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THE NATIONAL WORKPLACE INJURY LITIGATOR

LIGHTING THE WAY FOR THE RIGHTS OF INJURED WORKERS

OSHA Regulations and Discovery in Construction Site Accident Cases

By Jeffrey A. Manheimer • New York, New York

To many of us the OSHA regulations that pertain to construction site activity (Standards - 29 CFR: Part 1926 - Safety and Health Regulations for Construction) exist merely as a body of law to be cited in a memorandum of law or a pre-trial memorandum to be handed to a judge just prior to trial. We tend to minimize their use in other, sometimes more important portions of construction site accident cases. If used properly they can become powerful tools in developing your winning case strategy.

Two often overlooked areas of the case where familiarity with the OSHA regulations assumes major importance are at the very beginning of your case and during the discovery phase. First of all, it is no longer necessary to keep updated copies of the regulations in your office library. Today, those of us with internet access can find the full text of the regulations on the web at http://www.osha-slc.gov/OshStd. Using a search engine, you can simply search under "OSHA."

The first time to go to the OSHA regulations is at the very beginning of your case after hearing the facts from your client. By establishing the OSHA sections that apply to your fact pattern, you will be able to set the theory of your case and follow it to a successful conclusion. You will also be able to work with your expert from an early part of your case. These are not new or novel ideas but issues that we tend to overlook or underplay in preparing our cases.

In my opinion, using the OSHA regulations in discovery and knowing what documents and records are generated on construction jobs is what will make the difference in your cases. Becoming familiar with the language of the jobsite is also essential. Learn from your clients, your experts, and from the definition at the beginning of each standard.

When planning the discovery phase of your construction site accident case, start with the standards that you have identified as applying to the facts of your case. Review the subdivisions of the standards to see what the duties of the contractors are toward your client. Then determine what type of documents or records should have been generated and seek to obtain them. Sounds simple, and it really is if you follow through.

To give concrete examples of how to apply these ideas let's assume that you represent a highway construction worker struck by a vehicle and are alleging, in addition to a claim against the driver of the offending vehicle, violations of the OSHA standards concerning protection. Section 1926.201(a)(1) should be applicable. This section states:

When operations are such that signs, signals and barricades do not provide the necessary protection on or adjacent to a highway or street, Flagmen or other appropriate traffic controls shall be provided.

(Article continues on Page Eight.)

Florida Supreme Court Dents "Employer Immunity" Shield

Paul Turner, a chemical plant worker, was killed in 1991 in an explosion caused by combustion of the chemical compound TFE (tetrafluoroethylene). In a suit brought by his widow against the employer, PCR, Inc., evidence showed that TFE reacts spontaneously and violently when heated or compressed, has an explosive propensity two thirds that of TNT, and that the manufacturer of the chemical (DuPont) was about to discontinue production because of its hazards. Evidence also showed that PCR knew the chemical involved in the explosion that killed Mr. Turner was highly reactive because of other incidents in the plant. A DuPont memo stated that conditions at PCR "are not under good control." Mr. Turner was so worried about the project that he had requested vacation time just before the explosion.

The trial court and the Florida Court of Appeals had thrown out the suit on the basis of the employer immunity provisions of Florida's workers' comp statute, the only exception to which was the usual "intentional tort" proviso. Proof needed for the exception to apply was actual intent or

(Article continues on Page Seven.)

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Consumer Reports Article Blasts Workers' Comp

The February 2000 issue of *Consumer Reports* magazine featured the article "Workers' Compensation: Falling Down On the Job". For those members who missed this seeing this piece, a summary of its highlights is provided here:

"Workers-compensation laws, adopted by all states between 1911 and 1940, were designed to accomplish two goals: to provide medical care and income to workers injured on the job and death benefits to families of those who died, and to protect employers from costly and unpredictable lawsuits by workers." [p 29]

"Benefits available to injured workers were never princely, but by the 1970s their levels had sunk so far below the poverty line that President Nixon appointed the National Commission on State Workmen's Compensation Laws to study the problem.....Fearing federal takeover, states raised benefits. But as of last year, 17 states still didn't meet the recommended standard for temporary total disability [two-thirds of the worker's salary]." [p 29]

