes in facts or circumstances.

Stage 1 – Narrative: Tell us your story. Tell us why you're here.)Please detail what you want to accomplish today. Talk about stumbling blocks you anticipate today. List the details of an ideal result for you today. Please share details of how things were before this dispute arose.

Stage 2: Negotiation requires parties to explain and justify their current positions. Questions at this stage of mediation should aid a party in further explaining or justifying, encourage creativity and flexibility, and assist each party to listen to the other.

Stage 2 – Analysis: You mentioned ______. How would that work? What would you need for that to work? You've shared many things you would like in order to resolve the dispute. Is there anything on the list that you can't live without? What are your priorities? Is there anything the other side might propose that you can't live with? How do you expect them to respond to that? What are the options if you don't reach an agreement today?

Stage 2 – Introspection: Are you financially able to commit to the offer you've made? Are you being realistic in demanding that? How would you modify the current proposal? Is there any nonmonetary offer (time, different interest rate, future benefit, etc.) that might lead to a resolution? Will you be able to prove that in court if you don't reach an agreement in mediation? What are you concerned about if an agreement isn't reached today?

Stage 3: When parties begin to find common ground, that can be the basis for a resolution, so questions should focus on those points to elicit more details, exceptions, and concerns to continue to narrow the gap between them.

Stage 3 – Analysis: What variations would you consider given the current offers on the table? If you can't ______, what options would you offer? If you can't afford to ______, what options would you offer? If you can't make the proposed monthly payment, what alternatives could you suggest?

Stage 4: Once the parties have successfully negotiated their deal, they have proven to themselves that the dispute can be resolved, so drafting the agreement is almost always a "team" process. Questions at this stage should help the parties find the words and concepts that support and explain the agreement reached; that is, the agreement should be a step-by-step explanation of the resolution with each party's responsibilities clearly explained.

Stage 4 – Analysis: You've agreed to a payment schedule; what other details do you need to fully understand the deal? You've agreed to ______; are there any variations you want to discuss? How would that work? Does the agreement on the table cover everything? What, if anything, needs to be discussed to completely resolve the dispute?

Stage 5: With online mediation, getting an agreement reviewed and signed presents new challenges. How the draft agreement is to be prepared, circulated, revised, and executed needs to be clearly outlined. Questions at this stage of the mediation should help the parties focus on the procedural tasks to be completed.

Stage 5 - Analysis: How do you want the draft agreement to be circulated? (email? text attachment? Zoom chat attachment? other?) How much time do you need to review the draft? How do you want to execute it once the draft is approved by all? (DocuSign, email, U.S. Mail, other?) Do you want to come back to mediation if there are questions or concerns about the draft, or will you work it out between yourselves?

Since our goal is to get the parties speaking with one another, interrupting that dialog makes no sense! Active listening (and active observation) means turning off the desire to ask questions and actually listen to the conversation, thinking long and hard before intruding/interrupting/interfering unless something is said or inferred that could be highlighted to move the mediation forward or correct a misperception. It should be a productive interference.

If the mediator asks too many questions, it creates reliance on the mediator to direct the process, depriving the parties of the 100% control they jointly have over the outcome of their dispute in mediation. Once the parties are speaking with each other (and not turning to the mediator for guidance), a resolution is more likely and their discussion will be more productive.

A mediator who gets the parties speaking to each other by modeling the appropriate behavior and then lets them negotiate in the safe environment of mediation, with the mediator only speaking up to ask a question arising from something one of the parties said, is an effective mediator, especially when the parties have a personal or business relationship to be maintained, restored, or ended.



Robin Caral Shaw, Esq., is the primary trainer for the Mediation Training Group. She can be reached at robin@ladymediator.net.



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The 120-Day Fraud

by Daniel W. McKnight

Ceci n'est pas une pomme.

A customer walks into a grocery store. She grabs an apple from the produce section, places it on the register, and the cashier says, "That'll be \$1, please." The customer pays the bill, takes the apple, and canters into this hypothetical.

Q: Describe the preceding transaction.

A: Obviously, the customer rented the apple. Under the 120-Day Rule, she must treat the apple as if she had bought it and may return the produce within four months.

Q: Oh, it's too late to return the apple?

A: Perhaps she did bite the flesh of the apple; however, there was no discussion about purchasing the core of the apple. Nobody would intentionally buy the whole apple. She's not a horse!

Q: The whole apple, you say?

A: ...

The Second Bite at the Apple

Workers' compensation is a self-executing system. Those words have meaning. Employees do not initially report their injuries to the judge of compensation claims (JCC), but instead claim compensability informally through their employer. The employer/carrier (E/C) then adjudicates compensability, often informally, through its own internal process of questioning, written injury reports, recorded statements, etc. By statute, "Compensable' means a determination by a carrier or judge of compensation claims that a condition suffered by an employee results from an injury arising out of and in the course of employment."

When the E/C becomes aware that a claimant has medical needs, the E/C has three options: it must either pay for them, pay and investigate under section 440.24(4), or deny compensability. The E/C may deny all injuries by simply ignoring the employee. The E/C "obviously" accepts the employee's condition when the E/C provides benefits.

If the E/C wants to pay and investigate, then the statute requires timely, written notice. This means that the E/C

must use its words. When an employee complains of low back pain and the E/C elects to furnish an evaluation at a walk-in clinic, without reserving its rights, the E/C has accepted the compensability of the employee's low back condition, whatever that might turn out to be.

Q: Ma'am, you can't return an apple after you've eaten it.

A: The cashier never said the apple had seeds!

Q: It's an apple. You should have known that was a possibility.

A: That's a question for an expert. I'm not a horticulturist. I'm just a horse!

