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Workers First Watch

WILG Online: ***WILG is the national association and information clearing house for workplace injury plaintiffs' attorneys. Communicate with your colleagues in the members-only online forum by visiting WILG's web site at: http://www.wilg.org. WILG is a litigation group organized under and affiliated with the Association of Trial Lawyers of America (ATLA). Visit ATLA online at: www.atla.org***

president's page

Stephen Embry

Stephen Embry is current President and a founding member of the Workplace Injury Litigation Group. He is also past Chair of ATLA's Workers' Compensation and Workplace Injury Section. Steve is editor of The Longshore Textbook, a widely used resource for practitioners in Longshore & Harborworkers Act cases, and is a national speaker on issues of workplace safety and state and federal workers' compensation. He is a principal in the Groton, Connecticut firm of Embry and Neusner. He graduated from the American University in 1971 and the University of Connecticut School of Law in 1975. ▼

The Curse of Interesting Times

A Chinese proverb, sometimes considered a curse, goes: *"May you live in interesting times."* By this measure we are cursed indeed.

The recent elections mark a shift in political power that threatens to make our times very "interesting." The legislative and executive branches of the government are now controlled by those whose stated policy is the reduction of the rights of the injured and elimination of the "lawyer class" who protects them. They propose limitations on medical malpractice, class actions, and product liability, and there is even talk again of a national automobile no-fault bill. As I write, Health and Human Services Secretary Tommy Thompson has taken the position that medical workers injured by the smallpox vaccine will not be entitled to benefits under any state workers' compensation law, or indeed any law.

However, the obverse of every curse is opportunity and the excitement of the struggle it portends. Within WILG we are focusing on the opportunities and challenges ahead, certain of our ultimate victory. For as it turns out we recently arrived on the Washington, D.C. stage in an improved position to do battle. In the past several months we have achieved much to enhance our readiness for this struggle.

We are improving our media efforts to get the truth out about our clients. We submitted a letter to the editor of the New York Times, and Charles Jeffress, our federal advisor, was highlighted in the superb three-piece article in the *Times* about the unfair treatment of injured workers. ATLA has responded to our requests by increasing coverage of workers' rights issues in its weekly e-mail. We are working closely with Florida and West Virginia who are under attack and this year's potential victims of "reform." We worked with CAAA to help achieve a breakthrough improvement in benefit levels in California. We plan on expanding these state-based efforts, and Ricky Bagolie and his allies in New Jersey have begun a state chapter of WILG. I was the lead speaker at the recent NATLE National Legislative Convention and we are promoting our goals through the state trial lawyers associations. We have been in the forefront of the effort to prevent the Medicare Secondary Payer system from corrupting our clients' benefits.

We are working to develop a relationship with the Peggy Browning Fund, created by WILG member Joe Lurie to honor his late wife, and which supports law students who want to work on worker-related issues. We are planning a system where students who want to do good can find a place to do it in our organization and your law firms.

Education, coalition building, legislation, support for the states, law student research and placement, efforts to have the media get the truth out — these are just a few of the things we have accomplished. While the times are troubling, the opportunities are great. What more can you ask? Who would want to live in boring times? ▼

around the nation

COVERAGE FOR LATEX INJURY

SD A hospital nurse had a history of allergic reaction to pollen, animal dander and various foods. She was then diagnosed with latex allergy, and began working with non-latex gloves. But during an emergency c-section she double-gloved with latex gloves and suffered an anaphylactic reaction. The hospital argued the nurse's allergic reaction did not constitute a workplace "injury" because she had a pre-existing "disease."

Held: The South Dakota Supreme Court found her pre-existing allergy made her more susceptible to injury from latex exposure, and if the specific exposure at the time of injury aggravated, accelerated, or combined with the pre-existing condition to produce disability, it was a compensable injury. *St. Luke's Midland Regional Medical Center v. Kennedy,* No. 22223, 11/13/02.

COVERAGE FOR ILLEGAL ALIENS

PA An illegal alien maintenance worker employed for four years at defendant employer's plant was denied workers' comp benefits for an injury. The defendant's basis for denying benefits was that since federal law prohibited employment of illegal aliens, paying comp benefits would violate public policy.

Held: The Pennsylvania Supreme Court upheld an appeals court decision granting benefits, stating that Pennsylvania's workers' compensation system is a "comprehensive statutory scheme which carefully balances the respective rights of employers and employees…" The Court said it would not issue a policy decision concerning receipt of workers' comp benefits by illegal aliens that would be an exercise in "judicial legislation." *Earth Co. Workers' Compensation Appeals Board,* No. 124 MAP 2000, 11/6/02.

COVERAGE FOR STRESS RELATED TO PROMOTION PROCESS

HI Plaintiff firefighter took a promotional exam, and then because of dissatisfaction with the result was embroiled in several years of hearings. During this period he was promoted, but had the promotion rescinded after it was challenged in a lawsuit by other firefighters. He developed psychological injuries and went on sick leave.

Ruling on workers' compensation coverage for plaintiff's psychological condition, the Hawaii Supreme Court held that despite the absence of physical injury, the condition was covered. The rationale was that he had taken a test sponsored and administered by the state for its own benefit — that is, the advancement of its own employees versus the costs and other burdens of having to go outside the department to recruit new employees. While the

injuries were not caused by the test taking itself, but from the mis-scoring of the tests, "seemingly two steps removed from the ultimate work," the Court said that "upon closer inspection" the condition is related to and incidental to the employment. The Court noted similar decisions from Louisiana, Montana and Utah, and contrary holdings from Florida, Oklahoma and Oregon. *Davenport v. City and County of Honolulu,* No. 23141, 12/30/02

INDUSTRIAL INSURANCE RATE INCREASES

WA Following a proposed 40.5%(!) rate increase for employers in this exclusive state fund jurisdiction, Washington's Department of Labor & Industries announced its decision on 12/4/02 to implement a 29% across the board increase in premiums to be followed by legislative proposals to cut worker benefits. In the prior 8 years Washington employers had been granted $1.8 billion in rate reductions and deferred rates because of investment returns on the state fund. In 1999 and 2000, L&I had rebated $400 million to employers. The state's contingency fund then experienced significant losses as the economy and the market began to turn in 2000.

Calling the Department plan a sell-out of labor force, the Washington State Labor Council reminded the Department and Washington employers that the state has been in the lowest quartile of workers' comp costs nationally for several years, and that more humane alternatives exist to cutting benefits when employers have enjoyed years of steady rates and premium rebates.

WORKER DEATH RATES

5430 work-related deaths occurred in the nation's workplaces in 2000, not including contested claims and mortality due to chronic workplace exposure to carcinogens, cardiovascular insults and pulmonary disease. This represents 2.5 deaths per 100,000 of the U.S population, down from 2.6 in 1999. Looking at the prior eight years, deaths have decreased by an unimpressive total of 417 since 1993. This represents, on average, 8 per state or one per state per year. Clearly the "reforms" in workers' compensation over this period have had little or no effect in enhancing worker safety measures to control or eliminate the cause of on-the-job fatalities.

THE REAL FACTS ABOUT THE COST OF LABOR

The average hourly earnings for production workers in 2001 were 9% lower than in 1973 — their highest year — after being adjusted for inflation. Source: *Wealth and Democracy* by Kevin Phillips.

A PRIME-TIME CORPORATE VILLAIN

McWane, Inc., one of the world's largest manufacturers of cast-iron sewer and water pipe, is one of the most dangerous employers in America. Recently profiled in an investigative series in the *New York Times* and on a companion piece on PBS' "Frontline," this privately held company based in Birmingham, Alabama, which employs about 5000 people, has racked up 9 deaths, 4600 injuries and 420 OSHA violations since 1995, in a story described as worthy of Charles Dickens and Upton Sinclair.

$2 billion in annual revenues is the product of "the McWane way," modeled on the Andrew Carnegie-style adherence to a rigid manufacturing process not subject to question or alteration — 80 pipes per hour. The story profiled a 24-year plant manager, Robert Rester, who started as a welder with McWane working 16-hour days and became a "McWane way" disciple. Feeling guilt for his complicity in the McWane system, he blew the whistle after taking sick leave for a heart condition and then being fired based on charges of failing to get treatment for "alcohol abuse" — a condition he didn't have— while on leave.

Rester spoke of becoming numb to the constant body count— amputations, crushed hands and feet, disfiguring lacerations, burns from molten iron. His sole focus, like all other McWane managers, was to find a fresh body to keep production rolling. Questions about the cause of injuries or preventing them never crossed his mind. He was "like a robot" in his single focus of getting the machines moving again.

The NYT and "Frontline" story

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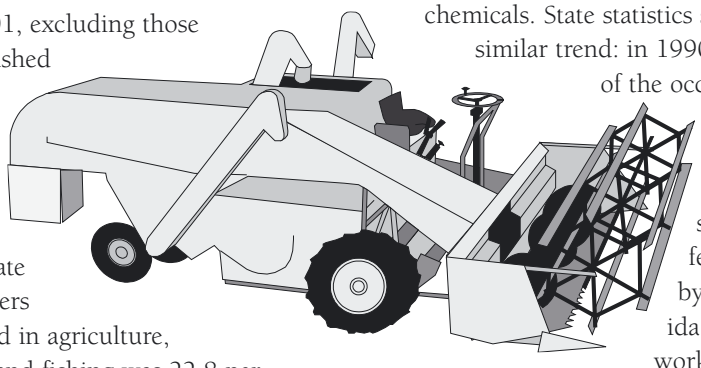
From the Farm to Your Table: The Human Cost of Farm Labor

By Shelley Davis, Washington, D.C

Shelley Davis has been an advocate for migrant and seasonal farm workers for over 14 years. Since 1996, she has been the Co-Executive Director of the Farmworker Justice Fund, Inc. (FJF), a national advocacy center based in Washington, D.C. FJF's mission is to improve the living and working conditions of farmworkers and their families. Shelley has represented farmworkers and their organizations in litigation, including a successful action to ban the use of the pesticide dinoseb, which causes birth defects. She has also authored a number of papers concerning working conditions of farmworkers and their families. Shelley is a graduate of Bryn Mawr College (1973) and Catholic University, Columbus School of Law (1978). Prior to her work at FJF, she worked for the Migrant Legal Action Program, the Political Rights Defense Fund, and the Legal Assistance Foundation of Chicago.

On September 10, 2002, 14 farmworkers were killed when the van in which their employer was transporting them to work toppled off a bridge (Huang 2002). Because of accidents like this one, agriculture consistently ranks as one of the three most hazardous occupations in the United States.

In 2001, excluding those who perished in the World Trade Center, the fatality rate for workers employed in agriculture, forestry and fishing was 22.8 per 100,000 workers, which was more than five times higher than the death rate for all workers (4.3 per 100,000 employees). The only industry with a higher fatality rate was mining, with a rate of 30.0 per 100,000 workers (Bureau of Labor Statistics 2002). Put another way, agricultural workers who account for only 2% of the total U.S. workforce suffered 12% of the fatal on-the-job injuries. The primary causes of agricultural workplace fatalities were motor vehicles (including tractors), farm equipment, falls, drowning, and exposure to harmful chemicals. State statistics show a similar trend: in 1990, 41% of the occupational fatalities suffered by Florida farmworkers were caused by transportation-related accidents (Becker 1991).



Performing strenuous physical labor, for long hours, six or seven days per week, often under very hot

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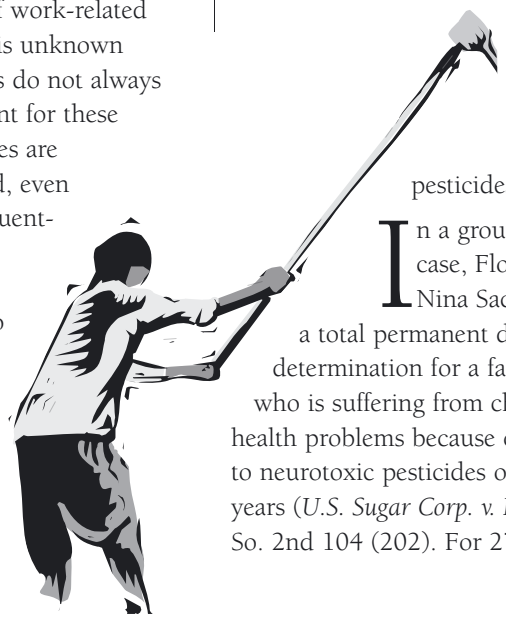
Acute effects of pesticide exposure range from nausea, dizziness, increased salivation, blurred vision, diarrhea, headaches, weakness, and skin rashes to respiratory failure, paralysis, convulsions, coma, and even death. Chronic exposure to pesticides may lead to birth defects, neurological disorders, infertility, and kidney or liver damage, Parkinson's disease, or cancer.

or very cold conditions, leads to large numbers of non-fatal injuries among farmworkers. In 2000, the non-fatal injury rate for workers employed in crop-production agriculture was 6.7 per 100 workers, with 3.7 cases per 100 workers involving lost work time (Bureau of Labor Statistics 2001). These injuries included fractures due to falls, eye injuries from chemicals or debris ejected from machinery, lacerations from knives and machetes, strains, sprains and repetitive motion injuries from stooping, lifting and sorting, and a host of crush, contusion, and amputation injuries from working with farm equipment (Bureau of Labor Statistics 2001; Wilk, 1986). A National Institute for Occupation Safety and Health (NIOSH) study of workers' compensation records from 1985 to 1987 reveals that sprain and strain injuries account for 37.2% of all claims filed by agricultural workers. Many of these injuries could be prevented. The decline in the use of the short-handled hoe in California from 1965 to 1970 led to a 34% reduction in strain and sprain injuries in that state.