"By the mid-1980s, however, insurance carriers found themselves deep in trouble. Medical expenses were increasing by about 11% a year, and returns had dropped on the investments that insurers maintained to pay future claims. . . . . Carriers beseeched the state insurance regulators for steep premium increases, blaming their losses on runaway benefit costs and claimant fraud. However, . . . the losses came partly because insurers had previously made excessive cuts in premiums to attract customers. As rates spiked, employers complained to governors and state legislators that there was a crisis." [p 29]

"The old system needed changing, many agree. But instead of targeting insurance bureaucracies and employer fraud - two key problems that still exist - the new laws have generated profits for insurers and savings for employers mainly at the expense of injured workers. Those laws clamped down on benefits, raised eligibility requirements, and put medical treatment mainly in the hands of insurance companies, which can delay or deny medical care or income payments. This tactic is called "starving them out," according to former insurance claims adjuster Erik Grindal of Coral Gables, Fla., who is now a lawyer." [pp 28-29]

"To whip up public support for reform, the insurance industry took its case to TV stations and newspapers across the nation. A powerful weapon was videotape culled from private investigators showing workers cheating small businesses. . . . Eric Oxfeld, President of UWC-Strategic Services on Unemployment and Workers' Compensation, which lobbies for insurers on this issue, now concedes that claimant fraud was never a major driver of workers-comp cost. 'People understand fraud,' he says. 'So it got more attention perhaps than it deserved.' " [p 30]

"In the early1990s, state legislatures across the nation, at the behest of insurance carriers and the business community, passed reform laws designed to improve the system. They did - for insurers and businesses. Workers-comp insurance, once the money loss of the industry, grew fat with profits." [p 28] ..... By 1995, workers-comp carriers had become the envy of the insurance industry, with annual operating profits of 20%. More companies entered the business and soon insurers were battling each other to cut premiums. [p 30] .....Insurance companies are again saying that unless something gives, premiums will rise. 'Reform,'says lobbyist Oxfeld, 'is by no means at an end.' " [p33]

"The new laws not only reduced benefits but made them harder to collect..... These days medical care doesn't come without a struggle..... If there's a dispute, the worker must petition for a hearing before one of the state workers' comp judges. That may add days or months to the wait for treatment. . . . .. Withholding or delaying such care has cut insurers' medical cost increases to 3 percent per year this decade, from 11 percent per year in the 1980s." [pp30-31]

"Getting medical care depends on the opinion of an independent medical examiner (IME), a physician called in to assess a patient's condition. . . . But more than a dozen injured workers who spoke to CONSUMER REPORTS, whom we found through lawsuits, injured-worker groups, and the internet, uniformly complained of doctors who clearly hadn't read their medical records and of examinations that lasted no more than 15 minutes. . . . workers in some states can't have anyone witness an exam except for their treating physician, who may not be available. . . . . IME's also

(Article continues on Page Seven.)

WORKERS' COMPENSATION AND THE PSYCHIATRIC INJURY

By N. Michael Rucka • Salinas, California

There are, medico-legally speaking, two sources of psychiatric injuries. The first, and generally most easily recognizable causative mechanism is the sudden traumatic event, resulting in classic signs of psychiatric disorder within six months. The second type of psychiatric injury occurs over a period of time as a consequence of frequent exposure to stressful events.

Adequate representation of an industrially injured individual with a psychiatric component to the case requires recognition of the presence of that psychiatric disorder. If the client becomes delusional, there is little doubt that a disorder is present, but the question of industrial relationship remains. Delusional clients are rare; more often the client develops depression or anxiety. Often the client has the concomitant features of both physical and psychiatric disorders.

Even if a psychiatric claim is not accepted, in order to have an effective recovery from the bodily injury, treatment must be provided for both the psychiatric and physical components. This becomes the key to receipt of benefits even in states where psyche claims are otherwise "barred".

Psychiatric cases require you to have a handle on the nomenclature. The best reference book is the Diagnostic and Statistical Manual of Mental Disorders - DSM-IV, which costs approximately $40.00 and can be obtained by writing the American Psychiatric Association, 1400 K Street NW, Washington, DC 20005.