Why Horses Don't Talk

Horses can talk. I've seen it on television. Horses can also apparently type. I routinely receive pleadings (e.g., responses to petitions for benefits) that have not been signed by defense counsel. This is not a question of ability. Rather, horses knowingly choose to remain silent about the details when they offer to take an employee for a ride.

Some may be overworked, shy, or forgetful; however, electing to pay and investigate also requires the E/C to "immediately and in good faith commence investigation." That is an affirmative duty that some horses don't want to assume. The remedies for a breach of this duty have not been fleshed out, so many assume there is no remedy. As a result, many love to frolic in the open fields of 120-day investigations while other horses find themselves to be more comfortable with lying.

Moreover, employees tend to notice a red flag when handed a formal, written notice:

Q: Wait!? You're not going to take care of me?

A: We might; just go to our doctors.

Q: What if I don't like your doctors?

A: We pay the doctors. We pick the doctors.

Q: Do I pick my attorney?

A: ...



Talk is cheap. It takes checks to stack decks.

Every doctor knows who pays the bills. As a respected surgeon recently told me, "You'll get to know who the players are. I do IMEs for employees, too."

Nobody wants to be perceived as levying acerbic accusations at doctors, lawyers, or judges. Some people can be mature and accept criticism in a constructive manner. Others can't. So, JCCs are necessarily political creatures, aware of these unpleasant realities:

Q: What if two doctors disagree?

A: That's understandable. People have different perspectives.

Q: No, I mean what if two doctors disagree with a third?

A: I suppose anyone can make mistakes.

Q: What if five or six doctors all agree that the employee's IME is wrong?

A: ...

Authorized Treating Providers

"Whenever a doctor selected by the defendant conducts a physical examination ... there is a possibility that improper questions may be asked and a lay person should not be expected to evaluate the propriety of every question." For this reason, employees have a right to legal counsel at all evaluations performed by the E/C's physicians.

Similarly, "it is unfair to place insureds in a position where anything they say may be used to terminate

their benefits, but they are not allowed an opportunity to protect themselves." Accordingly, employees have a right to record these examinations.

While the E/C's acceptance is binding, these evaluations and treatments remain highly adversarial. As an agent acting on behalf of the E/C, authorized providers speak for the E/C and question employees as to many issues outside of compensability. Their office notes discuss future medical care, subsequent intervening accidents, and—of course—accusations of fraud are always a possibility. When there is no attorney asking the doctor to clarify his questions and no video to record what the employee actually said, things can get lost in the shuffle.

Three Card Monte

Suppose that an unrepresented employee reports an injury to her employer. She has already been to her family doctor, obtained an MRI, and precisely conveyed the nature of her condition as she understands it. The E/C knows about the employee's relevant medical history because she has worked with the same employer for 20 years. This employee has completed several FMLA forms and has reported all prior work injuries.

The employee may be wrong. Perhaps the injury was not caused by work. Perhaps the condition is work related but was not caused by an accident. Perhaps it was caused by work, but the employee was performing work outside the course and scope of her employment.

What is certain in this hypothetical is this: the E/C doesn't issue a Notice of Denial, and the E/C doesn't

provide timely, written notice of an election to pay and investigate. Instead, the E/C conducts a brief, informal inquiry. The employee completes a form and provides a written or recorded statement. The employer calls the adjuster and sends the employee to the company's preferred walk-in clinic doctor, then chiropractor, then physical therapist, then MRI facility and radiologist, then an orthopedic surgeon, and for the grand reveal:

The E/C admits it never provided any benefit for the actual cause of the employee's problems!

Q: Describe the E/C's actions from the claimant's perspective.

A: Fraud. The offer to provide medical care is insurance fraud: a false, fraudulent, and misleading statement of acceptance made for the purpose of ultimately denying benefits for the actual cause of the employee's medical needs. As an intentional tort excluded from the comprehensive statutory scheme, the actions may also be federal mail or wire fraud: a scheme or artifice to deprive the employee of the intangible right to honest services.

Q: These are board certified medical doctors, experienced adjusters, and respected attorneys.

A: They're co-conspirators in a first-degree felony punishable by up to 30 years in prison, excluding federal charges.

Q: These are large enterprises that have been working with these individuals for decades. It's a common practice. That's how workers' compensation works!

A: It's a racket.



Daniel W. McKnight is a claimants' attorney practicing in Tampa, Florida. He received his undergraduate degree from the University of South Florida in 2010 and his law degree from the University of Alabama in 2013.

Protecting Workers' Compensation Proceeds in Bankruptcy – Everything You Always Wanted to Know About Debts (But Were Afraid to Ask)

by Kenneth M. Hesser

Having entered the practice of workers' compensation at the turn of the 21st century, I learned one lesson fairly quickly—always have a hedge. When it became clear sometime around 2005 that significant changes in the practice of workers' compensation in Florida were afoot (spoiler alert: the Legislature changed section 440.34, Florida Statutes), I noted a plethora of clients inquiring about filing bankruptcy. Every claimant has an individual story, of course, but all in our community can agree that the benefits provided by our workers' compensation system are certainly limited and financial troubles run part and parcel with even a compensable work injury.

With the mid-aughts' uncertainty of the practice's future, I found an old bankruptcy "summary" book at my former law firm and decided to educate myself on the federal bankruptcy statute. Fast forward 15 years. I have now filed hundreds of Chapter 7, Chapter 13 ... even a Chapter 11 case, in all three Florida bankruptcy

districts. A significant portion of these bankruptcy filings consists of former workers' compensation claimants, often in conjunction with case settlements. Having received numerous inquiries from colleagues over the years, typically asking about protection of workers' compensation funds from a bankruptcy trustee, I've observed the natural overlap between a workers' compensation practice and a debtors' bankruptcy practice.