Farmworkers suffer the highest rate of chemical-related illness of any occupational group (5.5 cases per 1,000 workers), according to the U.S. Bureau of Labor Statistics (U.S. Department of Labor 1987). The U.S. Environmental Protection Agency (EPA) estimates that there are 10,000 to 20,000 physician-diagnosed cases of pesticide poisoning of farmworkers each year (GAO 1992). In Washington State, between 1987 and 1990, farmworkers had a rate of systemic poisoning that was 3.2 times higher than that of all workers and a rate of toxic disease that was 2.2 times the rate for all workers (Demers 1991). The actual number of work-related pesticide poisonings is unknown because farm workers do not always seek medical treatment for these conditions, many cases are improperly diagnosed, even recognized cases frequently go unreported and scientific knowledge is often insufficient to link chronic effects with specific pesticide exposures (Moses 1989).

Acute effects of pesticide exposure range from nausea, dizziness, increased salivation, blurred vision, diarrhea, headaches, weakness, and skin rashes to respiratory failure, paralysis, convulsions, coma, and even death (Moses 1998, Reigart 2000). Chronic exposure to pesticides may lead to birth defects, neurological disorders, infertility, and kidney or liver damage, Parkinson's disease, or cancer (Moses 1998; Zahm 1993; CDC 1993; Congress 1990). The EPA has identified more than 100 pesticides as possible or probable human carcinogens (e.g., chlorothalonil and captan); others have been identified as likely teratogens (e.g., benomyl, cyanazine, and methyl bromide) or endocrine disruptors (e.g., carbaryl and ziram), based on animal studies (Moses 1998; Benbrook 1996). Farmworkers have an elevated rate of non-Hodgkin's lymphoma, multiple myeloma, and leukemia, and cancer of the stomach, prostate, testes, brain, and liver (Zahm 1993). Some of these cancer cases may be associated with excessive pesticide exposure. An epidemiological study of members and retirees of the United Farm Workers of America (UFW), utilizing California's cancer registry, found that UFW members had elevated rates of leukemia and brain cancer, compared to all Latinos in California (Mills 2001). Many of these cancer cases were likely caused by occupational exposure to pesticides.



In a groundbreaking case, Florida attorney Nina Sachs secured a total permanent disability determination for a farmworker who is suffering from chronic health problems because of exposure to neurotoxic pesticides over many years (*U.S. Sugar Corp. v. Hensen,* 823 So. 2nd 104 (202). For 27 years,

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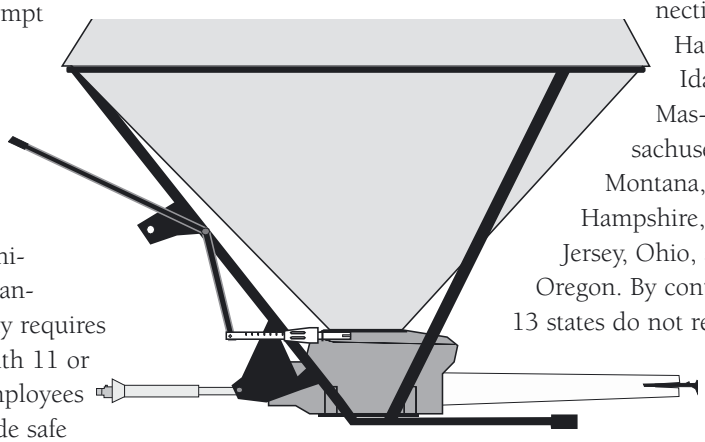
the claimant, Henson, worked for U.S. Sugar as a mechanic. He spent most of his days in the fields repairing equipment, and was regularly exposed to pesticide spray or residues while performing his work. Many of the pesticides used were neurotoxic organophosphate insecticides. Over the years, he was treated by company doctors for shortness of breath, nausea, gastritis, and muscle weakness (all of which could be symptoms of pesticide exposure). In 1996, he went to his own doctor for similar symptoms. His physician diagnosed his condition as a paralyzed phrenic nerve, which had resulted in a partial collapse of one lung and left him confined to a wheelchair and ventilator dependent. In the opinion of Henson's experts, the cumulative effect of his exposure to neurotoxic pesticides led to his phrenic nerve mononeuropathy. The non-treating physicians based their opinions on biological evidence; the treating physicians based their determinations on broadly accepted scientific literature and a differential diagnosis. The Court held that since Henson's doctors had relied on established scientific methods, their conclusions could be accepted.

The high rate of injuries among farmworkers is due in large measure to the inadequate workplace health and safety protections afforded them. Most federal labor standards partly or fully exempt agriculture. For example, the federal Field Sanitation Standard only requires farms with 11 or more employees to provide safe drinking water, hand-washing facilities, and toilets in the field (U.S. Department of Labor 1987). As such, it only applies to 36% of all farms. The lack of sanitary facilities in the fields causes high rates of heat stress or heat stroke, dermatitis, urinary tract infection, and third-world levels of parasitic infection. Under the Fair Labor Standards Act, farmworkers are not guaranteed overtime pay, so there is no economic incentive to limit the numbers of hours they work. As a consequence, accidents sometimes occur due to fatigue. In addition, the National Labor Relations Act excludes agricultural workers entirely, so only about 2% of agricultural workers are unionized. This prevents workers from having an organized voice to advocate for improved workplace safety.

The high rate of injuries among farmworkers is due in large measure to the inadequate workplace health and safety protections afforded them. Most federal labor standards partly or fully exempt agriculture.

Despite their high injury rate, not all agricultural workers are covered by workers' compensation. Only 12 states provide farmworkers with the same level of workers' compensation coverage as other workers. They are: Arizona, California, Colorado, Connecticut, Hawaii, Idaho, Massachusetts, Montana, New Hampshire, New Jersey, Ohio, and Oregon. By contrast, 13 states do not require any coverage of agricultural workers. These states are: Alabama, Arkansas, Indiana, Kansas, Kentucky, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Rhode Island, South Carolina, and Tennessee. The remaining 25 states impose greater limitations on coverage for farmworkers than for other employees. Partial-coverage states, like Florida and Maryland, exempt only small farms from the program while others, like Maine, exclude from benefits all farm workers who do not work all year round (U.S. Department of Labor 1999). Finally, federal law requires that all employers of temporary foreign workers, estimated to number 40,000, who enter the United States legally with H-2A visas to perform agricultural work, must be covered by workers' compensation insurance.



Farmworkers play a crucial role in our economy and our daily lives, ensuring that American consumers can buy fresh fruits and vegetables at cheap prices. In return, farmworkers should be provided safe working conditions and workers' compensation benefits when they are injured or become ill on the job. With advocacy, these goals could be achieved. ▼

References available on request.

Stephen Embry

Stephen Embry is current President and a founding member of the Workplace Injury Litigation Group.

What is the IAIABC Doing to our AMA Guides?

By Stephen Embry, Groton, CT

"An eye for an eye, a tooth for a tooth…" and "Vengeance is mine; I will repay, saith the Lord." The ancient words continue to resonate on the harp of justice, expressing simple but profound truths. Justice, punishment and compensation are to be proportionate to, and measured by, the harm done. When an accident takes an eye, the compensation for the injury should be of equal value — the value of an eye paid for the taking of an eye — not less, not more. Measuring the value of an eye is the hard part, and measuring the amount of a partial impairment of the eye even harder.

Workers' compensation systems attempt to make short work of measuring the value. Typically the loss of an eye, or hand, or functioning of the back is said to be worth a certain numbers of weeks of compensation. The exact number of weeks for loss of an eye is usually inflexible, having been arbitrarily enumerated by the legislature as a matter of political compromise. That eye's use and value to its particular owner does not enter into the equation. Over the past decade there has been a coordinated effort to reduce this value by reducing the number of weeks paid for specific loss of function of body parts and bodily systems, and by dropping the weekly compensation paid to the victims of industrial accidents. In Connecticut, for example, the value for total loss of vision has been reduced by a third, while the weekly payment has been lowered from two thirds of the average week wage to 75% of after-tax income. The net result has been a 50% reduction of the compensation paid for total loss of vision and most other organs. This process has been repeated in state after state, resulting in steadily diminishing value and compensation for loss. So extensive has been the decimation of so-called specified injury awards that few critics of workers' benefits or even insurance companies are actively pursing further reductions.

It would be a mistake, however, to assume that the shaving is done. We have apparently merely moved from the beard to bone. An industrial injury rarely takes the entire organ; more

IAIABC *cont. from page 8*

often it results in a loss of function, and compensation is due proportionately. This of course requires that the injury be rated, a process most often performed by a physician. Over the past several decades, the American Medical Association has published and refined its "Guides to the Evaluation of Permanent Impairment," which is now in its fifth edition. While the AMA's process and methodology has not been without its critics — balancing as it does mixed concepts of disability and impairment, and struggling with the definition of function of the parts of human beings — the AMA has generally received high grades for its efforts to avoid politicizing the process.

[The] IAIABC… seems to believe that the workers' compensation system would be better if we could get rid of those pesky doctors and lawyers, set the bar higher for the injured worker to be compensated, and provide clear sailing for employers and insurers.

On the other hand there are those who do wish to politicize the process and reduce the ratings awarded for partial loss of function. This is not surprising — those who stand to benefit by devaluing justice will always ply their trade. A surprising entrant into this particular fray, then, is the International Association of Industrial Accident Boards and Commissions (IAIABC). The IAIABC is, as its name suggests, an association of commissions comprised of those charged with the fair and impartial operation of workers' compensation systems. Before IAIABC-member commissions appear injured workers and their attorneys, who provide factual and scientific evidence obtained from physicians so that compensation for rated impairment can be awarded.

This past fall the Occupational Impairment Rating Committee of the IAIABC promulgated a Draft Supplemental Impairment Guides to "augment" and "clarify" other guides used in various jurisdictions, chiefly the AMA Guides. Comments made in the initial drafts certainly call into question the IAIABC's impartiality and demonstrate that it has greatly increased the risk of politicizing the impairment rating process.

The IAIABC suggests that impairment rating should be solely based on the "objective maximum condition achieved by the patient." This deceptively bland statement masks a deep suspicion of and lack of respect for the injured worker. Physicians often remark that the beginning of good medicine is listening to the patient and that patient history is the key to cure. The injured person may not know what is causing the symptoms, but is the expert as to their nature. While the occasional patient enhances the description of symptoms — for a host of possible and complex reasons — most are honest and straightforward when talking to their own physician. Instead, the IAIABC seems to take a hostile approach to the worker's veracity.

Many injuries, even serious ones, produce mainly subjective symptoms; often the apparent lack of so-called "objective" medical findings results from the inadequacy of medical testing or medical knowledge. Not long ago medical science thought that clinical depression was "all in your mind" and purely subjective. It is now understood that depression results from chemical imbalances and serotonin uptake problems.

At the recent WILG educational seminar in Mystic, Connecticut, Dr. Martin Cherniack described his research at the Ergonomics Center of the University of Connecticut concerning the adequacy of medical testing. One of his principal findings is that with proper testing methods subjective symptoms are usually verifiable. False negatives abound largely because the test is not designed to search for the cause, or because the examiner chooses the wrong test. The impairment rating system should not fall into the same trap. The inquiry should focus on the actual claimant rather than on some generic medical model, and the bar should not be set artificially high. The working presumption in the system should not be that the claimant is lying, with that presumption only overcome by unequivocal "objective" test findings.

The IAIABC proposal notes that for various reasons a treating physician may decline to make a rating of impairment, but it takes a strange approach to solving this problem. Normally the claimant would simply look for a second physician to assist in the process; however the Supplemental Guides suggest that the attending physician should first notify the insurance carrier and then either refer the patient, or request that the carrier refer the patient, for an insurance company medical exam. This recommendation denies a claimant appropriate respect for his condition, while ceding all control of the process to the carrier (or agency).

The basis for this lack of respect for the injured worker is revealed in

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the IAIABC's discussion of the role of pain in impairment ratings. One of the controversial aspects of the AMA's Fifth Edition is its inclusion of a small rating for catastrophic pain. Injuries often produce chronic pain, and catastrophic chronic pain often produces catastrophic results. Frequently such pain, and associated reduced functioning, bears little relation to the apparent severity of the injury, or to any objective testing. This pain is real, and often not only impairs but also disables. Hence, the AMA recognized that in proper cases it should be considered for rating purposes.

The IAIABC suggests that impairment rating should be solely based on the "objective maximum condition achieved by the patient." This deceptively bland statement masks a deep suspicion of and lack of respect for the injured worker.

Conversely, the IAIABC starts from the premise that the claimant is not very credible and has other motivations for expressing such pain. It suggests that pain results more from "beliefs, expectation, rewards, attention and training," and is largely a factor of job satisfaction, stress and financial considerations. One of the Draft's comments suggests that including objective guides for evaluating pain would only provide a road map for claimants to use in reporting their symptoms, which would, it declares, be "harmful to claimants and society!"