It is sometimes said that psychiatric injuries fall into one of two categories: "mental-mental" or "physical-mental". What does this really mean? In the "physical-mental" category, there is a physical injury in which the recovery is prolonged, the economic loss is substantial, and the injured person becomes depressed and ruminates on his/her predicament, perceived as having occurred through no fault of their own. In most jursidictions, a knowledgeable treating physician dealing with the physical injury will also treat the related psychiatric condition at the outset with antidepressants or anti-anxiety medications. If that treatment is not working, a referral should be made to a treating psychiatrist. Most states impose upon the employer or its carrier the affirmative duty, sometimes known as "primary duty" to provide that medical treatment necessary to "cure or relieve from the effects of the injury". Once notice of the injury has occurred, the employer must specifically instruct the employee as to what to do, and whom to see. Where the employer fails or refuses to act, it then loses the right to control the employee's medical care and becomes liable for the reasonable value of the self-procured medical treatment. See Braewood Convalescent Hospital vs. WCAB (Bolton), (1983) 34 Cal. 3d 159.

Generally, the employer or carrier will automatically reject as unreasonable the referral to a psychiatrist for treatment, so the key to effective representation is directing the client, through the treating physician, to a psychiatrist who will treat the concurrent psychiatric disorder on a self-procured basis. However, in this day of nurse case managers, the appropriate referral is not typically made, either because the physician has not recognized the psychiatric condition or has been discouraged from making the referral. However, in most states, statutes which establish the employer's burden to "provide all treatment necessary to cure or relieve from the effects of an injury" also provide for reimbursement of the costs of concurrent psychiatric treatment if obtained on a self-procured basis.

The foregoing principle is really an outgrowth of the concept that treatment for non-industrial conditions, required in order to treat an industrial condition, remains the employer's responsibility. Thus, when an industrially injured employee suffers from a non-industrial condition which prevents the full implementation of medical care for the industrial problem, the employer/carrier must take reasonable steps to treat that condition. See Vela vs. WCAB (1971) 22 Cal. App. 3d 513. An example of this situation is a pre-existing focus of infection, such as TB, which may be prolonging symptoms from the industrial injury such as the healing of a broken bone. See Georgia Casualty Company vs. I.A.C.; Lee (1927) 87 C.A. 333, 262 P.394; the malpractice of a treating physician, see Duprey vs. Shane (1952) 39 Cal. 2d 781, 249 P.2d 8.

In the "mental-mental" category, for those states which specifically proscribe psychiatric injuries, the approach changes dramatically. In those instances, the occurrence and the manifestation of the psychiatric condition becomes the focus of injury AOE/COE. An example of this is an extended and prolonged hostile work environment which causes or contributes to depression or anxiety, or causes an internal medical condition such as irritable bowel syndrome or some other physical manifestation of the underlying psychiatric condition.

In those states where "mental-mental" claims are barred by statute, the question becomes whether the debarment of psychiatric conditions is a denial of the "equal protection" clause under the Fourteenth Amendment to the U. S. Constitution. Consider the following analysis: Can benefits for an injury which arose out of and occurred in the course of employment be denied because the class of injury is mental rather than physical? Where the need for medical care, temporary compensation indemnity, and permanent disability are consequential to the injury, and otherwise covered for a physical injury, can these now be barred because of the class of injury, i.e., mental? Is not a psychiatric injury often as disabling as a physical injury?

If workers' compensation is perceived as a "fundamental right", the analysis must be according to the "strict scrutiny" test. Even if workers' compensation is deemed not a "fundamental right", the "rational relation" test is applicable. In either case, the same series of questions must be answered. The constitutional guarantee of substantive due process protects against arbitrary legislative actions. Therefore, any legislation denying certain types of workers' comp remedies must not be "unreasonable, arbitrary, or capricious", but have a "real and substantial relation to the object sought to be obtained". See Coleman vs. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1125.

However, since a legislative classification that is not arbitrary will generally be sustained by the courts, it must be shown that the classification is manifestly without support or reason for it to be held unconstitutional. In making the analysis, the first element to be considered is what classification is being made? Exempting psychiatric injuries, but accepting spinal injuries, makes a distinction between types of injuries. Denial of psychiatric injuries made solely on this basis of the type of injury requires analysis of the object of the legislation. If the rationale is that psychiatric injuries are too dif-

(Article continues on Page Seven.)