This article is intended to give a brief overview of the bankruptcy process, specifically how the bankruptcy court will consider a claimant's workers' compensation position. While I write with the perspective of a claimant's counsel representing potential individual debtors, I maintain it is also important for employer/carrier attorneys to be aware of these issues, especially if concerned about a claimant's solvency or use of indemnity/settlement payments.

A Basic Primer on Bankruptcy and Exemptions

For purposes of this review, I am focusing exclusively on a Chapter 7 bankruptcy filing, which comprises the vast majority of cases where a debtor also has an interest in workers' compensation. The reason? The bankruptcy law presumes, after changes made in 2005 under the George W. Bush administration, that a debtor who earns a certain amount of income has an ability to pay back all or part of one's debts. As virtually all workers' compensation claimants are experiencing reduced or no income, a Chapter 13 filing (where a debtor makes payments for up to 60 months to the court) is typically not an option. This threshold income figure, known as the "means test," is updated yearly and is dependent on the filer's state and county of residency.

When consulting with an individual or a married couple for a bankruptcy filing (we'll call either entity the debtor), my main inquiry is rarely about the amount of actual debt. For purposes of a standard analysis on a Chapter 7, someone having \$10,000 of credit card debt is substantively indistinguishable from someone with \$200,000 of medical debt. Under the same review as contemplated by the means test, it's not necessarily the debt total that matters, but rather the ability for the debtor to pay something back. Or, in the case of Chapter 7 cases, whether the bankruptcy trustee can sell an asset of the debtor's to pay back the creditors who are owed money at the time of filing.

As you are almost certainly aware, Florida guarantees residents one of the best homestead exemptions in the nation. With rare exceptions (especially in a case connected to workers' compensation), a family's home is safe from liquidation by the trustee. This includes mobile homes and attached land. If the debtor lacks a homestead, Florida's Constitution allows for a "wildcard" exemption for the debtor: \$4,000 for an individual and \$8,000 for a married couple. This can be used to protect any of the debtor's unexempt property and is typically used for vehicles.

With these factors in mind, for a standard Chapter 7 debtor, my main concerns are always: (1) vehicles, which only receive a total exemption of \$1,000 for each spouse; and (2) cash in bank accounts. Most retirement accounts are protected from the bankruptcy trustee, including IRAs and most 401(k) plans. That said, the presence of significant retirement funds can be used by an aggressive trustee as leverage to scrutinize a debtor's other (supposedly) exempt cash assets. This scenario

is often where a workers' compensation settlement or accrued continuing indemnity payments can come into play.

Section 440.22 Protection

Workers' compensation payments are considered exempt assets when analyzing a bankruptcy estate. Such protection is set out in the Federal Bankruptcy Code, 11 U.S.C. § 522(d)(10):

[t]he following property may be exempted ... (10) The debtor's right to receive ... (C) a disability, illness, or unemployment benefit;

This is codified on a state level in section 440.22, Florida Statutes:

Such compensation and benefits shall be exempt from all claims of creditors, and from levy, execution and attachments or other remedy for recovery or collection of a debt, which exemption may not be waived.

There are a minimal number of Florida cases addressing the section 440.22 exemption regarding creditor claims. In Sullo v. Cinco Star Inc., 755 So. 2d 822 (Fla. 5th DCA, 2000), the Fifth DCA affirmed that "no statutory restrictions" apply to the use of workers' compensation funds once received by the claimant while still noting that such benefits may be "preserved or squandered."

The Florida Supreme Court has also analyzed this issue in Broward v. Jacksonville Medical Center, 690 So. 2d 589 (Fla. 1997). In pertinent part, the Court discusses the section 440.22 exemption and its application and restates the validity of the exemption, as long as "funds claimed as exempt were traceable to the workers' compensation benefits."

Practice Points

My typical workers' compensation claimant who files bankruptcy does so in the ensuing months subsequent to receiving a washout settlement. Some considerations for a practitioner to consider:

• If a claimant is contemplating filing bankruptcy, always carefully account for any workers' compensation funds in the claimant's bank account, be it weekly indemnity payments or the proceeds of a washout. Opening up a separate checking account purely for the proceeds of one's workers' compensation funds, while not required, is optimal.

- It is not a smart move for a claimant to cash a workers' compensation check and then subsequently expect, without proper accounting, to be automatically protected from inquiry from a trustee. When I mentioned the issue of trustee leverage earlier, it anticipated precisely this scenario. Once workers' compensation funds are used for a more "luxurious" purpose (a car or even excessive weekly groceries could raise an eyebrow here), a trustee could then claim a colorable argument that such funds have been "converted" to nonexempt property and argue a right to recover the spent funds for the estate (and thus the creditors).
- To be fair, a quality debtor's attorney can effectively counter that such converted funds were at least partially attributable to wage replacement and such purchases (especially cost of living spending) should be allowable uses of those funds.
- There is nothing to keep a trustee from raising the converted funds argument with the Bankruptcy Court, especially if a claimant is somewhat haphazard and non-judicious in using indemnity or settlement proceeds. If anything, the trustee can use these objections to drag out a bankruptcy process (meaning the granting of the ultimate discharge of debts) for several months, costing time and money for the debtor and counsel.

• What often happens is the trustee, in order to resolve the issues with the estate, will suggest a debtor use some of the remaining washout money, or even protected money in retirement, to resolve the bankruptcy case in lieu of the risk of going before the judge. This is the reality of how the system often operates, given that the statute is geared toward creditors' rights. Hence why it is so very important for claimants to be well aware of the risks, even for seemingly "protected" money.