This anti-claimant bias is also reflected in the comments on apportioning prior injuries. Great care, it is suggested, must be taken to ensure that apportionment of prior impairment is not based on a higher standard than used for the claimant's injury; otherwise the insurer may be held disproportionately liable. The Draft suggests that the rating and compensation should be delayed until all data on prior conditions are located. In the meantime, any final resolution — and justice — is denied.

The attitude of the IAIABC towards claimants is most clearly revealed in the comments appended to the Draft's "Summary." The commentator remarks that the AMA's Guides is widely authoritative, and that the IAIABC is likely to face considerable obstacles in promoting its own agenda. It then identifies those forces that will oppose its efforts: "Unfortunately, with the trial lawyers who want to maximize all contests and the lawyers in all legislatures who are sympathetic to lawyer employing systems, this will be a difficult goal to achieve…"; and further: "The current most widely used rating system is the AMA Guides, which represents the most sincere efforts of many excellent medical specialists. However, these sincere efforts appear to be compromised by the AMA's desire to continue reaping very large income from the sale of the Guides to as many jurisdictions as possible. There is concern that the AMA may have accommodated threats from the trial lawyers and others to prevent the Guides acceptance by some state legislatures."

The author of these comments then suggests strategies to change the AMA's process by essentially infiltrating it and working from within, acknowledging that to replace the Guides in all jurisdictions would "provoke a bitter and expensive conflict" with the AMA and would require "expensive lobbying of every state legislature and every other jurisdiction separately."

Reading the IAIABC's Draft Supplemental Impairment Guides is a chilling experience. This organization is not supposed to promote special interests. Its members are the workers' compensation commissions charged with the resolution of disputes. Even if the Draft never gains traction as an alternative or supplemental system, its expressions of hostility to workers, doctors and lawyers call into question the IAIABC's fairness and impartiality. This organization seems to believe that the workers' compensation system would be better if we could get rid of those pesky doctors and lawyers, set the bar higher for the injured worker to be compensated, and provide clear sailing for employers and insurers.

For years participants in the workers' compensation system have watched as employers and the insurance industry have promoted use of the AMA Guides as the sole method for compensating partial disability. Claimants' advocates have expressed grave reservations about this because the Guides often fail to take into consideration the real impact of industrial injuries on the wages and lives of workers and their families. WILG has supported a broader definition of partial disability that includes pain, lost wage-earning capacity, and the impact of the injury on the quality of activities of daily life. Despite misgivings about some sections of the Guides, these have generally been recognized to be based on reasonable medical knowledge and to represent the consensus judgment of the medical profession. The IAIABC appears intent on introducing political bias into the process. The evaluation of medical issues is best left to the medical profession and should not be usurped by workers' compensation commissions.▼

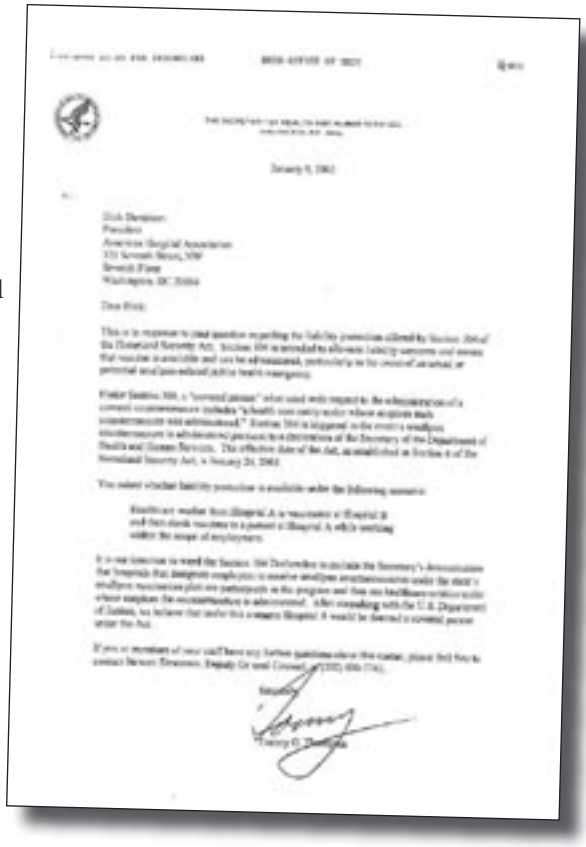
the labor page

Smallpox Protection for Health Care Workers and First Responders

By Rob McGarrah and Peg Seminario

Rob McGarrah is an attorney who currently serves as lead professional staffer for the AFL-CIO's national workers' compensation efforts. His position with the AFL-CIO involves advocating workers' rights in federal policy matters ranging from patients rights to medical records privacy and health insurance reform. He was one of the original "Nader's raiders", serving as staff attorney for Public Citizen's Health Research Group in the 1970's. From 1975 to 1997, he was staff attorney, and then director, of the first labor union public policy department with The American Federation of State, County and Municipal Employees (AFSCME). Among other accomplishments, during that period he launched AFSCME's successful drive to organize the clerical and technical workers at Harvard University. He joined President John Sweeney's public policy staff at AFL-CIO in 1997. Rob is a 1972 graduate of Villanova University Law School and received an MPH from Johns Hopkins University in 1999.

President Bush has ordered 500,000 U.S. armed forces personnel and requested 500,000 healthcare workers and 10 million civilian first responders to voluntarily agree to be vaccinated against smallpox. Military personnel vaccinations began on December 14, 2002 and civilian healthcare workers will be vaccinated beginning January 24, 2003.



Although both military and civilian first responders will be each be part of the front-line defense against an attack on the United States, there are significant differences in the protections afforded to civilian and military personnel. In brief, the Defense Department has provided for mandatory, comprehensive protections for all aspects of its vaccination program.

Nothing, however, has been done for civilian first responders: while the Centers for Disease Control has posted guidelines on its website, there are no provisions for medical or lost wage benefits, no benefits for household members who become infected, no mandatory training and screening prior to vaccination and no mandatory tracking and monitoring of adverse effects of the vaccine.

According to the Centers for Disease Control, for every million people vaccinated, 1,000 may suffer serious but not life-threatening reactions — such as headache, fatigue, muscle aches or chills — for a week or so. And studies warn that between 14 and 52 of those million vaccinated will get seriously ill,

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Ethical Issues for the Rehabilitation Provider

By Sue Anne Howard, Wheeling, WVA

Workers' compensation claimants are constantly confronted by difficulties in the physical and vocational rehabilitation process. Before you answer the usual question from your client, "Can they do that?", be well-versed in the various rules, regulations, statutes and case law of your jurisdiction. However, it is also helpful to examine the standards for ethical conduct established by national accrediting commissions for vocational rehabilitation counselors and rehabilitation nurses.

Effective January 1, 2002, the Commission on Rehabilitation Counselor Certification adopted a "Code of Professional Ethics for Rehabilitation Counselors." The scope of that document is broad and may be viewed in its entirety at: www.crccertification.com. The preamble of the Code emphases that "The primary obligation of rehabilitation counselors is to their clients, defined in the Code as individuals with disabilities who are receiving services from rehabilitation counselors."

Other sections of the Code provide:

"Rehabilitation counselors will not abandon or neglect clients in counseling. Rehabilitation counselors will assist in making appropriate arrangements for the continuation of treatment, when necessary, during interruptions such as vacations, and following termination." Section A.8.a.

"Rehabilitation counselors will practice only within the boundaries of their competence, based on their education, training, supervised experience, state and national professional credentials, and appropriate professional experience." Section D.1.a.

"Rehabilitation counselors will be accurate, timely, and objective in reporting their professional activities and opinions to appropriate third parties including courts, health insurance companies, those who are the recipients of evaluation reports, and others." Section D.6.b.

"Rehabilitation counselors will ensure that clients and/or their legally recognized representative are afforded the opportunity for full participation in their own treatment team." Section E.3.a.

"Rehabilitation counselors will not misuse assessment results, including test results and interpretations, and will take reasonable steps to prevent the misuse of such by others." Section F.2.a.

"Rehabilitation counselors will neither give nor receive commissions, rebates or any other form of remuner-

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Sue Anne Howard is a sole practitioner in Wheeling, West Virginia, limiting her practice to representation of the disabled in workers' compensation and social security claims. She was formerly counsel for District # 6 of the United Mine Workers of America. Ms. Howard is a frequent lecturer on disability law issues. She is a member of the West Virginia State Bar Workers' Compensation Committee and serves on the Board of Directors of WILG and is a panel lawyer for the Professional Hockey Players Association. Three years ago, she was appointed to the Board of Law Examiners by the West Virginia Supreme Court of Appeals and currently serves as President of that Board. She received her BA and JD from West Virginia University.
Sue Anne is "proud to be a coal miner's daughter." ▼

Practice Pointers *cont. from page 12*

ation when referring clients for professional services." Section J.5.b.

Certified Rehabilitation Counselors (CRC) are subject to disciplinary action. Although some rehabilitation nurses may have earned a CRC designation, the Association of Rehabilitation Nurses (ARN) has also developed a "position statement" relating to ethical issues that is posted at www.rehabnurse.org.

The ARN cross-references ethical codes recognized by the nursing profession in general, and has made additional statements specific to their area of specialization, including:

"1. The rehabilitation nurse acts as a client advocate.

2. The rehabilitation nurse recognizes the importance of clients' participation in the decision-making process and realizes that some clients do not and will not value independence and wellness as much as rehabilitation professionals do.

3. The rehabilitation nurse is always concerned about the rehabilitation client's quality of life as defined by the client, which may be compromised by technological advances in healthcare. Advanced medical technology may prolong life but not improve the quality of life.

4. The rehabilitation nurse is responsible for providing information or assisting with the collection and interpretation of information that is necessary to resolve major ethical dilemmas.

5. The rehabilitation nurse stays informed of ethical issues that might affect rehabilitation clients and is aware of his or her own values and attitudes.

6. The rehabilitation nurse supports ANA's (1991) position statement on nursing and the Patient Self-Determination Act.

7. The rehabilitation nurse bases his or her decisions on the ethical principles of autonomy, beneficence, justice and nonmaleficence."

Unlike the Code of Professional Ethics for Rehabilitation Counselors, the ANA position statement does not provide for sanctions of its certified rehabilitation nurses who fail to meet standards of conduct.

Recommended reading: *International Rehabilitation Associates, Inc., d/b/a/ Intracorp; and Tammy L. Bradly v. Adams,* 613 S. 2d 1207 (Ala.1992); and *Skaggs v. Eastern Associated Coal Corp.,* No 30190 (W.Va. Jan. 2002 Term). ▼

Smallpox *cont. from page 11*

and about one or two will die. Exposure to the vaccinia virus is especially dangerous to anyone with a weakened immune system, a group that includes anyone who has received a transplant, is HIV-positive, is being treated for cancer, or lives with anyone with one of those conditions. These individuals could even get ill if they come in close contact with someone inoculated within the last few days.

Asked about civilian first responders who become ill or die from the federal smallpox vaccination program, Health and Human Services Secretary Tommy Thompson said the only compensation presently available would come from "their own health insurance programs… or state workers compensation laws. And heaven forbid, if somebody dies, they would be able to receive the wrongful death portions of the workers compensation law put out by the particular state."

Thompson continued: "The next question you're going to ask me is, Is that fair? [B]ecause hospital's workers compensation rates might go up as well as other employers, or the health insurance premiums might go up. The truth of the matter is that we have not done anything in that regard as of yet, except to point out, quickly, that we have already given the states $1.1 billion. The balance of the money was sent out on June 1st of this year to the states to implement their plans."

"We anticipate when Congress passes the next appropriations bills for the Department of Health and Human Services, there will be included in there, almost $1.5 billion, of which about $535 million will be for hospitals, and we will be working with the states in the implementation of their plans, which have already been submitted for fiscal year 2003, to be able to amend those for fiscal year 2004, to be able to take into consideration any further costs that may result as a result of this vaccination program, and we are also looking at the potential of introducing some further legislation."

"I'm fairly confident that that is going to take place but at this point in time a decision has not been made on that and there has not been any legislation drafted in that regard."

January 24 is fast approaching for the first responder vaccination program. Secretary Thompson, Senators Bill Frist and Edward Kennedy and Representative Henry Waxman have each called for federal action to protect first responders. AFL-CIO is in the process of designing a smallpox compensation program with the critical elements it feels should be effective as of the first responder vaccination date. ▼

In Troubled Times Lawyers Need to Stand Up and be Counted

By Lance Palmer, Seattle, WA

Lance Palmer

Lance Palmer is managing shareholder at the law firm of Levinson Friedman, P.S. in Seattle. His practice is limited to the representation of injured persons, primarily maritime, product liability, construction site, automobile collision injury, and employment discrimination victims. He is admitted to practice in Washington and Alaska, and frequently litigates law suits in both federal and state court. The Honorable Barbara J. Rothstein has appointed him to serve as National Plaintiffs' Liaison Counsel for PPA MDL 1407, which is pending in Seattle. Lance received his B.A. degree summa cum laude, and his J.D. degree magna cum laude, from the University of Puget Sound, where he was a law review associate editor and author of the article "Curing Washington's Occupational Disease Statute." He is editor-in-chief of the Washington State Trial Lawyers' ***Trial News*** editorial board, and has served on WSTLA's Legislative Steering Committee, as well as on the Washington State Bar Association's Legislative Steering and Court Rules and Procedures committees. ▼

[Ed Note: This article is reprinted with permission from the November 2002 issue of the Washington State Trial Lawyers Association's Trial News.