SOCIAL SECURITY UPDATE:

By Henry Wansker • Rockingham, North Carolina

California District Court rules on Substantial Gainful Activity in supported employment

In Innerebner v. Apfel, No. 99-00794 (N.D. Cal. March 2, 2000), the U. S. District Court found the Social Security Administration had erred in determining that a plaintiff was engaging in SGA and no longer eligible for disabled adult child's benefits after completion of a trial work period where the agency refused to deduct a subsidy from gross earnings received. SSA's position was that subsidies could only be considered if provided by an employer, as opposed to being paid for by the claimant as impairment related work expenses (IRWE). In this case, the supports, including a job coach, were paid for by the third party supported employment program. SSA indicated that it would issue an emergency teletype and a new POMS to clarify the policy change. Unfortunately, the plaintiff lost a challenge to SSA's method of calculating the value of the subsidy, which was to multiply the hourly rate of the subsidized employee by the number of hours the job coach actually performed the employee's work. The plaintiff had contended that SGA determinations are supposed to be based upon the employee's productivity, and that one should consider the actual cost of providing the job coach, valuing the subsidy by multiplying the job coach's usually higher hourly rate by the number of hours the coach was required and not just the number of hours that the coach performed the employee's job. The Court also denied a Motion by the plaintiff for certification of a 9th Circuit class.

Agency implements Appeals Council process Improvement Action Plan (ACPI)

Because of increases in processing time — 118 days in fiscal year 1994 to 460 days in fiscal year 1999 – SSA has introduced the ACPI to speed up the process of Appeals Council review. The agency will temporarily assign additional resources to the Appeals Council, will provide for an expedited review process (yet to be detailed), and will reduce the number of favorable Administrative Law Judge decisions currently being reviewed by the Appeals Council. SSA projects that the ACPI will result in the 460 day processing time being reduced to 282 days by fiscal year 2000, and down to a low of 90 days by the end of fiscal year 2003.

Seventh Circuit follows Ninth On Standard Of Review Criteria

In Nelson v. Apfel, 2000 WL 490691, (7th Cir. 2000), the 7th Circuit has followed the holding of Harman v. Apfel, 203 F. 3d 1151 (9th Cir. 2000), that when a plaintiff appeals from a district court order remanding a Social Security case, the standard of review to be applied is an abuse of discretion standard, rather than a *de novo* standard. It should be noted that until the Supreme Court ruled in Forney v. Apfel, 524 U.S. 266 (1998), there was no defined right of appeal of an order remanding a case under sentence four of 42 U.S.C. §405(g). Hopefully, the Harman and Nelson cases will be deemed fact specific, so as to be of limited precedential value.

Fifth Circuit Allows Non-Attorney Parent To Proceed *Pro Se* On Behalf Of Minor Child In Federal Court

In a move completely out of character for SSA, the Commissioner raised an argument that attorneys are actually necessary in the Social Security process, albeit in a sharply circumscribed way. In Harris v. Apfel, 2000 WL 358293 (5th Cir. 2000), SSA for the first time argued at the circuit court level that a *pro se* action could not be maintained by a parent on behalf of her minor child in Federal Court. The Commissioner relied upon two 2nd Circuit opinions, Wenger v. Canastota Cent. Sch. Dist., 146 F. 3d 123 (2nd Cir. 1998) and Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F. 2d 59 (2nd Cir. 1990). The 5th Circuit, opining that a parent has "personal stake" in litigation involving a minor child for whom the parent is responsible for expenses and maintenance, rejected the Commissioner's argument. Unfortunately, and troubling to those of us concerned about due process, the Court also found that the rights of a minor child could be adequately protected without legal counsel in this setting.