My bottom line for clients considering a bankruptcy filing is to hold the washout money in a separate account, spend as little as possible on (even necessary) expenses, and file the bankruptcy sooner rather than later to ensure minimal questioning about the use of said funds, as well as to alleviate any risk of the conversion argument.



Ken Hesser is a partner in the law firm of Hesser & Kipke in Gainesville. Originally from Philadelphia, Pennsylvania, he is a graduate of Penn State University and Wake Forest School of Law. He has been board certified in workers' compensation since 2018.



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Expert Medical Advisor Motions

by Judge Erik B. Grindal and Jessica Carrie

Whether, when, and how to seek appointment of an expert medical advisor can have a significant impact on the ultimate resolution of issues in a workers' compensation claim. This article addresses some important considerations regarding these issues.

Utilization of an expert medical examiner to resolve disputes between the parties is a tool outlined in section 440.13(9), Florida Statutes, that allows for the claimant or the employer/carrier to request an expert medical examiner when physicians disagree on the appropriate medical treatment, the medical evidence supporting an employee's complaints, or the physical ability of an employee to work. The expert medical advisor is available as a method to resolve the conflict.

Legal Basis for Expert Medical Advisor

The first step when considering whether to file a motion for appointment of an expert medical advisor is to review the relevant statutory provisions. Section 440.13(9) (c) is the statutory provision addressing when an expert medical advisor may be appointed and the significance of the expert medical advisor's findings. In relevant part, this provision states:

If there is disagreement in the opinions of the health care providers, if two health care providers disagree on medical evidence supporting the employee's complaints or the need for additional medical treatment, or if two health care providers disagree that the employee is able to return to work, the department may, and the judge of compensation claims shall, upon his or her own motion or within 15 days after receipt of a written request by either the injured employee, the employer, or the carrier, order the injured employee to be evaluated by an expert medical advisor. The injured employee and the employer or carrier may agree on the health care provider to serve as an expert medical advisor. If the parties do not agree, the judge of compensation claims shall select an expert medical advisor from the department's list of certified expert medical advisors. If a certified medical advisor within the relevant medical specialty is unavailable, the judge of compensation claims shall appoint any otherwise

qualified health care provider to serve as an expert medical advisor without obtaining the department's certification. The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims. The expert medical advisor appointed to conduct the evaluation shall have free and complete access to the medical records of the employee. An employee who fails to report to and cooperate with such evaluation forfeits entitlement to compensation during the period of failure to report or cooperate.

It is important to note that absent clear and convincing evidence to the contrary, an expert medical advisor's opinion on a designated conflict of medical opinion is presumptively correct.

Alternatives to Requesting an Expert Medical Advisor

Requesting an expert medical examiner is not the only method available to resolve conflicting medical opinions. The cost, lack of control regarding who will serve as the expert medical advisor, and the limitations regarding contact with the expert medical advisor can leave parties reluctant to make the request. Although rarely utilized, there is an alternative to requesting an expert medical advisor that may provide a faster and more cost-effective solution that is also binding on the parties.

Consensus Independent Medical Examination

Depending on the facts of a case, the conflicting medical opinions, and the expert medical advisors available, a potentially effective alternative to requesting the appointment of an expert medical advisor is a consensus independent medical examination.

Section 440.13(5)(g) states in relevant part:

When a medical dispute arises, the parties may mutually agree to refer the employee to a licensed physician specializing in the diagnosis and medical condition at issue for an independent medical examination and report. Such medical examination shall be referred to

as a "consensus independent medical examination." The findings and conclusions of such mutually agreed upon independent medical examination shall be binding on the parties and shall constitute resolution of the medical dispute addressed in the independent consensus medical examination and in any proceeding.

Utilizing a consensus independent medical examination allows the parties to select a medical examiner themselves. This can avoid concerns based on the limited number of available physicians for appointment as an expert medical advisor, as well as allow the parties input into which physician will be making such consequential decisions.

Banuchi Notice

Generally, the party requesting appointment of an expert medical advisor is responsible for payment of the examination. Due to the cost, an injured worker may be reluctant to take on, or unable to afford, the expense of being the requesting party seeking appointment of an expert medical advisor. This concern is at least initially avoided by operation of the opinion in *Banuchi v. Dep't of Corrections*, 122 So. 3d. 999 (Fla. 1st DCA 2013).

In essence, Banuchi finds that a judge of compensation claims (JCC) is required to appoint an expert medical advisor, on his or her own order, when placed on notice of a conflict sufficient to warrant the appointment. This implicates section 440.13(9)(f), which provides that when a JCC orders appointment of an expert medical advisor, the carrier must compensate the expert medical advisor.

The filing of a timely and factually supported *Banuchi* notice serves to inform the JCC of the conflict. This in turn invokes the JCC's mandatory duty to appoint an expert medical advisor, without the injured worker bearing the cost as the requesting party.

Considerations for Preparation of Motion for Expert Medical Advisor

OJCC Rules of Procedure. When preparing to draft an effective motion for expert medical advisor or a *Banuchi* notice, there are a number of OJCC Rules of Procedure a practitioner must consider. The first is 60Q-6.102(11). This rule provides that the term *pleading* includes a motion. As such, procedural rules relating to pleadings are applicable to a motion for expert medical advisor. The second rule is 60Q.-6.102(12), which defines *personally* conferred as meaning communication in person, by

telephone, email, text messaging, or some other communication mechanism that permits an immediate, contemporaneous response.

Communication between counsel is both a mark of professionalism and required by 60Q-6.115(2). If you are considering filing a motion for expert medical advisor, it should be noted that the moving attorney is required to make a good faith effort to resolve the issue with the opposing party prior to filing. Not only is this required by the 60Q Rules and the Rules of Professional Conduct, such communication with the opposing party may result in resolution of important issues. This may include selection of the physician to be used and a clear identification of the areas of dispute to be addressed by the JCC and/or the expert medical advisor.

