2020

Advanced worker's compensation

Indiana Continuing Legal Education Forum (ICLEF)

ADVANCED WORKER'S COMPENSATION

March 12, 2020

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ADVANCED WORKER'S COMPENSATION

Discussion Agenda

I. Unique and Challenging Issues to Consider When Settling a Complicated WC Claim

II. The Ethics and Dilemmas of Representing the Small Business when the Injured Employee is the Owner/Insured

III. "In the Course of" in the Digital World: Working from Home, on Mobile Devices, and the Gig Economy

IV. Enforcement of and Challenging the Worker's Compensation Board IME: Impact of Bush v. Robinson

March 12, 2020

ADVANCED WORKER'S COMPENSATION

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Hon. Linda P. Hamilton, Chair

Indiana Worker's Compensation Board, Indianapolis

Governor Mitch Daniels appointed Linda as the Chairman of the Indiana Worker's Compensation Board in August of 2005. She had served as a Single Hearing Member of the Board since 1995, following her original appointment by Governor Evan Bayh. Linda grew up in Porter County, Indiana and attended Indiana University in Bloomington, where she graduated Phi Beta Kappa and thereafter received her law degree in 1983. After graduation, Linda clerked for the Honorable Judge Robert W. Neal of the Court of Appeals of Indiana for two years before joining the Fort Wayne law firm of Helmke, Beams, Boyer and Wagner. In 1991, she resigned her partnership in the firm to resume full-time work in the public sector as the City of Fort Wayne's staff attorney and later Corporate Counsel to City Utilities. In August of 2002 Linda left her City legal career to concentrate her professional efforts on worker's compensation matters.

George C. Patrick

George C. Patrick & Associates, P.C., Crown Point

George Patrick graduated from Northwestern University and received his J.D. degree from Valparaiso University School of Law. George is admitted to practice before Supreme Court of the United States of America, the Indiana Supreme Court, Worker's Compensation Board of Indiana, the U.S. District Courts of the Northern and Southern Indiana and the U.S. Court of Appeals, Seventh District. He proudly works with Jeffrey S. Sturm, both together helping injured employees find their best resolutions and solutions.

Martindale-Hubbell presented George with an AV-rating. Both Super Lawyers and Best Lawyers of America awarded George with their top ratings for representing injured employees before the Worker's Compensation Board of Indiana since 2005 to the present. The law firm received a Tier 1 ranking in the 2013 Edition of U.S. News - Best Lawyers “Best Law Firms.”

Professional Memberships in Workplace Injury Litigation Group, College of Worker's Compensation Attorneys, Litigation Counsel Indiana Trial Lawyers Association, American Trial Lawyers Association, Indiana State Bar Association, Lake County Bar Association, Calumet Inn of Court, Life-time Contributor of the Valparaiso University School of Law Review and Life-time Member of the Indiana Horse Council, Life-time Member of the American Quarter Horse Association.Member of Cal Ripken Baseball and Babe Ruth Baseball organizations.

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Education

Floyd Central High School	8/67-5/73
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Responsible for all Mortgage Banking operations including personnel, business development, and profit and loss. Management responsibilities included managing a sales force responsible for mortgage development within the State of Indiana as well as a processing staff. Attended and instructed numerous management and sales seminars both "in house" and sponsored by outside companies.
Prior Positions:
Senior Financial Analyst (St. Louis, MO)
Responsibilities included managing the budget and tracking actual performance of all states east of the Mississippi River except New

York. Responsible for managing financial analysts on the staff of vice presidents located in Washington D.C., Jacksonville, FL, and Oklahoma City, OK, as well as my staff in St. Louis, MO. I reported directly to the senior vice president.
Senior Account Executive (Richmond, VA)
Top sales production for the Richmond market.
Branch Manager (Columbus, OH)
Responsibilities included managing branch employees in the Columbus market which included all aspects of the mortgage business including but not limited to personnel, business development, file management, closings, collection, and community involvement.

Other Activities or Certifications

Attorney for the Floyd County Commissioners (2006 to present)
Attorney for the Floyd County Solid Waste Board (2006 to present)
Attorney for the Town of Greenville (2005 to 2013)
Attorney for the New Albany Township Fire District (2006 to 2012)
Attorney for the New Albany-Floyd County Parks Board (2003-2012)
Attorney for the Floyd County Stormwater Board (2013-present)
Attorney for the Floyd County Health Department (2008-present)
Floyd County Election Board (2014 - present)
New Albany City Attorney (2003)
Attorney for the New Albany Board of Public Works and Safety (2003)
Attorney for the New Albany Police Merit Commission (2003)
Attorney for the New Albany Economic Development Commission (2003)
Attorney for the New Albany Building Commission (2003)
Attorney for the New Albany Police Pension Board (2003)
President and member of the Board of the New Albany Flood Control District (2003)
Member of Board of Directors of the Floyd County Emergency Management Board (2003)
Floyd County Bar Association
Served as President 1995-1996, former delegate to the Indiana State Bar Association Convention.
Faculty Member for five Indiana Continuing Legal Education Forum Worker's Compensation Programs:
*The Breadth and Limits of IME's under IC 22-3-3-7 and IC 33-3-4-11. March 11, 2005
*Appellate Law Matters: Perspectives on the Book v Ballard case and a discussion of the new appellate rules. November 10, 2006.
*Unemployment and Workers Compensation: Effect of Ballard case; discovery and evidence. March 9, 2007
*The Workers Compensation Case (from interview through hearing). November 13, 2009
*Compensability Issues for Workers Compensation cases. November 7-8, 2013