Twenty IRS Factors to Determine Employee vs. Independent Contractor Status

The IRS has identified 20 factors to guide businesses in classifying workers as employees or independent contractors. In its Revenue Ruling 87-41,[1] the IRS compiled these factors from *common law* and its own rulings.[2] Under the following circumstances identified by the IRS, a worker would typically be an employee:

1. instructions are given to the worker
2. training is provided to the worker
3. the worker's services are integrated in the business
4. the worker's services are rendered personally
5. the company can discharge the worker
6. a continuing company-worker relationship exists
7. the worker has set hours of work
8. the worker's full-time services are required
9. work is done on the company's premises
10. the worker can terminate the employment
11. the worker is required to submit reports
12. the worker can't realize profit or loss
13. no major investment is required by the worker
14. the employer furnishes the tools/materials
15. the worker can't work for more than one firm at a time
16. the worker is paid by the hour, week or month rather than the task
17. the worker is reimbursed for business and/or traveling expenses
18. the worker is limited in making services available to the general public
19. the worker is hired, supervised and paid by the company
20. there is an order or sequence set by the company for the worker

(Article continues on Page Five.)

Workers' Compensation 2000

Injured Workers' Bar Association of New York
"Effective Medicolegal Strategies for the New Millennium"
June 1-2, 2000
Sheraton University Hotel and Conference Center
Syracuse, NY
Patricia Corasaniti

315-424-8118

NELA - Justice in the Workplace

National Employment Lawyers Association
2000 Eleventh Annual Convention
June 21-24, 2000
Renissance Washington DC Hotel
Washington, D.C.

415-227-4655

American Bar Association Workers' Comp. Seminar

July 9, 2000
New York, NY
Contact Richard Swanson through Len Jernigan for more information

919-833-1283

Southern Association of Workers' Compensation Administrators 52nd Annual Convention (SAWCA)

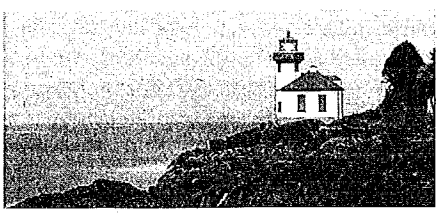
July 16-19, 2000
Westin Savannah Harbor Resort
Savannah, GA

404-656-5656
www.ganent.org/sbwc

Florida Worker's Advocates 10th Annual Educational Conference and General Membership Meeting

July 21-22, 2000
Disney's Coronado Springs Resort

850-562-9675



Jernigan Wins Motion Before US Supreme Court!

By C. James Williams III • Richmond, Virginia

Leonard Jernigan, prominent North Carolina attorney and President-Elect of WILG, stunned Court-watchers on April 25th with an outstanding performance before the United States Supreme Court in Washington, DC.

"I've never seen anything like him. He was awesome. So handsome and articulate," according to National Public Radio's Nina Totenberg.

The issue before the Court was whether certain attorneys, also of the WILG, should be admitted to its Bar. These attorneys included: Jay Causey of the Washington Bar, N. Michael Rucka, Steve M. Birnbaum and David Dugan of the California bar, Paul McAndrew of the Iowa bar, Kathleen Sumner of the North Carolina bar, and Laura McDonald, D. Edward Wise and C. James Williams, III of the Virginia Bar.

Observers said that Mr. Jernigan approached the podium with the utmost confidence, gripped it firmly and bellowed: "Mr. Chief Justice and may it please the Court, I move the admission of the following attorneys . . . . I am satisfied that they each possess the necessary qualifications."

Veteran Court watchers were stunned with the swiftness with which the Chief Justice granted the motion. "He normally pauses a moment, but not with Lenny. The Chief knew the caliber of attorney he was facing and didn't want to fool around." according to Ms. Totenberg.

After their induction, the Court's newest admittees remained to watch the argument on the highly-publicized case concerning the constitutionality of Nebraska's statute banning partial birth abortions. The attorneys arguing the case included the Attorney General for the State of Nebraska and an attorney for a pro-choice group. The latter engaged in a lengthy dialogue with Mr. Justice Scalia, who during questioning showed his academic roots by referring to ancient Greek abortion practices. All of the Justices but Justice Clarence Thomas – known for his passivity during oral argument – fired off pointed questions at both counsel.

Prior to the induction, the WILG members, significant others and friends had breakfast in the Court's cafeteria in a room normally reserved for the Justices' law clerks. Guests included: Laurel Anderson, Corry Rucka and friend Shana, Steve Birnbaum's mother and son, David Dugan's wife, Laura McDonald's mother, Ed Wise's brother, Beth Williams, Geoff McDonald, and WILG Executive Director Greg Williams. At breakfast, the group was briefed by the Clerk of Court, Mr. William K. Suter, dressed in a morning suit, similar to what grooms wear in formal weddings. Mr. Suter noted that Court's personnel were happy it was raining so hard that morning, since the demonstrations outside Court on the abortion case would be less forceful than with good weather.