In drafting an effective motion for expert medical advisor, review of Rule 60Q.-6.115 is essential. 60Q-6.115(1) states in relevant part:

Any request for an order or for other relief shall be by motion and shall have a title describing the relief requested. ... All motions shall be in writing unless made on the record during a hearing and shall fully state the relief requested and the grounds relied upon. Any document referenced in any motion shall either have been filed prior to the motion or be attached to the motion. (emphasis added)

As applied to an effective motion for expert medical advisor, this rule addresses a number of important considerations.

Specifically state in the motion which doctors disagree and what they disagree about. A general statement such as "Dr. Smith and Dr. Jones disagree on the claimant's work status" is by itself conclusory and may be factually insufficient to establish that an expert medical advisor is required. A better practice would be to state "Dr. Smith stated in his January 1, 2021, report that the claimant is unable to work due to his compensable injuries. Dr. Jones stated in his January 10, 2021, report that the claimant is able to work as long as he complies with a 10-pound lifting restriction." The clear and specific identification of the physicians and the reports documenting a disagreement between health care providers will facilitate the JCC's consideration of the request. This degree of specificity should also be provided in a *Banuchi* notice.

Provide documentation of the medical opinion conflict. For the JCC to appoint an expert medical advisor, there must be a conflict in medical opinions. 60Q.-6.115(1) specifically states "Any document referenced in any motion shall either have been filed prior to the motion or be attached to the motion." When filing a motion for expert medical advisor, provide the specific documents that establish the conflict. This can be by reference to docket and page number of a previously filed document or by attaching the actual report and/or deposition testimony to the motion. Failure to provide the documentary evidence demonstrating the conflict in medical opinions may result in the motion being denied due to noncompliance with 60Q.-6.115.

It is important to note that there are interpretive differences between districts regarding whether the medical evidence utilized to establish a conflict in medical opinion needs to be admissible. The best practice is to assume that all evidentiary rules apply.

State the relief requested and the question(s) the expert medical advisor is to answer. 60Q-6.115(1) requires that a motion "fully state the relief requested." While potentially subject to interpretation, for an expert medical advisor motion, the relief requested is not just appointment of an expert medical advisor. 60Q.-6.115(3) states "The motion and proposed order shall specify the relief being requested or ordered in reasonable detail....." The relief requested when seeking appointment of an expert medical advisor is to have the expert medical advisor resolve a specific dispute. The best practice is to state the actual question or questions sought to be answered.

Stating the question(s) to be asked of the expert medical advisor is not only required by 60Q-6.115(1), but also is strategically beneficial. How a question is framed can impact the answer received. By way of example: "What is the claimant's work status?"; "Is the work status opinion of Dr. Smith, who performed the claimant's surgery, a more accurate opinion than Dr. Jones's?"; and "Is Dr. Jones's opinion on work status more accurate that Dr. Smith's, based on Dr. Jones's having performed a functional capacity evaluation?" all ask the expert medical advisor to address a claimant's work status.

How an issue is framed may impact how the expert medical advisor analyzes the factual dispute. While your phrasing of the issue is not binding on the JCC, it will often serve as the starting point from which the questions to be asked are formulated.

Identify potential physicians to be appointed as the expert medical advisor. The list of expert medical advisors is limited. It is not uncommon for there to be no geographically available expert medical advisor on the "EMA list." It is also not uncommon to find that an otherwise qualified physician cannot be utilized due to a conflict based on a business relationship with one of the doctors already involved in the case.

If you are aware of qualified physicians in the geographic location, provide their information and qualifications in the motion. To further limit the risk that a physician may be selected who one or more of the parties would prefer to avoid, the parties should consider efforts to reach agreement on an appropriate physician to serve as the expert medical advisor prior to the filing of the motion.

When to File a Motion for Expert Medical Advisor— Timeliness

The timeliness of a motion for expert medical advisor is important. Section 440.25(4)(d) provides that a final hearing shall be held within 210 days after the receipt of a petition for benefits. This provision reflects the will of the Legislature that workers' compensation claims be resolved expeditiously. The timing of seeking appointment of an expert medical advisor should be considered in conjunction with this statutory provision. The statute does not set forth a deadline for the filing of a motion for expert medical advisor; however, the issue of timeliness has been addressed in a number of appellate decisions.

Generally, an expert medical advisor request is timely if it is made with reasonable promptness after the conflict in the medical opinions becomes apparent. A determination of what constitutes "reasonable promptness" and when the conflict in medical opinions "becomes apparent" is dependent on the particular facts of a case.

Conclusion

The determination of whether, when, and how to seek resolution of a medical dispute through an expert medical advisor can, and often does, determine the outcome of a litigated issue. As such, thoughtful consideration of admissibility of the evidence establishing the conflict, the framing of the medical questions to be asked, and the physician sought to be appointed may ultimately make the difference in whether your client prevails.



Jessica Carrier attended Indiana University in Bloomington, earning a B.A. in 1998. She attended Nova Southeastern University, Shepard Broad Law Center in Fort Lauderdale, Florida, earning a J.D. in May 2002. Since 2002, Ms. Carrier has represented injured workers and has also served as defense counsel, representing

the interests of employers/carriers/servicing agents. She served as an adjunct professor of civil pretrial practice at Nova Southeastern University, Shepard Broad Law Center from 2009 to 2010. Fluent in Spanish, Ms. Carrier is certified by the Madrid Chamber of Commerce in business Spanish. Since May 2018, Ms. Carrier has served the State of Florida, specifically Manatee and Sarasota counties, as senior attorney and state mediator for the Office of the Judges of Compensation Claims.