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Indiana Bar Association
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Attorney for LifeSpan Resources, Inc.
Valparaiso University Alumni Association
Louisville/Southern Indiana Chapter of the Indiana University Alumni Association Board Member (2006-Present) and past president
Former member of the Civil Air Patrol - Rank of Major

Charles W. Jewett

Schiller Law Offices, Carmel

Attorney *Charles Jewett* understands that personal injury and worker's compensation claims can be intimidating, which is why he works hard to give each client the attention and representation that they deserve.

Born and raised in Indiana, Mr. Jewett went to undergraduate at DePauw University, where he graduated cum laude with a degree in East Asian Studies. During this time period, he was also an active member in the Delta Chi Fraternity, serving as vice president, and studied at Waseda University in Tokyo Japan for one year. After graduation, he was accepted into the JET Programme, where he spent two years teaching English on the island of Sado, in Japan. Sado was once where people were exiled to, so Mr. Jewett had a fun time exploring that history.

After Mr. Jewett returned to Indiana, he enrolled in law school at Indiana University Robert H. McKinney School of Law. During this time period, he served as an extern for Justice Massa of the Indiana Supreme Court, the Indiana Utility Regulatory Commission, and the Indiana Board of Tax Review. He also worked as a law clerk for the Solicitor General, as an intern for Simon Property Group, and an intern for Finish Line. Mr. Jewett graduated magna cum laude and received several tax related scholarships during his time at law school.

Mr. Jewett is a member in good standing with the Indiana State Bar Association and is licensed to practice in both the Southern District and Northern District Courts of Indiana.

KRYSTEN LEFAVOUR is Of Counsel for Craig, Kelley & Faultless and specializes in medical liens, health insurance, and governmental benefits. Krysten was born and raised in southern Oregon and currently lives in Indianapolis with her husband and two children.

In 2001, Krysten graduated from IUPUI with a degree in Social Work, with Highest Distinction. During her undergraduate studies, Krysten was involved in many community activities including volunteering for the Children's Bureau of Indiana, The Julian Center, the Indiana Literacy Foundation, and the Good Friend's Program. Krysten was the recipient of the Outstanding Female Leader award in 2001.

Krysten graduated from the Indiana University McKinney School of Law in 2007, *Summa Cum Laude*. While in law school she was a member of the Indiana Law Review Executive Board and Order of the Barristers. She graduated with a certification in Health Care Law.

After graduation, Krysten was appointed as an Administrative Law Judge to the Indiana Worker's Compensation Board in 2007 by Governor Mitch Daniels. Krysten was re-appointed to the Board in 2011 and 2015. Krysten held hearings in Southeast Indiana as a member of the Board. Krysten retired from the Indiana Worker's Compensation Board in 2018 to pursue private practice in worker's compensation.

Krysten has worked with the team of attorneys at Craig, Kelley & Faultless on hundreds of personal injury cases for the past ten years. Krysten specializes in maximizing settlement recovery for clients who have been injured. Krysten assists with multiple other post-settlement challenges, including issues with ERISA plans, Medicare, and Medicaid. Krysten has also worked with Plaintiff's attorneys statewide on their post-settlement challenges.

KATHRYN A. MOLL, Partner, born Indianapolis, Indiana. Admitted to Indiana Bar, 1988. *Education*: Indiana University (B.A., 1985); Case Western Reserve University (J.D., 1988). *Member*: Indiana State Bar Association, Indiana Workers Compensation Institute, *Practice Areas*: Workers Compensation Insurance Defense. AV rated. Email: kmoll@nsmlaw.com

Mark X. Sullivan

Treacy & Sullivan, Lebanon

Mark X. Sullivan practices with Treacy & Sullivan in Lebanon. He has been licensed to practice law in the state of Indiana since 1982. His practice with Treacy & Sullivan concentrates primarily on worker's compensation defense.

Mark received his undergraduate degree in accounting from the University of Notre Dame in 1976. In 1982, he was awarded both a Juris Doctor Degree and a Masters Degree in Business Administration from Indiana University.

Since 1996, Mark has served on a part-time basis as the Commissioner of the Boone County Small Claims Court. In that capacity, he has also presided over the infraction docket of Boone County Superior Court II. (So, please drive the speed limit or close to it while passing through Boone County.)