"The first thing we do, let's kill all the lawyers," said Dick the Butcher in Shakespeare's *King Henry VI – Part II,* fearful that the lawyers would support the institutions of British government and thereby thwart Dick's rebellion. I like to think that one of the primary reasons that our country is governed by the rule of law rather than the rule of the gun is that lawyers are committed to the fair and impartial administration of justice. However, I am concerned that so few lawyers are speaking out against recent challenges to our judicial system. In these troubled times, when the populace is barraged with media coverage about legalizing torture to extract evidence from terrorists, military tribunals, secret appellate courts, and wiretapping jailhouse conversations between the accused and counsel, lawyers seem to be passively standing by and watching while this country's legal foundations are being undermined from within in response to a threat from without.

I have no doubt that for many lawyers, the perceived threat is great enough to justify the abrogation of a few civil liberties. For others, the belief is that those whose rights are at risk are people who should have no rights at all. Still others are of a notion that our system is strong enough to be stretched when needed. Yet, history has proven that our system is not always so resilient. One does not have to resort to Sinclair Lewis' great fictional novel "It Can't Happen Here" to find examples of lawyer acquiescence in great travesties of justice in the name of homeland security.

About 80 years ago, Washington State — as well as the rest of the nation — was in the throes of the great "Red Scare," initially inspired by the Bolshevik revolution in Russia. The organized labor movement, agitating for such then unheard of perks as the eight hour day and a minimum wage, had loose ties to the international communist movement and certainly invoked communist rhetoric with such memorable phrases as "workers of

the world unite!" Seattle was the site of the nation's first general strike. Business interests attacked the unions verbally and physically. Local newspapers chimed in, using anti-Red invective to incite "good people" to run the unions out of town. The state legislature passed criminal syndicalism laws that made it a crime for union members to distribute literature or even hold meetings. Thousands were jailed in this state for exercising what most of us take for granted as the right of free speech.

One union, in particular, the International Workers of the Word [IWW], was the Al Quaida of those times. IWW members, called "Wobblies," were especially despised. IWW leaders — such as Big Bill Haywood, Joe Hill and Ralph Chaplin — and members alike were jailed on trumped up charges. Rank and file members were tarred, feathered, and run out of town on a rail. By 1919, only two IWW union halls were left standing in the entire State of Washington. One, in my hometown of Centralia, was literally torn to the ground in 1918 by citizens who were supposed to be marching in a Red Cross parade. The town newspaper reported as follows:

The raid was orderly, the citizens who made it showed no violence. No property was damaged other than that of the IWWs. No opposition was encountered by the half dozen IWWs who were in the place when the determined citizens entered.

But in Centralia, the IWW dared to return. The next year, the Wobblies opened a new union hall. A citizens' action committee, composed of local businessmen, professionals and politicians, was organized and at a well-publicized town meeting resolved to destroy the new union hall during the upcoming Armistice Day Parade. The Wobblies' request for police protection was rebuffed. Their posters "implor[ing] the law abiding citizens to prevent" the upcoming raid were ignored. Their lawyer, Elmer Smith, correctly told them that they had the right to use force if their union hall was attacked and forcibly entered. Fatefully, the Wobblies resolved to fight, not run.

One does not have to resort to Sinclair Lewis' great fictional novel "It Can't Happen Here" to find examples of lawyer acquiescence in great travesties of justice in the name of homeland security.

On Armistice Day, November 11, 1919, members of the Centralia Post of the American Legion broke ranks during the parade and assaulted the IWW hall. Some of them actually carried nooses. As the door was kicked in, the Wobblies opened fire from inside and outside the hall, catching the legionnaires in a crossfire. Three of the legionnaires fell, mortally wounded. Before the hall could be overrun by the legionnaires, one of the Wobblies, Wesley Everest, bolted out the back door of the hall in an effort to escape. Everest ran through a residential neighborhood with his pursuers hot on his heels. They shot at him and he shot back. Another legionnaire was shot down by the fleeing Wobbly before he was captured while trying to ford a river. Badly beaten, he was led through town with a rope around his neck until he was deposited in the city jail, along with several other union members and their lawyer, Elmer Smith.

Shortly after night fell, the municipal power plant was shut down, veiling Centralia in darkness. Vigilantes removed Everest from the jail, castrated him, and then lynched him from a bridge. Wanting to have enough sections of rope for souvenirs, the several dozen people involved repeated the lynching three times with three different ropes. Then they riddled Everest with bullets. The next morning, Everest was cut down, and his body dumped in the river for two days. When the body was retrieved, it was returned to the jail, where it resided amongst his fellow Wobblies for another two days. During this period, the Wobblies were periodically removed from their cell and strung up in mock lynchings, in between interrogations by local officials. One of the prisoners was driven insane by this torture.

No one associated with Everest's lynching was ever arrested. Government officials took the position that the Wobblies were getting what they deserved. The local coroner gave a speech calling Everest's lynching a "suicide" stemming from the remorse he felt for his awful crime. An associate justice of the Washington State Supreme Court wrote a letter expressing his "appreciation of the high character of citizenship displayed by the people of Centralia in their agonizing calamity. We are all shocked by the manifestation of barbarity on the part of the outlaws, and are depressed by the loss of lives of brave men, but at the same time are proud of the calm control and loyalty to American ideals demonstrated by the returned soldiers

Cont. on page 16

and citizens. I am proud to be an inhabitant of a state which contains a city with the record which has been made for Centralia by its law-abiding citizens."

Ultimately, the Wobblies and their lawyer were put on trial for murder. Venue was changed to Grays Harbor County. Initially, the trial judge opined on the record that a fair trial could not be had in Montesano, but he later changed his mind. The "special prosecutors" were private lawyers who regularly represented the timber companies that opposed the IWW — one of the lawyers had even been one of the legionnaires who participated in the raid on the union hall and in the capture of Everest. The defense lawyer was George Vanderveer of Seattle, one of the greatest American lawyers of the twentieth century, and perhaps the best trial lawyer ever produced by Washington State.

Vanderveer was hamstrung by adverse evidentiary rulings throughout the trial. He was not allowed to introduce evidence of the destruction of the IWW hall in 1918, or of the citizens' action committee's resolution to raid the hall in 1919 — the trial judge ruled that Vanderveer could not link the dead legionnaires to either of those raids. Without that evidence, the Wobblies' self-defense argument was considerably weakened, as the prosecution's theory of the case was that the Wobblies had cruelly ambushed the American Legion as the legionnaires were peacefully marching down the street in patriotic celebration of Armistice Day. Moreover, the trial judge prevented Vanderveer from cross-examining prosecution witnesses about their anti-IWW bias, even if the witnesses were known to have attacked Wobblies before the Armistice Day raid, on the ground that such bias was irrelevant. On the other hand, defense witnesses who contradicted the prosecution's case were arrested for perjury — in front of the jury — and hauled from the witness stand in handcuffs. For Vanderveer, the final straw had to come when — at the prosecution's request — the Washington National Guard camped out on the lawn in front of the courthouse. It was explained to the jury that the soldiers were there to protect the jurors from the Wobblies. Exasperated, Vanderveer's words to the judge were as follows: "There was a time when I thought that your rulings were due to an ignorance of the law. That will no longer explain them."

The jury's reaction to the trial was as unusual as the trial itself. It first came back with a verdict acquitting Elmer Smith and two Wobblies, finding four other Wobblies guilty of second-degree murder, and two remaining Wobblies guilty of manslaughter. The trial judge refused to accept the verdict and sent the jury back for additional deliberation. In the second verdict, lawyer Elmer Smith and the two Wobblies were acquitted, but all of the other Wobblies were convicted of second-degree murder based upon a conspiracy theory. The jurors asked the judge to be lenient and hand down the lightest sentences allowed under the law. The judge refused and sentenced the convicted Wobblies to prison terms ranging from 25 to 40 years. Vanderveer and the Wobblies appealed, in part on the adverse evidentiary rulings, in part on an argument that the conspiracy charge requires premeditation, and there is no premeditation element to second-degree murder. The appeal was lost on all counts. The associate justice who had earlier expressed his "appreciation of the high character" of Centralia's lynch mob joined in the decision denying the appeal.

During the appeal, IWW lawyer Elmer Smith was held in jail. When he was ultimately released, he vowed to help secure the release of the jailed Wobblies. He tirelessly spoke at gatherings and raised funds for the families of the prisoners. However, within a short period of time, fellow members of the Centralia bar, led by one of the "special prosecutors" — who later become head of the American Legion for the entire state — pushed to have Smith disbarred for his radical affiliations. The Board of Law Examiners assembled a three-member panel to conduct a hearing into Smith's conduct. Vanderveer stepped in to defend Smith. Though members of the panel had made disparaging comments to the press about Smith before the proceedings even got started, Vanderveer was not allowed to get the panel removed from the case. The hearing lasted eight days, much of which was devoted to the "prosecution's" reading into the record of IWW literature, an act meant to paint Smith as a Red through guilt by association. The most damning evi-

dence against Smith was eyewitness testimony attributing to Smith statements calling for a general strike in support of the jailed Wobblies and saying that the murder trial judge was "ever faithful to the lumber trust."

If we stand by our legal institutions and our laws, they will be strong enough to survive whatever new threat comes along. But if we sell our legal system out for the sake of "getting" the newest bogeyman, sooner or later someone like Dick the Butcher will get us.

The Board of Law Examiners voted to disbar Elmer Smith after concluding that his offenses were "unethical, unprofessional and involve moral turpitude." The Board felt that supporting the union and calling for a general strike encouraged crime and was a violation of his oath to support the Constitution. The Board also wrote that it was false and unjustifiable for Smith to associate the murder trial judge with the "lumber trust" for "then the same charge could be made against the entire membership of the Supreme Court of the State of Washington where the case was reviewed. It is inconceivable that if the defendants did not have a fair and impartial trial, that the Supreme Court of this state would have permitted the verdict to stand."

The Washington State Supreme Court reviewed the Board of Law Examiners' recommendation for disbarment. The same associate justice who had earlier expressed his "appreciation of the high character" of Centralia's lynch mob wrote the majority opinion disbarring Elmer Smith, stating as follows: "The substance of the charge against him is that, in public addresses since 1919 he has advocated and approved sabotage, syndicalism, and general violation of the law as a means of social reform… any person who advocates such general principles is unworthy of the office of attorney at law."

The plight of Elmer Smith and his Wobbly clients generated national attention. *The New Republic, The Nation,* and the American Civil Liberties Union all weighed in against what they viewed as lawyer-sanctioned sell out of the judicial system for the sole sake of combating a communist-influenced labor movement. Influential writers such as Helen Gurley Brown and John Dos Passos lent their considerable talents in an effort to gain justice for Smith and his clients. Several groups, including church councils and American Legion chapters, investigated the shootings of November 11, 1919 and determined that the legionnaires had stormed the IWW hall and that the Wobblies had acted in self defense.

By the 1930s, the unions had won the eight-hour day and the minimum wage, and the public sentiment against the unions had softened. The government granted clemency to the imprisoned Wobblies who still lived. Elmer Smith applied for reinstatement to the bar. The Board of Law Examiners asked him three questions: (1) Were the IWW's ideas desirable for society?; (2) Did he believe that changes in society should be promoted by other than legal and peaceable means?: and (3) Did he approve of the ideas expressed in IWW literature? Taking a lesson from Galileo, Smith rejected the "vicious" ideas expressed by some unions and stated that labor could achieve its goals with the ballot. Smith was readmitted to the bar, but he died a short time later at the age of 44, bleeding to death from a hemorrhaging stomach ulcer.

At Smith's funeral, the eulogy was delivered by Judge J.M. Phillips, who said that long after Smith's enemies were dead, Smith's name would be a symbol of honor. Shortly thereafter, the U.S. Senate considered the nomination to the U.S. Circuit Court of the associate justice who had earlier expressed his "appreciation of the high character" of Centralia's lynch mob. The associate justice's nomination was denied. One senator called the decision to disbar Smith "a most arbitrary opinion."

Elmer Smith paid a high price for standing by his principles. Many of his contemporaries paid a higher price for giving up their principles for the sake of "getting" a foe that was more imagined than real. Like Elmer Smith, the lessons to be learned from 1919 have been largely forgotten. It is time for us — especially trial lawyers — to remember those lessons. If we stand by our legal institutions and our laws, they will be strong enough to survive whatever new threat comes along. But if we sell our legal system out for the sake of "getting" the newest bogeyman, sooner or later someone like Dick the Butcher will get us. Those of you who would like to learn more about Elmer Smith and his times should read "The Centralia Tragedy of 1919: Elmer Smith and the Wobblies," by Tom Copeland.