Following graduation from Wake Forest University, Judge Erik B. Grindal began his career in workers' compensation in 1992 as an adjuster for FCCI Mutual. While at FCCI, he earned his associate in claims designation from the Insurance Institute of America. Judge Grindal left adjusting in 1995 to attend law school at

St. Thomas University School of Law. While in law school, he was placed on the Dean's List for all six semesters and was awarded the "Book Award" as the best student in the study of workers' compensation by Adjunct Professor Thomas Conroy. Judge Grindal graduated cum laude from St. Thomas University School of Law in 1998 and was ranked in the top 10% of his class. Judge Grindal was admitted to The Florida Bar in 1998. Over the course of his career, Judge Grindal has represented injured workers, employers, and carriers. He has also represented corporate clients in complex commercial litigation and federal maritime matters and has argued before the First District Court of Appeal. He is board certified in workers' compensation and was appointed a judge of compensation claims in 2020 by Governor DeSantis.



Lawyers Advising Lawyers (LAL) is a free service offered to all members of The Florida Bar who may need advice in a specific area of law, procedure, or other legal issue. Currently, the program consists of more than 300 attorney advisors who volunteer to assist other members of The Florida Bar in this program. Advice is offered in more than 50 areas of law and procedure. Each LAL attorney advisor is required to have a minimum of five years of experience in his or her respective area of advice.



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To qualify, a LAL attorney advisor must have a minimum of five years of experience in his or her respective area(s) of advice and must be a member of The Florida Bar in good standing.



Who is someone who inspires you and why?

My parents are my biggest inspiration both personally and professionally. My father, who has a two-year college degree, started a business from the ground up and today has an extremely successful car business 48 years later. They have shown me that hard work, commitment, and passion are the ingredients to being successful.

Why do you practice workers' compensation law?

I began my law career in criminal defense and fell into the practice when I was approached to make a shift. Now, five years later, I enjoy the day-to-day practice and relationships I have built within our community.

Proudest accomplishment within the section?

Successfully arguing an advance and doing the legwork, discovery, and research on a totally denied case on many different defenses that led to a decision by the JCC that an accident did occur, notice was given, and the MCC was the accident.

Favorite workers' compensation law case?

Castellanos.

What is something few people know about you?

Even though I am a *millennial*, I do not consider myself to fit into the mold. I remember when computers were not small enough to carry around and the screens were black and white. I am not very tech savvy; I handwrite everything!

Favorite quote?

"Do your thing. Do it unapologetically. Don't be discouraged by criticism. You probably already know what they're going to say. Pay no mind to the fear of failure. It's far more valuable than success. Take ownership, take chances, and have fun. And no matter what, don't ever stop doing your thing" – Asher Roth

Best place you have traveled and what makes it special?

Marrakech, Morocco. It is filled with so much culture, and it's one of the most fascinating places I have ever been.

Something we did not know about you?

I love to run. I do not run nearly as much as I used to or would like to, but it is something that I enjoy and try to keep up with.

If you could have lunch with anyone from history, who would it be and why?

Princess Diana. I admire her resilience, keen fashion sense, and humility.

Q&A with Chick Leo

by Chick Leo



Top: Celebrating the championship with the team. Bottom left: Softball team Bye Week's championship win. Bottom right: Chirck's turn taking home the trophy.

Charles Holden "Chick" Leo has been licensed to practice law since May 21, 1992. In May of this year, he will mark 30 years of practice in workers' compensation law, 25-plus of those years in his own firm, Charles H. Leo PA (www.leotrialgroup.com), which he established on January 1, 1997.

Asked about his greatest accomplishments as a workers' compensation attorney, Mr. Leo related a trial victory in which he won compensability for a homeless man of his leg amputation after a nail puncture wound. The workers' compensation insurance denied antibiotics, which led to the amputation. Mr. Leo also takes pride in his role in the appellate case Cynthia Richardson v. Aramark, the second case consolidated behind Castellanos v. Next Door Co., 192 S. 3d 431 (Fla. 2016).

"We were allowed to brief my record, which included the reported fee disparities recorded by DOAH that showed the 'Keeto effect,' the data cited in *Castellanos* that led to the Florida Supreme Court's holding that if a claimant shows that his attorney would receive an unreasonable fee, then the claimant's attorney would be entitled to a fee 'that deviates from the fee schedule," Mr. Leo says.

Here Mr. Leo shares tips for a well-balanced work life that he has learned over his 30 years of practicing workers' compensation law.

Q: What do you do to start off your workday on a fresh note?

A: Morning meditation while hanging upside down on my inversion table (teeter) and then up to 45 minutes of treadmill work and strength training.

Q: What is your philosophy on a healthy workday?

A: When I'm at work, I stay focused and work efficiently. I don't take work home in the evening, and I turn off my work phone. When I'm at home, I want to be present for my family.

Q: Do you enjoy owning your own firm?

A: Yes, working long hours is easier when working for yourself, and you control your own time. If a job takes too much time from your family, then you should change jobs. I don't have to attend meetings that take away from the real purpose of my job. I'm a fan of banning afterhours emails, phone calls, and Zoom meetings.

Q: Are you active with sports or other activities outside of work?

A: Yes, I play softball and golf with my friends and travel a lot with family.

Q: Do you like any other activities that are a good source of exercise?

A: Yes, I like to add in surfing and bike riding on the weekends when I have the time.



440 Q&A

How did YOU end up practicing WORKERS' COMPENSATION LAW??



I clerked at a workers' compensation firm while in law school. My wife, fiancée at the time, was a private banker at SunBank. She introduced me to the attorneys at Langston, Hess, one of the bank's clients, and the rest is history.