Mark is a member of the Indiana State and Boone County Bar Associations. He is also licensed to practice law in the state of Alabama.

Krysten M. LeFavour

Craig Kelley & Faultless, LLC, Indianapolis

Krysten is a Single Hearing Member with the Indiana Worker's Compensation Board and also is Of Counsel with Craig Kelley & Faultless, LLC in Indianapolis.

In 2001, Krysten graduated from IUPUI with a degree in Social Work, with Highest Distinction. During her undergraduate studies, Krysten was involved in many community activities including volunteering for the Children's Bureau of Indiana, The Julian Center, the Indiana Literacy Foundation, and the Good Friend's Program. Krysten was the recipient of the Outstanding Female Leader award in 2001.

Krysten graduated from the Indiana University McKinney School of Law in 2007, *Summa Cum Laude*. While in law school she was a member of the Indiana Law Review Executive Board and Order of the Barristers. She graduated with a certification in Health Care Law.
Krysten has worked with the team of attorneys at Craig, Kelley & Faultless LLC on hundreds of personal injury cases for the past eight years. Krysten specializes in maximizing settlement recovery for clients who have been injured. Krysten assists with multiple other post-settlement challenges, including issues with ERISA plans, Medicare, and Medicaid. She also handles a portion of the firm's pre-litigation cases.

Honors Graduate: Summa Cum Laude, IU McKinney School of Law Honors Graduate with Highest Distinction, Indiana University Bachelor's Degree Certification in Health Care Law 2001 Outstanding Female Leader - Indiana University-Purdue University Indianapolis Indiana Super Lawyers Rising Star 2016.

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Section One

UNIQUE AND CHALLENGING ISSUES TO CONSIDER WHEN SETTLING A COMPLICATED WORKER'S COMPENSATION CLAIM/CASE

Richard R. Fox
Fox Law Offices
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Section One

Unique and Challenging Issues to Consider When Settling a Complicated Worker's Compensation Claim/Case.....Richard R. Fox
Mark X. Sullivan

Unique and Challenging Issues to Consider When Settling a Complicated Worker's Compensation Claim/Case

I. Introduction

So, you are close to settling your case, at least you think that you are. The case seems to have been part of your inventory forever. The paperwork that this case has generated occupies nearly a full drawer in your filing cabinet. But now, it seems that you are finally poised to put this case in the rearview mirror relatively soon. You lean back in your chair and reflect upon the difficult path that you have traveled with this case. What comes to mind most prominently are the many lengthy and sometimes heated telephone calls with the client trying to explain the peculiarities of Indiana worker's compensation law and the nature and extent of benefits available. What also comes to mind are the frequent exchange of emails with opposing counsel, the drafting of which sometimes took all of the professional restraint that you could muster to keep them civil. You have already reviewed the settlement checklist issued by the Indiana Worker's Compensation Board and you see no obstacles that cannot cleared. All that is needed to finally be in a position to close this file and make a little money from it (whether on a contingent fee basis or via your final defense billing) is to address a few lingering issues. However, as you reflect upon these issues, you come to the sad realization that these issues are probably not as simple as they once seemed. Perhaps settlement is no longer imminent. You have issues to deal with, unique and challenging ones.

What sort of issues could possibly cause settlement optimism to vanish like a wisp of smoke? Medicare always seems to be front and center when it comes to settlement complications. The prospect of unspecified future medical treatment and palliative care can be just as challenging to address from a settlement perspective. This presentation will ponder a number of these complications and others that can ensue by means of the factual scenarios which follow. In reviewing these scenarios, the overall goal is to isolate and address the contested issues inherent in each and attempt to fairly resolve the issues via negotiated settlement. Hopefully, there is a means to do so despite the challenges involved, legal, adversarial and otherwise.

II. Hypothetical Settlement Situation No. 1. Involving, Among Other Things, Medicare and Causation

Rick Sullivan was injured in the course and scope of his employment with ABC Inc. while inspecting the plant. Sullivan fell through a manhole cover that had rusted and did not support his weight. Sullivan's arms caught him as he fell through injuring both shoulders, his neck, his low back, and his knees. Sullivan has had previous surgeries to all of the same body parts he claims were injured by reason of this manhole incident.

ABC accepted compensability for the manhole incident and authorized medical treatment for the injuries suffered by Sullivan. However, Sullivan had unauthorized surgery on his back at Deacon Hospital prior to reaching MMI due to excruciating pain. Sullivan used his personal health insurance to pay Deacon Hospital for this surgery. Nevertheless, Deacon Hospital filed a provider fee claim with the Indiana Worker's Compensation Board ("Board") seeking full reimbursement for the back surgery from ABC. ABC denied liability, contending that Sullivan's back surgery was due to his preexisting condition and thus, was not causally-connected to the manhole incident.