And that's one man's opinion. ▼

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Fleecing the Day-Laborers — and the Workers' Comp System: The Labor Ready Story

In 1989, two guys running a burger joint in Spokane, Washington had an idea of how to supply manpower on demand instead of burgers. They would apply the principles learned in fast food production to a business of providing units of human labor. That idea turned into Labor Ready, which by 2002 was the nation's largest supplier of temporary manual labor — the veritable McDonald's of the temp industry. Now Labor Ready generates $1 billion a year from over 800 branches. About 700,000 workers are employed each year, making the company one of the largest employers in the U.S. By and large, these workers are recruited from unemployment offices, homeless shelters and drug-rehab centers.

Temping grew by 150% in the 1990s, and Labor Ready essentially captured the low end of the temp business, bolstered in large measure by the federal overhaul of the welfare system in 1996, which brought thousands of potential low-wage employees on to the market. At the dawn of every day, thousands of people line up across the country for minimum wage work at Labor Ready, hoping to be dispatched to some of the dirtiest and most dangerous jobs in the labor market.

The most profitable mechanism for fleecing the workers — one invented by Labor Ready — is a special ATM for workers with no bank accounts, who comprise a significant portion of the workforce.

Labor Ready boasts in its annual report of its emphasis on safety and how it treats its workers with "respect," but in truth workers are often sent off to dangerous jobs with little or no training or preparation. And company records indicate about 10,000 people are injured on the job each year. Moreover, Labor Ready has failed to pay employees for all the time it controls them, and has found inventive ways to bilk those employees out of some of the meager compensation they receive.

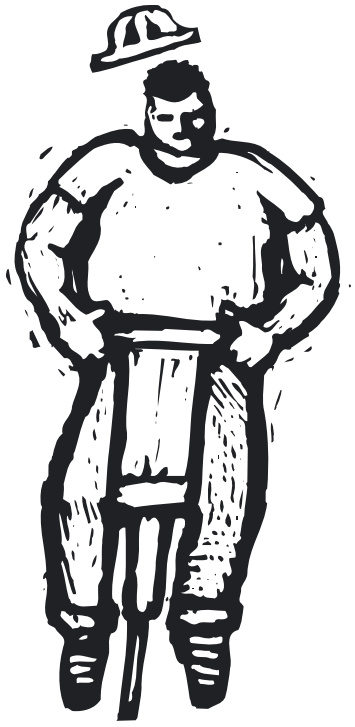
When Labor Ready offices open at dawn, job seekers sign in, and names are then called. Those who get assignments are unpaid for the time — often

Labor Ready *cont. from page 20*

a couple hours — it takes to transport them to the worksite. When they return to the Labor Ready office, they often spend considerable time just waiting to be paid. Many others are required to wait on a stand-by basis for hours in a Labor Ready office. A suit filed in California to force the company to pay for time waiting for assignments and for paychecks is predicated upon the company's marketing promise to provide "labor on demand." Labor Ready advertises a "ready and available workforce" and then makes prospective employees sit and wait so it can make good on that promise.

Labor Ready charges its clients double what it pays its workers. It adds to the profit by charging exorbitant prices for the protective gear required by the job — sometimes double the actual cost of the item — along with transportation fees and drug test fees, all of which are simply debited from the paycheck. All these charges often bring the actual pay to below minimum wage, which has resulted in fines being levied against the company in some states. The most profitable mechanism for fleecing the workers — one invented by Labor Ready — is a special ATM for workers with no bank accounts, who comprise a significant portion of the workforce. Instead of going to a check-cashing facility, the worker puts a voucher into a Labor Ready ATM, which deducts $1.00 plus any change. Thus, for a day's wages of $41.99, the machine pays $40.00, so the charge of $1.99 represents nearly 5% of the paycheck.

In 2000, ATM charges provided gross revenue to Labor Ready of $8.3 million, and a net profit of $5.2 million after deducting for the expense of the machines. The latter figure comprised more than half of the company's net profits for 2000. Class action suits in several states have been filed against Labor Ready for the ATM charges,



based on the proposition that under wage and hour laws wages paid must be immediately negotiable and payable in cash without a discount.

Beyond fleecing its employees, Labor Ready has a proven track record of fleecing the public by shorting the various state workers' comp insurance funds on premiums it should be paying for its workers. It has done this in a variety of ways, with misclassification of workers being a prime example. Construction workers have been classified as janitors and maids, and in one case as a piano tuner/taxidermist. Construction insurance runs $13.15 per $100.00 of payroll versus $1.09 for a piano tuner/taxidermist. Insurance industry documents reflect a nationwide pattern by Labor Ready, which has told insurers in 33 states that 44% of its workers are clerical, as opposed to manual, but has internal files that show the figure to be only about 20%. While no governmental investigations have yet charged Labor Ready with intentional misclassification, managers interviewed by *Mother Jones* have acknowledged a pattern of training supervisors to misclassify, and there are reports of record-shredding to conceal that fact.

Facing a constant barrage of criticism over the past several months, the company's original founders have departed, the value of Labor Ready stock has crashed, and some company branches have been closed. Thousands still show up at the company, though, trapped in a day-labor system that provides no hope of permanent or full-time employment and is so demeaning that it is, as one worker commented, worse than being unemployed: "I was making $34 a day working eight hours. It wasn't worth it. I can do that by panhandling." ▼

Source: *Mother Jones,* March/April 2002. Ed.

Around the Nation *cont. from page 4*

described a corporate culture gone completely awry: extensive underreporting to OSHA of actual injuries and lost workdays; dehumanizing treatment of injured workers through a corrupt in-house medical department; plant turnover rates of up to 100% per year; the fact that five of McWane's ten plants have been designated "high priority" violators of environmental laws by the EPA; and a disciplinary system that "teaches safety" by firing employees for complaints about safety – "if you step in a hole, it's because you weren't watching where you were going, not because the hole should have been covered."

McWane puts lives at risk daily under a system of financial and disciplinary incentives that flourished a century ago under the industrial barons of molten iron. "The people, they're nothing," said Rester. "They're just numbers. You move them in and out. I mean, if they don't do the job you fire them. If they get hurt, complain about safety, you put a bull's-eye on them." ▼

Charles N. Jeffress

Mr. Jeffress served from 1997 to 2001 as Assistant Secretary of Labor for Occupational Safety and Health in the United States Department of Labor in Washington, DC. As Assistant Secretary, Mr. Jeffress directed an agency with 2200 people and an annual budget of $384 million. He was responsible for establishing national safety and health regulations, for inspecting businesses for compliance with the regulations, and for educating employers and workers about safety and health protections. Mr. Jeffress was the leader of the United States delegation to the Transatlantic Dialogue with the European Union on occupational safety and health issues, and he was named Regulator of the Year by Business Week magazine in January of 2001.

Congress Bears Watching

(or)

Can You Bear to Watch?

By Charles N. Jeffress

This issue of *Workers First Watch* wouldn't be complete without an article on the new Congress, but writing an article in early January to appear in February is just asking for trouble! This Congress, like the one preceding it, seems destined for a stormy session.

The Senate, formerly the more stable of the legislative bodies, now has had new majority leaders in each of its last three sessions of Congress. From Trent Lott to Tom Daschle to Bill Frist, the majority leader position is beginning to look less like the seat of power and more like the proverbial hotseat. With a closely divided Senate, the majority leader has to keep the diverse elements of his party in line in order to pass legislation, not an easy task for a Republican party with a deep fracture between a small group of moderates and a much larger group of right-wingers. Senator Frist, with a conservative voting record but a moderate image, will try hard to maintain a party line, but elements of discord were sown even before he took over as majority leader.

In the final days of last year's session, the Senate passed the Homeland Security bill conference report only after Republican senators Lincoln Chafee, Olympia Snowe and Susan Collins obtained a promise from then-majority leader Trent Lott that three provisions of the bill would be repealed in January. (The provisions eliminated liability for vaccines containing mercury [the "Eli Lily" amendment], designated Texas A&M as the only university qualifying for a federal appropriation for a planned research center on homeland security, and reinstated the authority for the Department of Homeland Security to contract with corporations who have reincor-

Congress *cont. from page 22*

porated offshore for tax reasons. (Rep. Dick Armey inserted them into the bill at the last minute.) After the President had signed the bill, Rep. Tom DeLay announced that the House had only agreed to review the provisions, not repeal them. Should the Senate Republican leadership not keep its promises to the moderates on this issue, look for the moderates to become very stubborn about seeing final House action before voting for any controversial bills wanted by the Senate leadership.

In the House, not only is the Republican majority larger, but it is much more cohesive on leadership issues. Speaker Hastert should have little trouble getting from the House the legislation that he desires. He has already set the tone by ignoring seniority in awarding two committee chairmanships, giving them to loyalists instead of to more senior members who had opposed the leadership on an issue last year.

While the House majority is cohesive, it can also be intransigent, as it was on the bankruptcy bill in the closing days of the last session. Both the House and the Senate had passed a bankruptcy "reform" bill, which for the most part made it harder to file for bankruptcy and made it harder to discharge credit card debts in bankruptcy proceedings. However, the House had added a provision that allowed criminal fines against protestors at abortion clinics to be discharged in bankruptcy proceedings. Criminal fines generally are not dischargeable now. The House leadership refused to back down on the issue, the Senate refused to agree to it, and the bill, which had support even from Democrats in the Senate, failed as a result. More such ideological impasses are certainly possible this year.

The first bill in the new Congress to address injured workers' needs will likely be a bill to address any potential victims of complications from the smallpox vaccine. The medical community is virtually certain that some people will suffer complications, from missing a day's work to severe illness and perhaps death. At the outset of this Congress only military employees and military contractors had a program that directly addressed vaccine complications, and it appears to be a very comprehensive program. An effort will be made in Congress to provide some of the same guarantees – 100% coverage for lost wages and 100% payment for medical costs – for any other victims of complications from the vaccine. The best method for delivering the payments would appear to be through the employer and the employer's health insurance, with the federal government making reimbursements to employers and insurers for any benefits paid. There is bipartisan interest in making these victims whole, and action may have occurred by the time this article is printed.

Beyond vaccine protections, no other helpful legislation is on the horizon for worker safety in this Congress. Worker advocates expect to be fighting defensive battles for the next two years.

Beyond vaccine protections, no other helpful legislation is on the horizon for worker safety in this Congress. Worker advocates expect to be fighting defensive battles for the next two years. No outright attacks on worker safety legislation have been discussed, but advocates are braced for fights yet to come. Any action on worker safety issues in the Senate is likely to come through the Senate Health, Education, Labor, and Pensions subcommittee on employment, safety, and training, led by Sen Mike Enzi of Wyoming. In the House, watch the House Education and Workforce subcommittee led by Rep. Charlie Norwood of Georgia.

On the "tort reform" front, the Republican strategy seems to be to attack the issue piecemeal instead of directly. In the last two years, legislation passed limiting tort recovery in selected areas, such as in terrorism-related claims, in public school settings, and in some cases against airline manufacturers and drug companies (the "Eli Lily" amendment noted above). A major campaign to limit medical malpractice awards is underway at present. By chipping away at the issue, Republicans hope to create liability protections one at a time, perhaps building up to some version of comprehensive "reform" at a later time.

To keep up to date on potential action in Congress which may affect injured workers, keep checking your WILG website discussion pages, where calls for action will be posted.

Katherine Mason

Katherine Mason recently joined the editor of this magazine at Causey Law Firm in Seattle, Washington, where she litigates workers' compensation cases at all levels and handles other injury claims as well. She gained her experience in workers' compensation as an Assistant Attorney General with the Washington State Attorney General's office, and then spent two years in private practice with a Seattle firm specializing in medical negligence and health care law issues. Katherine has undergraduate degrees in both English and Philosophy, and a Master's degree in English, from Central Washington University, and earned her J.D. from the Chicago-Kent College of Law in 1999. She is a member of the Washington State Trial Lawyers Association, and recently joined WILG. ▼

Trauma and Multiple Sclerosis:

Solid Evidence Trumps Frye Defense on Causal Relationship Issues

By Katherine L. Mason, Seattle, WA

At the time of his rear-end motor vehicle collision in August of 1998, Matthew Baril was 28 years old and had no idea he had occult or asymptomatic multiple sclerosis. He sustained injuries to his neck, elbow and knee that were initially covered under his workers' compensation claim. As early as three days following the collision, he had reported symptoms consistent with MS, namely tingling in his hands and feet. An MRI was obtained in September, and it showed evidence of MS in his cervical spine. Six weeks later, a second MRI showed demyelinating disease in his brain, and a diagnosis of MS was officially made.

A third-party action was then filed against the driver of the other vehicle. In addition to other claims, Matthew sought specific damages for traumatic onset of multiple sclerosis. State Farm Insurance, an intervening party and the insurer of the driver who caused the accident, filed a so-called "*Frye*" motion (*Frye v. United States,* 293 F. 1034 (D.C. Cir. 1923)) under ER 702 seeking to exclude evidence that MS can be triggered by the type of trauma sustained in this type of injury and to prevent Matthew from presenting these claims to the jury. The insurer contended Matthew's evidence did not meet the *Frye* requirement that for expert opinion to be presented to the trier of fact, it must be based upon "an explanatory theory generally accepted in the relevant scientific community." The basis for this motion was that, despite considerable research that supports the proposition that MS can be triggered by trauma, there remains much controversy regarding that relationship. And, since there is significant disagreement in the medical community about the cause of MS, the evidence supporting the theory of traumatic causation was not admissible for its ostensible failure to have achieved "general acceptance in the relevant scientific community."