Phillip Augustine, Esq., Maitland

I came back from the Gulf War and could no longer tolerate insurance adjusters. Stewart Colling promised me that I would only have to do workers' compensation for a couple of months until they got that straightened out, and then I would be doing medical malpractice again.

David Rickey, Esq., Orlando

Before and during law school, I worked as a paralegal in the workers' compensation department of a law firm. Thus, when I graduated law school and passed the bar exam, it was natural for me to continue in that field.

Brian D. Tadros, Esq., Oviedo

My wife was pregnant, and I needed a job. No one else was hiring in 2008.

Matthew Troy, Esq., Orlando

After graduating from UCF with a legal studies degree, I decided that it would be best to actually work in a law firm before I decided whether to go to law school or not. A fraternity brother of mine was about to leave a workers' compensation firm to attend law school himself and got me in as his replacement. I ended up working at that firm throughout law school and then switched over from paralegal to attorney once I passed the bar exam. So I guess I've been doing workers' compensation since literally day one.

Jesse Rowe, Esq., Daytona Beach

I answered a blind ad! It turned out to be with an insurance defense firm in Miami whose workers' compensation attorney was going out on maternity leave. Her baby arrived a few weeks early, and she decided to stay home. I was a lawyer about a year at the time—talk about getting thrown into the fire!

Jill Jacobs, Esq., Palm Bay

I was looking for a law office job to make sure I found law practice interesting before committing to law school. A friend worked for James Birmingham, who hired me as a workers' compensation paralegal. I was still working with James when I finished law school, so it made sense to stick with workers' compensation law.

Neil Ambekar, Esq., Orlando

I lost a coin flip. I was hired from the State Attorney's Office to be a civil trial attorney. On my first day, I was told our firm had hired two new attorneys and needed one to do workers' compensation. I had never heard of workers' compensation. We both wanted to do civil trials, and the boss flipped a coin. I lost the coin flip, and the rest is history.

Frank Wesighan, Esq., Orlando

In law school I clerked in-house for Aetna/Travelers and actively avoided any workers' compensation assignments. After graduating, I worked with a civil litigation firm for about a year. The head partner passed away unexpectedly a year in, and the firm ended up disbanding. I had met (then) JCC Rick Thompson many years earlier and went to lunch with him about my next move. He suggested I contact Rex Hurley and Bill Rogner, and that is where I have been since January 1, 1998.

W. Rogers Turner, Jr., Esq., Winter Park

I started practicing law doing almost exclusively employment discrimination litigation. Then one day I was handed a workers' compensation file and was dispatched to a mediation the next day. I did the old "fake it until you make it" at mediation. The mediator was Frank Johnson, who asked if I'd be interested in a new job, and with whom I then practiced law for the next 10 years.

Matthew E. Romanik, Esq., Daytona Beach

I got into workers' compensation because in September 1990 my first firm imploded and shut down. The 60 lawyers from that firm were suddenly on the street and grabbed up every "real" job in town, leaving this not-even-licensed-yet guy with one option only—a job offer at a workers' compensation defense firm, which I was thrilled to get (poor, student loans, living with mom, etc.). Best thing that ever happened to me.

William Rogner, Esq., Winter Park

I was referred to Stewart Colling by a former state attorney I practiced against as a public defender. He was now working as a defense attorney in workers' compensation. Stewart Colling and John Morgan invited me to lunch at the University Club and offered me the job. I joined the firm as their ninth lawyer at the time, and the rest is history.

Richard Manno, Esq., Winter Park

After my second year of law school, I clerked at a firm that had me do half workers' compensation and half personal injury. After that, whenever I spoke with a firm about a job, they only wanted to talk about a workers' compensation position because no one at the time was graduating knowing anything about workers' compensation.

Honorable Robert Dietz, Sebastian

My father was a workers' compensation defense attorney and a judge of workers' compensation claims. He took me to trials and appeals. I loved what he did and wanted to be a lawyer like my father, but I found representing injured workers and helping them navigate the system was my calling.

Glen Wieland, Esq., Orlando

UPCOMING QUESTION:Who is your FAVORITE AUTHOR and WHY?

Email your answer to

smccormack@thefloridafirm.com,

and it may appear in our spring edition.

Case Law Update

by W. Rogers Turner, Jr.

<u>Tejeda v. City of Hialeah/Sedgwick, __So. 3d__</u> (Fla. 1st DCA 12/29/21)

Jurisdiction of JCC/Medical Disputes/Interpretation of Prior Agreements

The DCA affirmed the JCC's decision as well as the JCC's interpretation of a prior agreement between the parties. The E/C initially provided authorized back treatment including surgeries with Dr. Brusovanik. In 2017, Dr. Vanni was authorized and Dr. Brusovonik was deauthorized. The parties stipulated "If Dr. Vanni opines that Claimant does require further surgical invention, the Employer/Servicing Agent will authorize same, and the Claimant will decide whether he wants to undergo such procedure." The claimant subsequently obtained an unauthorized fusion from Dr. Brusovanik, with no opinion from Dr. Vanni. The claimant then filed a PFB seeking payment of the surgery and co-pays. Although the JCC's order found the surgery medically necessary, he denied reimbursement based upon the prior agreement. The DCA rejected the claimant's argument (despite filing a PFB on the issue) that DFS and not the JCC had jurisdiction over the reimbursement dispute. The DCA found that the issue did not meet the statutory definition of reimbursement dispute as the claimant was a not a health care facility or provider. Additionally, the DCA found no error in the JCC's interpretation of the parties' prior agreement.