Sullivan's authorized treating physicians eventually deemed that his work injuries reached maximum medical improvement ("MMI") and he was assigned a permanent partial impairment rating. However, Sullivan did not thereafter return to work. In fact, he contends that that he is not able to return to reasonable employment. Sullivan's attorney knows that Sullivan has the burden of proving that he is permanently and totally disabled and that he (the attorney) will need to obtain a vocational report to that effect. However, Sullivan wants to avoid this fee if possible. Sullivan has filed for Social Security disability benefits but, he has not yet had his hearing.

By the way, Sullivan consulted with a surgeon on his own after he was deemed to be at MMI and this surgeon recommended that Sullivan undergo a cervical fusion. This surgeon did not address causation. In the meantime, Sullivan, being in pain from all of his various injuries and conditions, decided to seek relief at a local pain clinic. Sullivan's attorney requested that ABC cover the expenses incurred by Sullivan for ongoing treatment received at this pain clinic. ABC declined, taking the position that nothing further is owed to Sullivan from a medical standpoint since he has been deemed to be at MMI by the authorized treating physicians.

Sullivan's attorney filed a worker's compensation case with the Board. Sullivan and his attorney prefer to settle the worker's compensation case for a number of reasons, one of the most notable being the desire to take advantage of spreading-out the amount paid to settle the case over Sullivan's lifetime in order to maximize his Social Security disability award (if received).

So, is there any hope that this case could be settled, in whole or in part?

Consider how settlement will be affected if Sullivan is awarded Social Security disability benefits and qualifies for Medicare?

III. Hypothetical Settlement Situation No. 2 Involving, Among Other Things, Affirmative Defenses, Attempting to Identify Presumptive Dependents and a Worker's Compensation Lien.

Dale Trickle was a short-track racer of some reknown in the Midwest. He retired several years ago after a particularly nasty crash at the Salem (Indiana) Speedway. However, Dale quickly tired of sitting around his home doing little other than maintaining his home and yard. Actually, he found that he liked lawn mowing and eventually secured employment with a local landscape company, Greenspace. His main job responsibility was mowing lawns on a riding mower. He tended to drive the mower to the limit (probably the racer in him). The owner of Greenspace was OK with him doing so although more than once, the owner had to remind Dale to utilize the safety devices on the riding lawnmower. That would include a safety harness and a roll bar which was deployed by a trigger switch.

Sadly, in 2019, Dale died as a result of a broken neck suffered when his riding lawnmower flipped-over while making a sharp turn at maximum speed. This happened while Dale was mowing the infield at Greenspace's biggest client, the Fast Track Motor Speedway. Some thought that this was fitting—that if Dale was to die in a lawnmower crash, this is where he would want it to happen. By the way, Dale was pronounced dead at the scene and went straight to the morgue.

The worker's compensation insurance carrier for Greenspace assigned an adjuster to investigate the accident in which Dale was killed and learned that he (Dale) was not wearing his safety harness. It was also determined that the roll bar on the lawnmower was not deployed when the accident occurred. Realizing that there may be an affirmative defense or two that could be asserted, the adjuster retained an engineering firm to perform an analysis of the crash. The result was a report issued by the engineering firm which concluded that had Dale been wearing his shoulder harness and had the roll bar been deployed, he would have survived the accident with no or only minor injuries.

In the meantime, the adjuster set about trying to locate and identify Dale's dependents. Preliminarily, it was determined that Dale was not married but, that he had two ex-wives. These two ex-wives both had children who were born of their marriage with Dale and each child was under the age of 18 (aged 7 and 9 years, respectively). The adjuster also learned from the ex-wives that Dale had a girlfriend when he died. The adjuster obtained the girlfriend's contact information and telephoned her. In speaking with the girlfriend, the adjuster was advised that she (the girlfriend) was 6-months pregnant. The girlfriend believed that Dale was the father, although she admits that she could be mistaken. The girlfriend also advised the adjuster that Dale once mentioned that he had a child with a woman from Springfield, Illinois, whom he met in a bar back in 2013 after having won the feature race at the dirt track at the Illinois State fairgrounds. Supposedly, paternity was never

formally established, mainly because the woman was married at the time. However, Dale's girlfriend knew that Dale would occasionally send money to the woman and he still visited with her when he was in the Springfield, Illinois area. Dale's girlfriend could provide no other information concerning this woman or the child although she indicated that there may be more children of Dale's out there and in close proximity to racetracks where he was successful. The girlfriend also advised the adjuster that she planned on calling Rick Fox, noted worker's compensation attorney from New Albany, Indiana, to see if he would be willing to represent her interests in this matter.

The adjuster quickly realized that this was a very complicated claim, what with potential affirmative defenses and multiple presumptive dependents, at least one of which was unknown at this time and one that was unborn. The adjuster had been told by her supervisor that she was to make every effort to resolve the claim in its entirety before it goes litigated due to Greenscape's stated desire to avoid a public and lengthy litigation which might hurt Greenspace's relationship with its best client, that being the Fast Track Motor Speedway. So, the adjuster decided to retain, on a pre-litigation basis, the carrier's regular defense attorney to provide legal advice and practical assistance. It just so happened that the carrier's regular defense attorney, Mark Sullivan, was available, having recently been reinstated to the practice of law and in need of work. Sullivan, being a former resident of Speedway, Indiana, and having graduated from Speedway High School in the top ½ of his class, gladly accepts the assignment.