Muliple sclerosis remains largely a puzzle. There is no known cure for it, nor is its cause understood.[1] MS occurs when the protective coating (myelin) around the axons of the central nervous system (CNS) or in the cerebrum (the front, upper portion of the brain) come under attack by

white blood cells. These attacks cause degeneration of the myelin called demyelination. During demyelination of the CNS, tissues around the area of attack become inflamed, and scars can form around the damaged areas. These scars are known as sclerosis or plaques; multiple sclerosis literally means "many scars." The scars on the myelin cause electrical impulses to and from the brain to be disrupted, slowed down or lost. Symptoms of demyelination of axons include weakness, numbness, tremor, loss of vision, pain, paralysis, loss of balance, and bladder and bowel dysfunction. Demyelination of the cerebrum can affect memory, motivation, insight, personality, touch, hearing, vision and muscle tone. The severity, quantity, and location of plaques determine the type and extent of symptoms experienced.

During the discovery phase of Matthew's suit, his attorney disclosed his experts who were then deposed by the other side. The most prominent expert was Dr. Charles Poser, a board-certified neurologist and professor of neurology at Harvard Medical School. Dr. Poser's specialty is multiple sclerosis, and he is a leading proponent for the theory that MS can be triggered, exacerbated and/or lit up by trauma to the axons in the CNS.[2] However, only trauma to the head, neck or upper back is related to this process.

There are two critical medical facts Dr. Poser relies upon to support his opinion on causation. First, concussion trauma and whiplash injuries have been demonstrated to cause alterations in the blood-brain barrier (BBB). Put simply, the BBB consists of tightly packed cells that prevent blood constituents from passing from the bloodstream into the brain. Alterations in the BBB, caused by whiplash or other trauma, set the stage for a lighting up of MS because white blood cells are permitted to flood the brain and damage nervous tissue as a result of the trauma. Under normal circumstances, white blood cells would not cross the BBB. The second critical fact for Dr. Poser is that alterations in the BBB are a necessary step permitting white blood cells to attack myelin. It is the combination of these two steps that leads Dr. Poser and others to believe that trauma can trigger, exacerbate and/or light up MS in a previously asymptomatic person.

In responding to the motion to exclude, Matthew's attorney, Robert Kornfeld of Kirkland, Washington, first argued that his evidence was outside the scope of a *Frye* analysis. A leading Washington decision in 1995 (*Reese v. Stroh*, 128 Wn.2d 300), which elaborated upon ER 702 and *Frye* requirements, had established that *Frye*'s "general acceptance" test applied only to "novel scientific procedures," not to medical testimony based on practical experience, acquired knowledge and accepted methodologies. Reese had held the trial court abused its discretion in excluding plaintiff's expert's testimony that was based on his qualifications, experience and participation in clinical studies even though the testimony was not supported by empirical, statistical evidence. Alternatively, Kornfeld argued that even if *Frye* applied, the standards had been met since the theory of causation was not "novel," having been around for decades, that the studies supporting causation were based upon valid and accepted scientific methods, and that there was, in fact, evidence that this theory of causation was generally accepted in the relevant scientific community. There was further reliance on case law from other jurisdictions, as well as upon articles in professional, peer-reviewed journals.

In November of 2002, a judge of the King County Superior Court denied defendants' *Frye* motion, finding upon all the evidence that the theory that pre-existing MS can be lit up is not a new theory and has been, in fact, part of accepted medical literature for over fifty years. The judge further found that while the validity of the theory is not universally accepted, and opposition to it seems to be mounting, those factors went to the weight, not the admissibility, of the evidence. (There was no appeal of the trial court's ruling, and the case subsequently settled.)

Multiple sclerosis remains one of the great medical mysteries, and one thing is clear: any workers' compensation or personal injury claim that attempts to present evidence that trauma has triggered the onset of MS symptoms should be prepared to confront motions similar to the one filed in Matthew Baril's case. But carefully marshaled and expertly presented evidence on this fascinating and difficult issue can overcome collateral attacks on a plaintiff's case — assuming an open-minded court hears and carefully considers that evidence. ▼

1 General information about Multiple Sclerosis was obtained from the Multiple Sclerosis Association of America's website located at www.msaa.com and the Multiple Sclerosis International Federation's website located at www.msif.com.

2 Poser, Charles M., MD, FRCP, Trauma to the Central Nervous System May Result in Formation or Enlargement of Multiple Sclerosis Plaques, Archives of Neurology, Volume 57, July 2000, p. 1074.

Robert Kornfeld is a solo personal injury attorney in Kirkland, Washington with over twenty years experience in trial advocacy. He is a graduate of the University of Vermont, and the Gonzaga University School of Law. He is licensed to practice in both Washington and New York, and tries cases in both state and federal court. He is a member of ATLA and the Washington State Trial Lawyers Association.

book review

Leonard T. Jernigan, Jr. practices workers' compensation and personal injury law in Raleigh, NC. He is a charter member of WILG, and has just completed a year of service as President. He has been Chair of ATLA's Workers' Compensation and Workplace Injury Section, and has served on the Board of Governors for the North Carolina Academy of Trial Lawyers. Len is author of *North Carolina Workers' Compensation Practice,* has been an Adjunct Professor of Law at North Carolina Central University Law School, and has been a frequent lecturer and author on issues of North Carolina personal injury and workers' comp law. He has a B.A. from the University of North Carolina, and a J.D. from North Carolina Central University.

The Hawk's Nest Tragedy — Silicosis Deaths in West Virginia and the Beginning of Occupational Disease Claims

by Martin Cherniak, M.D., M.P.H.
Yale University Press
(1986)

Reviewed by Leonard T. Jernigan, Jr.

Len's article is not so much a book review as it is a synopsis of the powerful story Cherniak has told about the human carnage in the workplace that led to coverage of occupational disease by the workers' compensation system. It's important to remember these horrors so we can put into proper perspective and context the current egregious disgrace of American industry — the story of McWane, Inc., recently profiled in the *New York Times* and on "Frontline." How little we've progressed in many respects in the past eighty years. –Ed.

In the introduction to *The Hawk's Nest Incident, America's Worst Industrial Disaster* by Martin Cherniack, M.D., M.P.H., (Yale University Press - 1986), Phillip J. Landrigan states as follows:

> The disaster at Gauley Bridge, West Virginia, killed a hitherto unimagined number of workers. Most of these men died of acute silicosis, and a few in falls and cave-ins. The Gauley Bridge disaster remains today the greatest American industrial tragedy; indeed, more people died during the drilling of the Hawk's Nest Tunnel than in the Triangle Shirt Waist Fire, the Sunshine Mine Disaster, and the Farmington Mine Disaster combined. Yet, Gauley Bridge is almost forgotten.

In 1927, Union Carbide and Carbon Corporation, a corporate entity best known for the production of Prestone antifreeze in 1920, needed a power source for a proposed metallurgical complex near the village of Boncar, West Virginia. It began buying key sections of the New River and created the New Kanawha Power Company, a licensed public utility, ostensibly to build public power stations. However, the true intent was to create hydroelectric power solely for Union Carbide.

The power company began making plans to build a dam and tunnel upstream from Gauley Bridge, West Virginia, near a spectacular promontory known as Hawk's Nest. The

proposed dam would direct part of the river flow through a three-mile long tunnel of solid rock with a descent of 162 feet. The power generated there would travel six miles by cable over 23 towers to the plant in Boncar.

In 1929, thirty-five contractors bid on the dam project. It became known as the Hawk's Nest Tunnel. The Rinehart and Dennis Company of Charlottesville, Virginia, an experienced and well-qualified builder, was awarded the contract in 1930 with a low bid of $4.2 million. Union Carbide kept tight control over planning and supervision and determined the speed of the work, while at the same time it avoided liability through the puppet Kanawha Power Company and through the terms of its contractual agreement with the contractor. In essence, Rinehart and Dennis was under the direction of Union Carbide engineers.

The work force was nearly 5,000 men and 65% of the workers were black. Most of the men had been recruited from the south (primarily Virginia, Alabama and the Carolinas) and were paid 15 – 20 cents per hour. Fewer than 20% of the workers were local in origin. Only 738 whites ever worked inside the tunnel, compared to 2,254 blacks.

The project was completed in less than two years, which was a remarkable feat, and was accomplished by using rapid drilling techniques. These techniques precluded such standard safety precautions as proper ventilation and the use of water to suppress airborne dust. To do so would have slowed progress by one-half to two-thirds of the rate achieved, which was 250 – 300 feet per week. Wet drilling to reduce dust exposure had been introduced in England as early as 1897, and by 1911 dry drilling had been strictly forbidden in South African mining. According to the workers the dust was so thick that a man could not be identified from 20 feet away. On the other hand, a Rinehart and Dennis engineer stated he never saw dust, "at least not enough to say it was dusty."

According to the workers the dust was so thick that a man could not be identified from 20 feet away.

By December of 1932, local attorneys had filed 80 claims with the West Virginia Compensation Commission, alleging silicosis. Individual lawsuits were filed in Fayette County, West Virginia, and the first was by a widow of Cecil Jones, a 23 year-old former tunnel worker who had died of silicosis. Before trial, the case was dismissed on the grounds that the workers' compensation laws of West Virginia covered this claim. The estate appealed to the West Virginia Supreme Court. While this case was on appeal, the case of Raymond Johnson, a 35 year-old white man and local resident who had worked as a driller in the tunnel for only a year, was called for trial in 1933.

This trial was the longest in the history of Fayette County. The plaintiff called 175 witnesses and the defense called 75. The trial judge gave jury instructions that made it difficult to rule in favor of the plaintiffs, if strictly followed, and after 20 hours of deliberation the jury deadlocked (7-5) in favor of the plaintiff. [The judge later issued a contempt citation to one of the jurors who had been chauffeured to and from the courthouse by employees of Rinehart and Dennis.] Unfortunately, Johnson died of acute silicosis before his case could be retried.

The West Virginia Supreme Court eventually issued its ruling in the Jones case, and held that no coverage existed under its workman's compensation laws for silicosis, and allowed the lawsuit to proceed. The gates were now open for personal injury claims, and within two weeks of the court's ruling 111 suits had been filed. Eventually, silicosis plaintiffs filed a total of 336 claims. Before the Cecil Jones case was called for trial, an out-of-court settlement was reached for all claimants represented by the attorneys in that action. The total amount of the settlement was $130,000.00, and the plaintiffs' lawyers agreed not to prosecute any further claims and also agreed to turn over all documents to the defense. The judge assigned settlement amounts based on race. For example, an unmarried black man got $400.00, but an unmarried white man got $800.00. The maximum possible award was $1600.00.

Daniel Shay, a worker who was not involved in the settlements, had his case tried in July of 1934. He also got a hung jury, but this time it was 10-2 in favor of the plaintiff. Before the case could be re-tried, the West Virginia legislature stepped in. Earlier, in 1932, when silicosis issues began to surface, efforts to clarify that the disease was compensable under the West Virginia Compensation Act were rebuffed by industry, although strongly supported by labor. Only six states (California, Connecticut, Massachusetts, Missouri, North Dakota and Wisconsin) covered claims of this nature. Now, in 1935, the legislature reconsidered and adopted silicosis legislation, this time with the blessing of industry. Unfortunately for the workers with silicosis, the statute was slanted toward employers and was considered a disgrace. One com-

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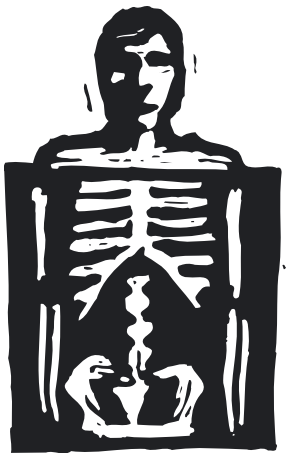
mentator on the legislation stated:

> Whether or not the West Virginia workmen's silicosis law is declared unconstitutional, the subservience of the West Virginia Legislature to the interests of employers is almost unparalleled in its hypocrisy, and the statute must be wiped out.

In 1936, Congressman Vito Marcantonio, a Republican Congressman from New York who supported workers' rights, called for hearings concerning the dangers of silicosis. Two of the people who testified, Mr. and Mrs. Charles Jones, residents of Gauley Bridge, told the committee that they had lost three sons to silicosis. The committee requested funding for more work on this issue, but the House of Representatives refused. The hearings did, however, raise national awareness of the dangers of silicosis, notwithstanding a *New York Times* article claiming that the whole episode at Hawk's Nest was caused by "a few conniving lawyers and their disingenuous clients." After further study the *Times* realized it had relied on false reports, and it conceded that a tragedy had indeed occurred at the Hawk's Nest Tunnel. By 1937, forty-six states had enacted laws concerning silicosis claims. In a national effort to control occupational lung disease, silicosis and Gauley Bridge would eventually come to symbolize the "dark side of progress." For example, 16 days before Illinois passed its Occupational Disease Act, Caterpillar Tractor Company took chest x-rays of 1,400 workers in one of its foundries. After finding evidence of lung disease in 179 workers, all were dismissed.