Ranger Construction/Travelers v. Brand, __So. 3d__ (Fla. 1st DCA 12/1/2021)

Final Orders/Competent, Substantial Evidence

The DCA made short work of the E/C's appeal alleging the JCC erred in finding a compensable injury occurred. Noting "formidable evidence" of an injury by accident, the appellant pointed only to inconsistencies in that proof. The DCA noted that numerous decisions provide the standard of review in workers' compensation cases of "the existence of competent, substantial evidence supporting the decision." Citing contradictory record evidence is simply insufficient. The DCA repeated they would not substitute their judgment at the appellate level on the JCC's judgment of factual evidence supported by CSE. Appeals requesting such review are "baseless," and this appeal lacked merit.

Doss v. UPS/Liberty Mutual, __So. 3d__ (Fla. 1st DCA 11/10/21)

Temporary Benefits/Constitutionality of 401-Week Cap

The First DCA affirmed the JCC's denial of temporary benefits. The claimant had a compensable knee sprain in 1997. In 2016 the E/C authorized arthroscopic knee surgery, and the claimant was on a TTD status from Sept. 10, 2016, to Jan. 3, 2017, and thereafter placed at MMI with a 14% PIR. The parties stipulated the claimant had received less than 260 weeks of temporary benefits. The E/C refused to pay, citing section 440.15(3)(C), Fla. Stat., which states a claimant's eligibility for temporary benefits "terminates on the expiration of 401 weeks after the date of injury." The claimant asserted that, similar to Westphal, this "gap" in benefits was unconstitutional as applied to the claimant, as a violation of his right of access to courts. The DCA analyzed whether the Legislature, in enacting the 401-week cap, failed to provide a reasonable alternative for redress under Kluger v. White. They also examined the Florida Supreme Court's prior 1990 holding in Martinez v. Scanlon (affirming legislative reduction of temporary benefits from 350 weeks to 260 weeks), which approved that reduction, as it left workers' compensation as a reasonable alternative to tort litigation. While the "gap period" in Westphal was found to be a "tipping point" in reducing benefits, here the claimant's four-month TTD status, placement at MMI, and potential ability to pursue permanent benefits did not create a situation void of remedy. They further noted that 440.15(3)(c) acts as a "Statute of Repose," and under workers' compensation the claimant sought temporary benefits 19 years after his accident, which would be well after any tort statute of limitations would have run.

Hospitals East LLC d/b/a Kindred Hospital - N. FL/ Sedgwick v. Hampton, __So. 3d__ (Fla. 1st DCA 2021) Statute of Limitations/Reservation of Fees/Tolling

The DCA reversed the JCC's holding that a prior order's reservation of jurisdiction on amount of fees and costs tolled the SOL. The claimant's 2013 PFB sought indemnity arising out of her 2011 workers' compensation accident. The JCC awarded indemnity in a 2015 order that awarded entitlement to fees and costs, but reserved

as to amount. The DCA issued a PCA affirming that order. Nothing occurred thereafter until a 2020 PFB sought medical benefits. The E/C asserted that no benefit had been paid since 2016 and the SOL had run. The JCC disagreed, ruling the prior order's reservation on amount tolled the SOL, relying on Black v. Tomoka State Park and Longley v. Miami-Dade School Board (pending claims asserted via PFB—even claims for fees and costs toll the statute of limitations). The DCA agreed with the E/C that reservations as to amount of fees and costs does not toll the SOL, noting that prior case law distinguishes fees/costs from medical/indemnity payments, which operate to toll the SOL, and that Q rules stating JCCs "shall" require filing of fee petitions for entitlement but "may" for amount. Noting that Black and Longley were distinguishable because neither amount nor entitlement had been adjudicated, reservation as to amount of fees and costs alone does not operate to toll the SOL.

Tampa Elec. Co. v. Gansner, _So. 3d_ (Fla. 2d DCA 11/10/2021) (on Motion for Rehearing/10/16/20 prior opinion withdrawn and substituted)

Workers' Compensation Immunity/Statutory Employer

Reversed trial court's order denying summary judgment to the extent that it determined Tampa Electric was not entitled to workers' compensation immunity as a contractor under section 440.10, Fla. Stat. The trial court concluded Tampa Electric did not qualify as a contractor because it had no contractual obligation to maintain the equipment that it uses to generate electricity. Rather, its



obligation was solely regulatory. The First DCA agreed, however, with Tampa Electric's argument that it was required to maintain the equipment implicitly, as part of its explicit obligation to supply electricity.

Andersen Firm, P.C. v. Brown, So. 3d (Fla. 4th DCA 11/10/21) Releases/Ambiguity

Affirmed the trial court's finding that the appellant's proposal for settlement was ambiguous and did not support an attorney's fees award under the offer of judgment statute and reversed as to the portion of the order denying the appellant's motion for costs. The appellant, Andersen, served Brown with a proposal for settlement that required Brown to execute an attached release "in favor of the Defendant and Defendant's insurer" to release all claims "arising out of the allegations and issues of the Plaintiff's discharge from the Anderson firm" in regard to a wrongful termination suit. The appellee did not sign the proposal fearing that doing so would also extinguish his outstanding workers' compensation claim. The court found that not naming the parties to be released when there are outstanding claims involving other parties can constitute an ambiguity. In addition, the language did not specify which claims were included; however, as Andersen was the prevailing party, the trial court had no discretion to deny costs due to the ambiguity.



W. Rogers Turner, Jr., is a shareholder in the Winter Park office of HR Law PA. He is board certified by The Florida Bar as a specialist in workers' compensation law and is AV rated by Martindale Hubbell. He is a member of The Florida Bar's Workers' Compensation Section Executive Council, past chair of the

Board Certification Committee, and vice president of the Judge William Wieland American Inn of Court. Mr. Turner earned the B.A. in German and history from Tulane University, the M.P.A. with a concentration in health policy from Florida State University, and the J.D. from Stetson University College of Law.



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