So, is settlement doable and can it conceivably be done prior to litigation?

Consider how settlement prospects are affected by the following development. Not too long after hiring attorney Sullivan, the adjuster received a telephone call from one of the most well-advertised trial lawyers in the state of Indiana. (Let's just call him what he refers to himself as in his many ads—the "Terminator".) The Terminator advised the adjuster that he now represents Dale's two ex-wives and their children and that he plans on suing those reckless bastards that own the Fast Track Motor Speedway dry. He also plans on going after the manufacturer of the lawnmower that Dale was operating when it flipped-over. It is the Terminator's belief that the shoulder harness was faulty and the roll bar inoperable. Oh, by the way, the Terminator asked the adjuster to do nothing more to push the affirmative defenses available because doing so would hurt his 3rd-party civil case and would likewise damage the carrier's recovery potential with respect to its worker's compensation lien.

IV. Hypothetical Settlement Situation No. 3 Involving, Among Other Things, Speculative Future Medical Treatment and Statute of Limitations.

Sergio Fox is a 48-year-old immigrant from Mexico who is employed at the Cow Palace, a dairy facility in northwest, Indiana. Sergio has a number of different responsibilities at the dairy. Chief among these is the artificial insemination of female cows. This process involves the insertion of Sergio's left arm directly into the cow from the rear port-of-entry so as to properly place and trigger the insemination device.

Last year, Sergio was attempting to artificially inseminate a cow and inserted his left arm inside of the cow from the rear in order to do so. Unfortunately, the cow did not react well to this process and tried to escape. However, the cow's rear legs could find no traction and they splayed-out, causing the rear-end of the cow to drop down to the ground as a consequence. Sergio's left arm was still inside the cow when this incident occurred and was injured as a consequence. The injuries included, most significantly, a labral tear in the left shoulder. The labral tear was surgically repaired without complication. Nevertheless, a subsequent MRI of the left shoulder revealed severe degenerative arthritis that appeared to be progressing rapidly.

Eventually, the treating physician authorized by the Cow Palace's worker's compensation insurance carrier, Dr. Sullivan, ordered a functional capacity evaluation ("FCE"). The results of the FCE testing indicated that Sergio could, in fact, return to his previous job of inseminating cows at the Cow Palace. This was welcome news to Sergio and he happily returned to his insemination duties. In the meantime, Dr. Sullivan deemed that Sergio was at maximum medical improvement ("MMI") and gave to Sergio a 15% permanent partial impairment ("PPI") of the left shoulder.

Sensing that the decision as to whether to accept the PPI money had consequences, Sergio decided to consult with a young attorney who recently opened an office in the vicinity of the Cow Palace and who was fluent in spanish. After speaking with the attorney, Sergio hired him. Sergio's attorney then made arrangements for Sergio to be evaluated by a physician who would hopefully come-up with a larger PPI rating than that which was given by Dr. Sullivan. The goal of Sergio and his attorney was a quick settlement for a number somewhere between the competing PPIs. Sergio was interested in a quick settlement mainly to avoid any ill-will which might be created with the Cow Palace by reason of prolonged litigation. As far as the physician to be utilized for the PPI evaluation, Sergio's attorney, being young and idealistic, decided against utilizing one of the usual suspects and instead, selected Dr. Patrick, a physician who was still actively practicing medicine and who, in fact, specialized in treating injuries to shoulders. To the surprise of Sergio's attorney, Dr. Patrick, after having examined Sergio, stated that Sergio was not at MMI and that, "Sergio will likely require an arthroplasty at some point." Dr. Patrick went on to state, "For the time being considering his age he

is probably too young to consider a total shoulder arthroplasty". Dr. Patrick declined to give to Sergio a PPI rating, believing him to be far short of MMI

So, out the window went the plan of Sergio's attorney for a quick and easy split-the-difference PPI settlement. Realizing that the Cow Palace's carrier would not likely settle for what it may cost to pay for a shoulder arthroplasty and all that goes with it, Sergio's attorney went ahead and filed an Application with the Board. The carrier for the Cow Palace retained its usual defense attorney who was experienced but, who was getting a bit long in the tooth. In fact, the Cow Palace's attorney was getting a reputation of one who tries to avoid going to hearing at all costs and is most willing to settle, even if the amount exceeds somewhat the reasonable range. However, before putting any money on the table, the Cow Palace's attorney realized that he needs to negate somewhat the likelihood that Sergio would require shoulder arthroplasty. Who better to put the kibosh on this likelihood than Dr. Sullivan. After all, Dr. Sullivan previously issued a PPI rating to Sergio and deemed him to be at MMI with no mention of future shoulder surgery. So, the attorney for the Cow Palace asked Dr. Sullivan to consider and comment upon Dr. Patrick's stated opinion that shoulder arthroplasty for Sergio was inevitable. Unbeknownst to the Cow Palace's attorney, Dr. Sullivan was a dear friend of Dr. Patrick and admired him greatly as a physician. Dr. Sullivan, after reviewing Dr. Patrick's report, had this to say about shoulder arthroplasty: "Given Sergio's age and the level of arthritis that he has in his shoulder, I think it is more likely than not that he is going to require future shoulder surgery, which could include possible shoulder replacement surgery at some point in the future."