Although death statistics were not accurately kept in Fayette County, West Virginia in the 1930's, Union Carbide admitted that at least 109 deaths occurred, which would be 2.8 times the number expected. Cherniack attempted to extrapolate a more accurate figure. He concluded that 581 of the 922 black workers died as a result of silicosis or related diseases, and 183 of the 291 whites, for a total of 764 deaths. He also concedes this number may actually be too small. He summarized as follows:

After further study the *Times* realized it had relied on false reports, and it conceded that a tragedy had indeed occurred at the Hawk's Nest Tunnel. By 1937, forty-six states had enacted laws concerning silicosis claims.



> [T]he death toll of the disaster at Gauley Bridge was immense when compared with any other outbreak of industrial disease in modern history. That toll was taken not by accident and a merciful sudden death, but by prolonged illness and physical deterioration. No statistical method has been devised to tally human suffering and despair.

In January of 1937, the plant began to provide power and has operated for over 60 years at a minimal cost for maintenance and overhead. It was a "marvel of engineering prowess. Because of the low wage scales that prevailed in this region during the Great Depression, its monetary cost was ludicrously low." The initial investment was returned within nine years of completion.

Rinehart and Dennis never competed for a major project again, and within five years of completion of the Hawk's Nest Tunnel the company assets were liquidated and primarily purchased by local firms in Charlottesville, Virginia. Union Carbide continues as a powerful industrial force today. In 1964, after a 30-year court case, the federal government finally won its battle with Union Carbide for jurisdiction over the New River. In 1984 toxic fumes from a Union Carbide plant in Bhopal, India, killed over 2,000 people. The company admitted that 28 relatively harmless, but similar, incidents had occurred at a sister plant in Institution, West Virginia, 50 miles from Gauley Bridge. In 1991, the government obtained the right to purchase the Hawk's Nest Tunnel and power plant at the 1935 price ($11.2 million). Today, the dam still blocks the flow of water from the New River at Hawk's Nest and the power station at Gauley's Bridge continues to operate. There is no marker or other evidence concerning the men who died there, simply trying to earn a living.

Dangerous Jobs Still Exist in India's Techno-Hub

By Jessamyn Embry, Washington, D.C.

Pirambi has been rolling incense sticks in the Dairy Slum of Bangalore for twenty-six years. Now 34, she continues to roll incense seven days a week for at least eight hours a day. Her house is a one-room shack in a maze of similar homes without any plumbing or electricity, crisscrossed by dirt paths and streams of raw sewage. In her home there are no windows and only one small door through which little air passes in this dusty sauna of a city. A dark cloud of charcoal dust hangs in the air. After a few minutes in the room my eyes begin to tear. My sinuses and throat itch and burn. As I sit with her in this cloud of pollution, her two-year old grandson plays in the corner and another infant sleeps in a cradle suspended from the ceiling. She and her daughter work in their house every day while her son-in-law struggles as a day-labor construction worker. "We are exploited," she tells me in between a chain of deep, wet coughs.

"Rollers" like Pirambi are hired on a weekly basis to roll the basic unscented sticks that are then resold to incense perfumeries. They are supplied with the raw materials (bamboo, charcoal and jigat powder). At the roller's home, a portion of the powder is mixed with water, making a dense clay-like substance. She sits on the floor before a small table about four inches high and rolls a thin bamboo reed in the paste. Once an adequate amount of paste surrounds the stick, she pats it with powder and sets it aside to dry. This process is repeated non-stop for the next eight hours. If she uses too much material she will not have enough supplies to meet her quota and will have to purchase more from her own pocket. At the same time, if she does not use enough material, the stick is deemed poor quality and is tossed aside. For 1,000 sticks (roughly 8 hours labor) Pirambi is promised 16 Rupees (around 34 cents). Twenty to thirty sticks are always deemed inadequate and are removed. For a day's work she usually makes 16 cents.

Charcoal dust, kicked up during hours of rolling, hovers in a black cloud in the one or two-room shacks, severely damaging the lungs of anyone spending a long time inside the home. Pirambi, her daughter, son-in-law and two young grandsons live, eat, and sleep in this room and breathe this dust all day, everyday. These homes have very poor ventilation and the surrounding living conditions only worsen the situation. Children cooped up in the small houses with no toys and little attention often play with the powder and paste. Mothers with small infants cannot afford to stop rolling when the child is hungry and so breast-feed it in their laps, within inches of the hazardous material.

One of the most common diseases resulting from working with incense is chronic obstructive pulmonary disease (COPD).[1] Chronic bronchitis, occupational asthma, silicosis and emphysema are all connected with the incense trade.

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Jessamyn Embry is a senior in the School of International Service at American University in Washington, D.C. She spent her Junior year abroad studying development issues in South India and peace and conflict in Northern Ireland. In addition to having studied development and labor issues, she is also interested in American foreign policy. After graduating this May she plans to visit Central Asia for further study of labor and life in the developing countries.

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Black lung disease, an illness traditionally affiliated with coal mining, is also suspected but not confirmed as an incense-related disease. It occurs when deposits of coal dust gather around the bronchioles and eventually spread throughout the lungs. As time goes on these particles spread, coating the lungs.

Home-based workers cannot afford to seek medical treatment. A single bronchodilator injection costs $3, nearly 19 hours worth of work. Government hospitals provide some free health care but even then the journey requires 14 cents round trip bus fare (nearly a day's wages) plus the loss of half a day's work and the need to find childcare.

Work with incense also results in skin disease, the most common of which is primary irritant contact dermatitis. A direct result of handling incense powder and paste, dermatitis involves great discomfort as blisters itch and burn. If left untreated, the skin will begin to chap, crack, and ooze. With incense rollers who use their whole palm to make the sticks, the entire hand may puff and swell and the ability to perform household tasks, not to mention continuing to meet production quotas, becomes impossible.[2]

Treatment for dermatitis can be very expensive. Workers may take a prescription ointment that costs around $2 and only serves to relieve irritation, or they may choose to get an antibiotic injection to prevent infection. The injection costs between $6 and $10 and requires the patient to return to the hospital once a day for a week (98 cents bus fare). Very few women are able to receive the injection. As a result, the sores often become infected and the condition worsens. The only way to truly cure the disease is to prevent direct skin contact with the paste. It is impossible for a worker to wear gloves, as they will make her sloppy. She risks the loss of precious powder and paste or of making an inferior product that will in the end be rejected by her employer.[3]

These occupational diseases are by no means the ends of the illness and injury Pirambi and her family face. The slums of Bangalore run rampant with disease. Rivers of raw sewage run through the community. Houses are so close together and overcrowded that contagions are easily transmittable. Rudimentary fire fuels such as cow dung and wood along with Bangalore's own air pollution (equivalent to smoking six cigarettes a day) further affect the lungs and general health of workers and their families. Living in these conditions would result in disease even for the healthiest person. With so many strikes against them already, weak and injured lungs make incense families even more susceptible to illness. Among other serious diseases, tuberculosis is very common among this population. In most cases it is the workers who have the most sensitive lungs. They are the first to contract the disease, and then pass it on to their families whose lungs are also weak.[4]

It is not uncommon for workers or their family members to suffer from chronic bronchitis, emphysema, and asthma along with the new symptoms of tuberculosis that include high fever, night sweats, weight loss, and the coughing up of blood. With the onset of tuberculosis, medical bills skyrocket. A TB patient requires long periods of in-patient care to recover, an unimaginable concept for these families.[5] Pirambi and her daughter most likely already have tuberculosis, though they have never been to a clinic to be tested.

To find a solution to this situation seems, at this point, to be impossible. There are so many barriers and the issue is so complicated that it is hard to know where to begin. These women should be able to work to support their families without putting their health or that of their family at risk, but little effort is being made to remedy this situation. Incense rollers are largely invisible to the Indian government. These women were born in the slums, never received a birth certificate, and are entirely unregistered workers. Any attempt to unionize only leads to the abandonment of the workers in that slum for another where families are eager to work.

Medical experts claim that the only effective means of preventing these health hazards are to wear protective gear or stop the work altogether. Neither of these options is viable. Any use of gloves affects the final product. Supplying masks is impractical, as they must be replaced regularly and the entire family, including infants, would have to wear them. The real source of the danger is the confined space in which the woman and families work and live. The work should be done outside the home, but that poses the risks of powder being blown away and paste drying too quickly in the sun, and in any case still does not address problems of skin disease.

Women's Voice, a Bangalore based women's organization, is doing some work with incense rollers, but even they feel that it is a near impossible task to tackle. Their primary achievements thus far have been to establish health education programs to prevent the spread of disease. Free daycare centers have been established with the hope mothers will be able to get their children out of the house and away from these health hazards. These centers have been successful to an extent, but many families keep their older children at home to help with the labor, and the children who do go to the centers return home at the end of the day to eat and sleep in a cloud of black dust.▼

1 "American Lung Association Fact Sheet: Chronic Obstructive Pulmonary Disease". [January 2001, accessed 29 November, 2001] available from http://www.lungusa.org; Internet.

2 Dr. Leelavathi, interview with author. 9 December 2001. Bangalore, India.

3 Ibid

4 Ibid

5 Ibid

Firefighter and EMS Hearing Loss from SIRENS

By Jordan L. Margolis, Chicago, IL

Jordan Margolis is founding partner of Margolis & Velasco, a Chicago personal injury firm emphasizing cases arising from medical negligence, defective products, inadequate security, workplace and construction site issues, and vehicular incidents. He is a member of Chicago, Illinois and National Trial Lawyer Associations, and is founder and current chair of ATLA's Firefighter and Paramedic Hearing Loss Litigation Group. He graduated from the University of Illinois, Champaign, with a B.A. in 1976, and from Northwestern University School of Law with a J.D. in 1979.

BACKGROUND (Do You Hear People Sing?)

A. NIOSH Hearing Loss Surveys

Researchers from the National Institute for Occupational Safety and Health (NIOSH) began their investigation into firefighter noise exposure in 1980. The documentation of noise exposure in the fire service was first reported in the literature in 1979 concerning the California Department of Forestry. A second study of Los Angeles firefighters revealed hearing losses which were far greater than the general population normative data, suggesting the occupational exposure as the cause.

NIOSH began its involvement in 1987 at the Newburgh Fire Department in N.Y. That survey was followed in 1982 with a noise survey of large vehicles and ambulances of the Fire Department for the City of New York. In 1985, NIOSH was requested to investigate noise levels affecting firefighters assigned to the Memphis Airport. Thereafter, in 1988, NIOSH conducted evaluations of noise exposure levels in the fire departments of Pittsburgh, PA and Hamilton, OH.

In addition to examining specific fire departments, NIOSH also tested firefighters at two annual conventions of the International Association of Fire Fighters in 1984 and 1987. The Houston Fire Department also was the subject of an Emergency Medicine study of EMS personnel in 1985. Anaheim, CA and Phoenix, AZ similarly conducted noise measurements for their firefighters in 1992.

Statistical analysis of the data found significant relationships between hearing loss and years of fire service, both for the noise sensitive high frequencies as well as the lower frequencies responsible for speech recognition. Based on the findings, one might project a 25-dB occupationally induced hearing loss over a 30-year career in the fire service.

Most of the reported noise data indicated intense noise exposure during emergency operations, despite full-shift noise dosimetry that documents lower noise levels. Thus, the NIOSH PARADOX, as it is called, reveals consistent finding of hearing loss in the

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face of contradictory noise data on a time-weighted average. The cause, of course, is the siren.

B. The Silent Injury (The "Sounds of Silence")

Although many of the firefighters' noise exposures may seem obvious, the damage occurs by stealth. While loss of hearing may result from a single exposure to a brief impulse noise, such traumatic losses are rare. In most cases, noise-induced hearing loss (NIHL) is insidious. The inner ear, called the cochlea, contains nerve cells in the hair fibers which, when destroyed by noise, creates an irreversible sensorineural deprivation. This impairment occurs before the condition is recognized. Eventually, the person loses the ability to hear and understand speech under everyday conditions. Although the primary frequencies of human speech range from 200 to 2,000 Hz, research has shown that the consonant sounds, which enable people to distinguish words such as fish from fist, have still higher frequency components. Typically, NIHL begins to develop at 4,000 or 6,000 Hz (the hearing range is 20 to 20,000 Hz) and spreads to lower and higher frequencies.

Audiometric test results are used to establish hearing handicaps for speech perception. Several criteria exist —- NIOSH uses a 25-dB "low fence" value, wherein the percentage of handicap is calculated by multiplying each decibel in excess of 25 dB HL by 1.5% (an average dB HL of 40 would represent a 22.5% hearing handicap).

Another formula proposed by the American Academy of Otolarnygology combines the puretone frequencies of 3,000, 4,000 and 6,000 Hz and suggests an otologic referral to determine the nature and cause of the hearing impairment if an average change of 20dB occurs at these frequencies.

A third criterion uses a single-frequency hearing impairment determination of 25dB HL, so that any person who has a hearing level of 26dB HL or greater at any single frequency is classified as having some degree of hearing loss (mild loss 26 to 40; profound loss at greater than 90dB HL.)