After viewing the argument, WILG members assembled for a group photograph in front of a statue of John Marshall, the first Chief Justice of the US Supreme Court. Later that day, Jay Causey, Mike Rucka, Paul McAndrews, Jim Williams and Lenny Jernigan visited the office of Senator John Edwards (NC). WILG's goal was to make its presence known to the Senator and his staff as a resource for issues pending before the Senate. As a former plaintiff's attorney, Senator Edwards has had a sympathetic ear for issues important to WILG members.

WILG member Mark Schaffer and Federal Issues Advisor Randy Rabinowitz joined some WILG members for dinner at Vidalia's the previous evening.

(Continued from Page Four.)

IRS...

The ruling warns employers against excessive reliance on the factors. The IRS is careful to explain that the factors are designed *only as guides.* The factors cannot necessarily be applied across-the-board since typically no work situation embodies all the factors. Nor can they be applied according to any mathematical formula. While all of the factors may help determine if an individual is an employee under common law, the importance of each factor will vary based on the job and other facts.

[1]*Rev. Rule 87-41, 1987-1 C.B. 296. (NB: This regulation is currently under review.)*
[2]*The* Revenue Ruling *describes the factors in considerably more detail.*

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☐ ***Back Issues*** of The National Workplace Injury Litigator or Special Bulletins. Please List: _____

☐ ***Public Speaking assistance for talking points on key issues***. List Issue: _____

☐ ***AMA Guidelines Teleconference with George Smith***, MD, author of Chapters 1 and 2 of the Third Edition of the Guides and consultant to the 2nd, 3rd, and 4th Editions, November 1996 teleconference transcripts $30. March 1997 follow-up transcript $25. Both for $50.

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...PSYCHIATRIC INJURY

ficult to assess, that is not a rational basis. It is particularly irrational when, under the law of every state, the Workers' Compensation Act is the exclusive remedy against an employer for work related death or injury, with very few statutorily or judicially created exceptions [and those exceptions go to enlarge rather than constrict benefits].

Even when the Workers' Compensation Act is a lesser remedy for the employee, it is still the employee's *only* remedy. This is based upon the legal theory of a presumed "compensation bargain" and that workers' compensation was a legislative quid pro quo to provide prompt settlement of on-the job injury claims. See Torres v. Xomox Corporation (1996) 49 Cal. App. 4th, page 1, 56 Cal. Rptr. 2nd 455; and see Goldman vs. Wilsey Foods Inc. (1989) 216 Cal. App. 3d 805. As noted in the Goldman case, worker's compensation reflects a "fundamental social compromise".

The classification of psychiatric injuries which results in denial of benefits for some workers has absolutely no rational relationship to any known stated purpose of the compensation law. Either by statute, case law, or in some states, a constitutional provision, a common precept exists in all states' laws: that "All laws of a general nature shall have uniform application", e.g., Article IV, Section 16a of the California Constitution. See also Atchey vs. City of Fresno (1984) 151 Cal. App. 3d 635. In Atchey the court noted that the principle of equal protection preserved by both the Federal and State Constitutions does not preclude a state from drawing distinctions between different groups of individuals, but does require that, at a minimum, persons similarly situated with respect to a legitimate purpose of law shall receive like treatment; classifications, therefore, must be reasonable, not arbitrary, and must rest upon some ground of difference, having a fair and substantial relation to the object to the legislation.

Violation of the Equal Protection Clause exists when a state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The inequality is clear where a worker with a physical injury receives workers' compensation benefits but a worker with a mental injury does not. Where the worker with a mental disability related to the job can receive no benefits, the entire purpose of the workers' compensation scheme is thwarted.