The case has been scheduled for hearing in approximately one month. Can this case be settled before then?

Consider the added complication of Sergio's wife, who insists that Sergio hold-out for shoulder surgery, whenever and wherever it might occur (maybe outside the U.S.).

V. Random Thoughts Concerning Settlement and Related Matters Courtesy of Richard Fox

A. Information Needed to Analyze and Evaluate Settlement Options—A Checklist

1. Identify the issues which are actually being settled, whether they be disability, permanent partial impairment, past medical obligations, future medical obligations, mileage, attorney fees or some combination thereof.

2. Determine whether the injured worker has applied for Social Security Disability Income and, if so, the status of the application.

3. Ascertain whether the injured worker is or will soon be eligible for Medicare.

4. If the injured worker is eligible for Medicare, inquire as to whether conditional payments have been made by the Centers for Medicare Services ("CMS"). Regarding conditional payment issues, Medicare's reimbursement rights are actually a bundle of rights that include subrogation rights and an independent right to sue any party involved in worker's compensation litigation to recover CMS' conditional payments. Any such lawsuit can also seek double damages plus fines and interest from a primary insurer and any other party receiving a payment in connection with the worker's compensation case, including, for example, the injured worker's attorney who is compensated by way of a contingent fee. 42 U.S.C. 1395y(b)(2)(B)(iii) and 42 U.S.C. 1395y(b)(3)(A). The fines which can be assessed for failure to report or erroneous reporting with respect to conditional payments may be as much $1,000.00 per day. 42 U.S.C. 1395y(b)(2)(B)(iii). Thus, it is imperative that CMS is made aware of the worker's compensation case where conditional payments are involved and that the process for obtaining and finalizing conditional payments is followed.

5. Assess whether a Medicare Set-Aside ("MSA") is required. In its Memoranda of April 22, 2003, Question 20, CMS stated that it was not necessary to establish an MSA if all of the following criteria are met: 1. The facts of the case demonstrate that the injured worker is only being compensated for past medical expenses; 2. There is no evidence that the injured worker is attempting to maximize the other aspects of settlement (e.g., the lost wage and disability portions of the settlement) to Medicare's detriment; and 3. The injured worker's treating physicians conclude (in writing) that, to a reasonable degree of medical certainty, the injured worker will no longer require any Medicare-covered treatments related to the workers' compensation injury. **However**, the MSA analysis should also factor-in whether the injured worker is reasonably likely to incur future medical expenses related to the worker's compensation injury. This would apply to an

injured worker who is Medicare eligible and therefore deemed to be in Class 1 or if the injured worker is deemed to be in Class 2, which are individuals who meet any of the following criteria: 1) The individual has applied for Social Security disability benefits; 2) The individual has been denied Social Security disability benefits, but anticipates appealing that decision; 3) The individual is in the process of appealing and/or refiling for Social Security disability benefits; 4) The individual is 62 years and 6 months old, i.e., may be eligible for Medicare based on his or her age within 30 months; or 5) The individual has an end stage renal disease (ESRD) condition but does not yet qualify for future Medicare based on the ESRD.

6. Ascertain the status of collateral benefits paid by third-parties in connection with the worker's compensation case. This would include determining whether and/or to what extent there have been payments by insurance companies (medical, disability, and automobile), Medicare, Medicaid, and the Veterans Administration.

7. Determine whether there are outstanding obligations which will impact upon settlement. This would include whether and/or to what extent there are unpaid medical bills, provider fee claims, child support owed by the injured worker, and attorney fee liens.

8. Assess what forms to use in the settlement paperwork and the drafting which will be necessary to address the issues which have been settled or resolved, whether that be the State Form 1043 Agreement to Compensation, a Section 15 Compromise Agreement or some variant or combination thereof.

9. Consult and comply with the Checklist for Settlement Documents published by the Indiana Worker's Compensation Board.

B. Revisiting the Reeves Case and the Issue of Palliative Medical Treatment

The ruling in Gregg v. Sun Oil Co., 388 N.E.2d 588 (Ind. Ct. App. 1979) confirmed that the Indiana Worker's Compensation Board had the discretion to award to an employee continuing medical expenses for period of time which the Board deemed "necessary to limit or reduce the amount and extent of such impairment." See also Ind Code Section 22-3-3-4 and 22-3-3-27. The length of time for which medical expenses can be awarded at any one time is, therefore, committed to the Board's discretion.