Firefighting depends in large part on the sense of hearing. Since it is often impossible to see in a smoke-filled area, search and rescue requires one to listen for cries and moans. Radio communications must be perceived accurately or lives will be lost. Firefighters must listen for warning sounds for air horns signaling the need to leave the interior of a building because of imminent danger. In the wake of the World Trade Center tragedy, this risk cannot be overerstated.

Ultimately, everyday life experiences and pleasures are victimized by NIHL. Ordinary conversations are missed; loved ones are unknowingly ignored; TV, radio and telephone volumes must be turned up to a degree which annoys others, and eating out at restaurants becomes problematic because background noise obliterates table conversation. Everyone tires of the hearing loss victim saying "What?" all the time.

GETTING STARTED (If You Don't Bill Them, They Will Come)

A. Notifying the Union or the Firefighters Directly

Despite the fact that everyone at the fire station yells rather than speaking in normal, conversational tones, firefighters are generally unaware that they are really injured. They are not the type of people who complain, especially about something which is not life-threatening, so they don't share information (other than to laugh off similar complaints by their wives about "selective hearing.")

Unless their particular Fire Department has annual audiograms, individual firefighters don't consider it to be a "medical need" to get their hearing tested. Therefore, strong encouragement is necessary, including setting up easily accessible and modestly priced audiogram testing. Letters and/or union meetings must get the word out to the station houses.

B. Screening for Plaintiffs

Abnormal audiograms should be screened by the attorney, assisted by medical consultants, to reject potential plaintiffs whose audiogram shows abnormality other than NIHL in whole or part.

Those individuals who test positive must then be interviewed by the attorney to determine their individual noise exposure, as well as to uncover any other supervening cause for hearing loss.

Intake interviews should be complete enough to obtain answers to the most obvious defense theories (to be discussed below).

WORKERS' COMPENSATION VS. PRODCTS LIABILITY SUITS (Show Me the Money!)

A. WC Or Not WC (What's Comp Got to Do With It?)

As most attorneys practicing in the area of workers' compensation know, audiology losses vary in definition depending on the state. Many states, like Illinois, only provide compensation for hearing loss at the frequencies of 1,000, 2,000 and 3,000 cycles per second. A classic pattern of NIHL may show the major loss at 4,000 Hz — "The 4K Notch" as it is called. This very real injury would not be compensable under workers' compensation. Assuming state law does provide for compensation at the higher frequen-

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cies, the amount may be too negligible to be worth the effort of a disputed administrative hearing and appeal; or, if victorious, a comp award may nullify the return to the client after a subrogation set-off from a products liability third party action.

B. Personal Injury (Who Put the Bop in the Bop-She-Bop-She-Bop?)

PRODUCT ID: Identifying the product manufacturer is simple — just ask your clients. For active firefighters, this is a continuing injury. Older fire apparatus and siren information should be maintained in the purchasing records of the fire department, and may also be known at the repair shop. Since there are and have been only a handful of siren manufacturers, the information is attainable.

HOW TO SUE—DIRECT VS. CLASS ACTION

The answer to this question is guided by practical concerns and precedent. Very few products liability tort cases have been "certified as a class." Defendants often cite the differences in liability and damages issues as reasons against certification, and courts are likely to agree. However, filing direct liability lawsuits, joining multiple plaintiffs from similar fire departments, provides the benefit of judicial economy to otherwise unwieldy litigation.

WHERE TO SUE — FEDERAL VS. WHICH STATE COURT

If any reader's lips are currently mouthing "Federal Court," please BANG YOUR HEAD DOWN ON YOUR DESK, NOW!

So the next question is, obviously, whether the lawsuit should be filed where the defendant manufacturer resides as opposed to where the plaintiffs work or live. Such strategic determinations will involve the advantages of filing most cases in a centrally confined state court venue, along with the benefits of filing other "test" cases in several states, to preserve the exposure potential. Suffice it to say, duplicative motions to dismiss will only benefit the defense, not the plaintiffs.

THEORIES OF RECOVERY (How Do I Love Thee, Let Me Count the Ways)

A. Strict Liability

Siren manufacturers have placed unreasonably dangerous products into the stream of commerce causing significant, permanent injuries to thousands of firefighters and EMTs. Electro-mechanical sirens (which wail up to 127 dB) are of limited effectiveness to warn motorists and pedestrians, even at their peak volume. Their omnidirectional projection (rather than focused forward); their neuro-sensorial lack of directionality (nobody knows where the siren is coming from since the pitch is not localizable); their long-time mounting location on the roof or hood of the fire engine or truck; their inability to pierce the soundproof engineering of modern automobiles; and their utter lack of warnings as to the hazards they create to the firefighters who are proximally exposed to their blaring sounds; all combine to render the mechanical sirens unreasonably dangerous.

Electronic sirens (which yelp and wail up to 120 dB) suffer identical defects. It must be noted that "safe sirens" have been technologically and economically feasible for as long as unreasonably dangerous sirens have existed, but the manufacturers simply refuse to vary from the "traditional fire engine sound" which, even though ineffective, they consider to be identifiable by the public.

B. Negligence

Despite the knowledge of quantifiable hearing losses in the fire services, as demonstrated by the NIOSH and other studies, siren manufacturers have shirked their non-delegable duty to eliminate, guard against or warn of the hazards they create on their assembly lines.

C. Breach of Warranty

In connection with the sale of their sirens, the manufacturers warrant that their products are without defects and are safe and fit for their intended use. They are not safe, and they have injured the intended users.

D. Punitive Damages

Sirens have never been tested by manufacturers to determine the risk of harm to firefighters. "Class A" sirens require the decibel volume to be 120 dB at 10 feet. Firefighters are continuously exposed to the siren noise at much closer proximity, yet the manufacturers have never tested decibel levels at less than 10 feet. Despite decades of knowledge that sirens have significantly contributed to the occupational disease of firefighter hearing loss, siren manufacturers have never altered their product design nor provided adequate warnings of the hazards they cause. Such reckless disregard and indifference to the suffering of firefighters everywhere is surely grounds for punitive damages.

E. Municipal Subrogation

Should cities wish to recoup losses from: (1) workers' compensation claims from accidents (despite the use of a siren); (2) hearing loss claims; (3) liability payouts or property damage losses from accidents (emergency vehicles and automobiles); subrogation lawsuits should be considered. Since the siren manufacturers' sales pitch to their city customers is the avoidance of accident losses, the sirens' lack of effec-

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tiveness (known by the manufacturer) could be the source for recoupment or valuable city revenue.

DEFENSES (Deny, Deny, Deny)

A. Federal Pre-emption (The Noise Control Act)

The gist of their argument is that when the EPA issued regulations pertaining to interstate carriers (40 CFR SS 202) and medium/heavy trucks (40 CFR SS 205), by exempting fire apparatus and emergency vehicles from those regulations, state courts were supposedly preempted from products liability cases by injured firefighters. This defense is not only untrue (see affidavit of Henry E. Thomas, former EPA Director of Regulations and Standards), it requires sophistic reasoning contrary to most state appellate courts' decisions on what constitutes "affirmative decisions to do nothing."

B. Statute of Limitations

Check state law in the jurisdiction where suit will be filed on the subject of date of discovery of injury and/or the wrongful cause of injury for products liability cases. Also consider the continuing exposure for active firefighters to toll the Statute.

C. Statute of Repose

Check state law in the jurisdiction where suit will be filed on the outside public policy time limit, if any, when actions may be filed in products liability cases. Likewise as above, consider the continuing exposure for active firefighters to toll the Statute of Repose.

D. Product Identification

As in any product case, obtain evidence of the Defendant(s) as soon as possible. Fortunately, only a handful of siren manufacturers exist. Unquestionably, the dominant market share leader is, and has always been, Federal Signal Corp.

E. Risk/Utility Test or Consumer Expectation Test

Check state law in the jurisdiction where suit will be filed to counter this anticipated defense. Basically this defense is laid out as follows: 1. That sirens are supposed to be loud so they can't be unreasonably dangerous. 2. That sirens are so necessary to safeguard the public that it doesn't matter what collateral damage is done to firefighters. These arguments are as fallacious as they are obscene. Counter such a motion with the facts (ineffectiveness of sirens) and the law (non-delegable duty of manufacturer to eliminate/guard or warn of hazards it creates).

F. Assumption of the Risk

Check state law in the jurisdiction where suit will be filed to determine if such a defense exists. If so, counter the argument with the fact that firefighters have no choice but to subject themselves to risks associated with their jobs.

G. Causal Connection – Other Causes for Hearing Loss

This is the heart of the defense and the reason why plaintiff screening is necessary. Remember, in most states, "A" proximate cause need not be "THE" only cause of injury. Therefore, despite the plaintiffs' noise exposure outside of firefighting (rock concerts, airplanes, military duty, hunting, shooting ranges, construction jobs, trucking jobs); and exposure in the fire service to noises other than sirens (air horns, diesel engines, water pumps, saw, explosions); most state laws permit compensation of injuries for which the siren is a significant or substantial contributing factor in the ultimate injury of hearing loss.

H. Contributory or Comparative Negligence

Check state law in the jurisdiction where suit will be filed to determine if such a defense exists. Is the case based on strict liability? If so, the defense will focus on the plaintiffs' to wear ear protection. Keep in mind that, in most states, a manufacturer cannot deflect its duty not to create the hazard. Assuming a negligence theory exists at trial, counter this defense with the fact that firefighters need to perform their jobs on the emergency vehicles (plan of deployment) and hearing protection would further complicate communication. Also, ear plugs are difficult to insert on the fly, and might melt at the fire scene. Earmuffs won't fit under a standard issue helmet.

I. The "Empty Chair" Defense — Blame the Fire Department

Check state law in the jurisdiction where suit will be filed to determine if such a defense exists (assuming strict liability if the case is going to trial). The gist of this defense is that the Fire Department knows best what it needs and wants, and the siren manufacturer is only following the Class A Siren specification. Obviously, the manufacturer has or should have superior knowledge of the hazards it creates. Fire departments can only order equipment from the limited, identical products available on the market, regardless of their ineffectiveness or inherent hazards.

CONCLUSION

Handling a firefighter or EMT hearing loss case presents numerous practical and legal challenges. Since the defense knows all the tricks in this particular trade, co-ordination of efforts by plaintiffs' counsel is essential for success. Interested attorneys can learn more by joining the ATLA Firefighter and Paramedic Hearing Loss Litigation Group.

director reports

Marla Jo Bennett

Marla Bennett joined WILG as its Executive Director in March of this year, just in time to help coordinate the move of our headquarters from Denver to Washington, D.C. She was formerly a program manager for the American Institute of Architects who dealt with project and fiscal management, event planning and membership services for the professional practice division at the national headquarters of AIA. She is a 1993 graduate of Mary Washington College with a B.A. in international affairs, and has taken post-graduate courses at American University in international development and international political economies. She has lived and traveled extensively overseas and has worked abroad as a business and cultural consultant. She lives in McLean, Virginia, a short ride — on a good day — from our new office. ▼

Outgoing president Len Jernigan receives award from President Steve Embry.

The year is off to a bright start with a calendar full of events and goals for the organization. We have the energy of over 600 members and relationships with a growing number of national, regional and local organizations who share our vision for a safe and just workplace. In sunny southern California, WILG recently joined the California Applicants Attorneys Association for their Winter Convention. While enjoying the breathtaking surroundings of the Hotel Del Coronado and the Pacific coastline, the 4 days of meetings, with more than 1200 in attendance, provided numerous opportunities to network and discuss tactics for addressing the latest challenges in workers' compensation. The WILG Board of Directors met and discussed our efforts to raise awareness of the consequences of the proposed national smallpox vaccination program by the Bush administration, and the ongoing issues with Medicare set-asides.

In April, WILG will have a three-day CLE program at Jazz Fest

On the SS Sabino, off Mystic Seaport; above: George Patrick, IN, Bob DeRose, OH; left: Harold and Sandy DuBois, MD, Mary Domer (Tom), WI.

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in New Orleans with timely presentations on: Oxycontin; dealing with Medicare; air quality and toxic mold; construction site accidents; representing the injured worker charged with fraud; ethical advertising; privacy and surveillance; and multi-state jurisdictions. The Board of Directors will meet again in New Orleans and all are welcome to attend. Building relations with allied organizations continues to be a top priority, and WILG will be presenting to the National Organization of Social Security Claimants' Representatives in Washington, DC in early April at their national conference. In the international arena, WILG has also been invited to speak at the 6th Work Congress to be held in Rome, Italy in early June. Leonard T. Jernigan, Jr. will present on Silicosis; Ron Simon will speak on Finding Justice Through Civil Litigation; Michael J. O'Connor will discuss Beryllium exposure; and Stephen Embry will present on Industry Response to Safety Standards. The three-day program will focus on work injury prevention, rehabilitation and compensation.

Keep watching the website www.wilg.org for details of all upcoming events. ▼

John Boyd, MO Nancy Mogab, MO.

Your editor and James Morton, IWP, cruise sponsor.

Betsy Jernigan, NC and Milt Black, IL.

Captain Steve Embry addresses his crew.

Marla Bennett, Director, and Len Jernigan, NC