Another argument is that exempting psychological injuries from workers' compensation violates the constitutional right of enjoying and pursuing life and liberty, acquiring, possessing, and protecting property and pursuing and obtaining safety, happiness and privacy. In some states, where there is no explicit statute or constitutional provision which sets forth these rights, these are found in the penumbra of the Declaration of Independence and the Constitution. The constitutional rights of a worker who sustains a psychiatric injury arising out of and occurring in the course of employment are clearly applicable in all states through the Fourteenth Amendment of the Constitution. See also Endler vs. Schutzbank (1968) 68 Cal. 2d 162, which found that the right to practice a profession and to work was a fundamental right; and Sail'rnan vs. Kirby (1971) 5 Cal. 3d 1, which found that the right to work and the concomitant opportunity to achieve economic security stability are essential to the pursuit of life, liberty and happiness.

CONCLUSION

Psychiatric injuries are difficult to prove. Often the psychiatrically injured person is more demanding than a physically injured individual. There is stigma attached to having a psychiatric injury, and there is prejudice directed against those who appear to have mental disabilities. Yet these are the very reasons why the representation of these injured individuals can be so rewarding. To understand both the medicine and the law is critical to successful resolution.

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Consumer Reports...

examine a worker's medical history to find other explanations for the illness or injury." [p 31]

"In their reform laws, 18 states set up special agencies to ferret out workers-comp fraud. It's important to crack down on cheaters; they boost premiums and the cost of goods and services for everyone. But most current enforcement efforts are one-sided: In almost all jurisdictions, the target is the claimant. Yet fraud by medical providers and employers is much more significant. The Texas Research and Oversight Council on Workers' Compensation found that in 1996, fraudulent billing by doctors and other health-care providers cost about 1.2 million - more than eight times the $134,000 in phony worker claims that were uncovered." [p 32]

(Continued from Page One.)

Florida Supreme Court...

conduct "substantially certain" to result in injury or death.

For about 15 prior years, Florida courts had routinely dismissed suits against employers on the basis that the statute required virtual certainty the conduct alleged would result in injury. In the leading case used to dismiss such suits, a dissenting Florida Supreme Court Justice accused the majority of effectively rewriting state law to protect all conduct by employers that wasn't "virtually" certain to result in injury and of giving employers a "license to maim and kill their employees."

On March 2, The Florida Supreme Court reversed 15 years of adverse rulings by holding that PCR's responsibility was an issue best left for the jury. The justices unanimously decided that the workers' comp system was to protect employers from suit over accidents, not deliberate acts. Justice Harry Lee Anstead stated: "It would appear logical to conclude that if a circumstance is certain to produce injury or death, it cannot reasonably be said that the result is 'unexpected' or 'unusual', and thus such an event should not be covered under workers' compensation immunity.... The Legislature did not intend workers' compensation immunity to be used to create a shield for employers to block intentional tort suits."

It is notable in the Turner case that OSHA had investigated the incident and ruled that PCR had not violated any agency regulations that might have caused or contributed to the explosion. Ed.

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OSHA Regulations...

Demand discovery of the "traffic channelization plan" if one was developed by the contractor. Was a "traffic safety plan" prepared? If yes, obtain same. Obtain the "manpower records" to see if flagmen were employed at the site.

Include in your discovery demands a request for any training/safety manuals prepared for traffic control by the contractor.

Always request minutes of job meetings to see if traffic control or barricading was discussed. By knowing the standards you can direct your discovery demands to the types of documents generated.

If your case involves a worker falling from a height, then you should be familiar with the provisions of Standards 1926.501 and 1926.502. The standards require that all workers be protected from falls of 6 feet or more by a proper fall protection system (1926.501(b)(1).

What do you look for in your discovery demand? Request a copy of the "site safety plan" prepared for the project to see if fall protection was discussed. Obtain a copy if one was prepared to see if it covers the requirements of this section.

When they issue equipment such as harnesses, many contractors require employees to sign for them. Demand copies of these forms to see what safety equipment was supplied. Demand the perimeter guarding plan if one was called for in the contract or specifications. Obtain the daily or weekly job logs to see what entries were made regarding fall protection and guarding. The absence of the above documents can help you to establish a violation of the standards and a breach of the duty owed to the plaintiff on the jobsite.

Knowing the standards and knowing where to look for documents to help establish violations of the sections is essential to a successful case. The above are but a few examples of the ideas that will apply, whether you are dealing with a defective scaffold, collapsed trenching or steel erection. Couple your knowledge of OSHA with your document discovery skills and you will successfully represent your clients.