Now, consider Reeves v. Citizens Financial Services, 960 N.E.2d 860 (Ind. Ct. App. 2012).

Reeves cites Grand Lodge Free & Accepted Masons v. Jones, 590 N.E. 2d 653 (Ind. Ct. App. 1992) for the proposition that the Board has the authority to order payment of palliative care, in addition to a PPI award, when the palliative care limits the extent of impairment. In Reeves, it is noteworthy that there were a total of five doctors involved in the treatment of the injured worker. All five doctors recommended some form of additional care for the injured worker. Dr. Deshpande, who assigned a permanent partial impairment ("PPI") rating of five percent, gave the injured worker one month's worth of prescriptions and directed him to see his primary care physician for any refills needed. Dr. Miller assigned no PPI but, did direct the injured worker to take an over-the-counter NSAID as needed. Dr. Thompkins did not assign a specific PPI rating but, he did opine that the injured worker would need continued treatment with "nonoperative measures, occasional medication and pain tolerance techniques." Dr. Yergler assigned a PPI rating of zero percent as to the injured worker's hip but, stated that the injured worker may need evaluation for sciatic pain and that he should continue his "present treatment plan." It is not clear from Dr. Yergler's report what treatment plan was in place at that time. Finally, Dr. Willardo, on several occasions, gave his opinion that the injured worker would need pain medication on an ongoing basis. The injured worker testified that he was taking Vicodin and Valium, which were prescribed by Dr. Willardo. However, Dr. Willardo's office records do not go beyond December 13, 2007, and the Reeves case does not explain this discrepancy.

Critical Issue in Reeves (in my view). Whether the doctors took palliative care into account when it came to treatment necessary for the work injuries involved in the case.

Holding in Reeves. The injured worker failed to specify what treatment he believes he needs in the future. Thus, the injured worker's request for future palliative medical care was denied. Unlike Grand Lodge, the evidence in the Reeves case is conflicting as to whether palliative care, be it medicine, physical therapy, or some other measure, reduces the extent of PPI. Thoughts on the case and palliative care in general?

VI. Random Quotations Regarding Settlement
Compiled by Mark Sullivan

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Abraham Lincoln

"A closed file is a happy file."

Ray Bolea, Claims Manager, Farm Bureau Insurance Company

"Usually, the only people who make money on a case that goes to hearing are the doctors."

Matt Golitko, Indianapolis Attorney

"You folks need to find a way to settle this case (or words to that effect)."

Advice given by any number of Indiana Worker's Compensation Board Hearing Judges, past and present, to opposing counsel in a worker's compensation case.

Section Two

THE ETHICS AND DILEMMAS OF REPRESENTING A SMALL BUSINESS WHEN THE INJURED EMPLOYEE IS THE OWNER/INSURED

By: Kathryn A. Moll
Krysten LeFavour

Section Two

The Ethics and Dilemmas of Representing a Small Business When the Injured Employee is the Owner/Insured.....Kathryn A. Moll
Krysten LeFavour

BIOGRAPHICAL SKETCH

KATHRYN A. MOLL, Partner, born Indianapolis, Indiana. Admitted to Indiana Bar, 1988. *Education*: Indiana University (B.A., 1985); Case Western Reserve University (J.D., 1988). *Member*: Indiana State Bar Association, Indiana Workers Compensation Institute, *Practice Areas*: Workers Compensation Insurance Defense. AV rated. Email: kmoll@nsmlaw.com

KRYSTEN LEFAVOUR is Of Counsel for Craig, Kelley & Faultless and specializes in medical liens, health insurance, and governmental benefits. Krysten was born and raised in southern Oregon and currently lives in Indianapolis with her husband and two children.

In 2001, Krysten graduated from IUPUI with a degree in Social Work, with Highest Distinction. During her undergraduate studies, Krysten was involved in many community activities including volunteering for the Children's Bureau of Indiana, The Julian Center, the Indiana Literacy Foundation, and the Good Friend's Program. Krysten was the recipient of the Outstanding Female Leader award in 2001.

Krysten graduated from the Indiana University McKinney School of Law in 2007, *Summa Cum Laude*. While in law school she was a member of the Indiana Law Review Executive Board and Order of the Barristers. She graduated with a certification in Health Care Law.

After graduation, Krysten was appointed as an Administrative Law Judge to the Indiana Worker's Compensation Board in 2007 by Governor Mitch Daniels. Krysten was re-appointed to the Board in 2011 and 2015. Krysten held hearings in Southeast Indiana as a member of the Board. Krysten retired from the Indiana Worker's Compensation Board in 2018 to pursue private practice in worker's compensation.

Krysten has worked with the team of attorneys at Craig, Kelley & Faultless on hundreds of personal injury cases for the past ten years. Krysten specializes in maximizing settlement recovery for clients who have been injured. Krysten assists with multiple other post-settlement challenges, including issues with ERISA plans, Medicare, and Medicaid. Krysten has also worked with Plaintiff's attorneys statewide on their post-settlement challenges.

Preamble: A Lawyer's Responsibility

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct of other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all

lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal professional and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be an effective advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include a lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer

should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and party constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally

vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do no abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability, but these Rules may be used as nonconclusive evidence that a lawyer has breached a duty owed to a client. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Select Rules for Discussion

Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope and objectives of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Rule 1.4 – Communication

(a) A lawyer shall:
    1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
    2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
    3) keep the client reasonably informed about the status of the matter;
    4) promptly comply with reasonable requests for information; and
    5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance nor permitted by the Rules of Professional Conduct or other law or assistance limited under Rule 1.2(c).
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.6 – Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disputed is permitted by paragraph (b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
    1) to prevent reasonably certain death or substantial bodily harm;
    2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
    3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
    4) to secure legal advice about the lawyer's compliance with these Rules;
    5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
    6) to comply with other law or a court order.

(c) In the event of a lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files, disclosure of a client's names and files is authorized to the extent necessary to carry out the duties of the person managing the lawyer's files.

Rule 1.7 – Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
    1) the representation of one client will be directly adverse to another client; or
    2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of a lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
    1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    2) the representation is not prohibited by law;
    3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
    4) each affected client gives informed consent, confirmed in writing.

Rules 1.8 – Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
    1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
    2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
    3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

1) the client gives informed consent;
2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) and (l) that applies to any one of them shall apply to all of them

(l) A part-time prosecutor or deputy prosecutor authorized by statute to otherwise engage in the practice of law shall refrain from representing a private client in any matter wherein exists an issue upon which said prosecutor has statutory prosecutorial authority or responsibilities. This restriction is not intended to prohibit representation in tort cases in which investigation and any prosecution of infractions has terminated, nor to prohibit

representation in family law matters involving no issue subject to prosecutorial authority or responsibilities. Upon a prior, express written limitation of responsibility to exclude prosecutorial authority in matters related to family law, a part-time deputy prosecutor may fully represent private clients in cases involving family law.

Rule 1.16 – Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
   1) the representation will result in violation of the Rules of Professional conduct of other law;
   2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
   3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
   1) withdrawal can be accomplished without material adverse effect on the interests of the client;
   2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
   3) the client has used the lawyer's services to perpetrate a crime or fraud;
   4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
   5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
   6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
   7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 3.1 – Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[1] The advocate has a duty not to abuse the legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for damage.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Provisions in the Indiana Worker's Compensation Act Regarding Definition of Employee

The scenarios to be discussed relative to their ethics and dilemmas of representing a small business generally involve small businesses, sole proprietorships, and partnerships. I.C. §22-3-6-1(b) et al. provides procedures whereby the owner of a sole proprietorship, a partner in a partnership among others may be considered an employee of the business for purposes of the Indiana Worker's Compensation Act. I.C. §22-3-6-1(b) provides as follows:

> "Employee" means every person, including a minor, in the service of another, under any contract of hire or apprenticeship, written or implied, except one whose employment is both causal and not in the usual course of the trade, business, occupation, or profession of the employer.
>
> 1) An executed officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation, other than a municipal corporation or governmental subdivision or a charitable, religious, educational, or other nonprofit corporation, is an employee of the corporation under IC 22-3-2 through IC 22-3-6. An officer of a corporation who is an employee of the corporation under IC 22-3-2 through IC 22-3-6 may elect not to be an employee of the corporation under IC 22-3-2 through IC 22-3-6. An officer of a corporation who is also an owner of any interest in the corporation may elect not to be an employee of the corporation under IC 22-3-2 through IC 22-3-6. If an officer makes this

election, the officer must serve written notice of the election on the corporation's insurance carrier and the board. An officer of a corporation may not be considered to be excluded as an employee under IC 22-3-2 through IC 22-3-6 until the notice is received by the insurance carrier and the board.

2) An executive officer of a municipal corporation or other governmental subdivision or of a charitable, religious, educational, or other nonprofit corporation may, notwithstanding any other provision of IC 22-3-2 through IC 22-3-6, be brought within the coverage of its insurance contract by the corporation by specifically including the executive officer within the contract of insurance. The election to bring the executive officer within the coverage shall continue for the period the contract of insurance is in effect, and during this period, the executive officers thus brought within the coverage of the insurance contract are employees of the corporation under IC 22-3-2 through IC 22-3-6.
3) Any reference to an employee who has been injured, when the employee is dead, also includes the employee's legal representatives, dependents, and other person to whom compensation may be payable.
4) An owner of a sole proprietorship may elect to include the owner as an employee under IC 22-3-2 through IC 22-3-6 if the owner is actually engaged in the proprietorship business. If the owner makes this election, the owner must serve upon the owner's insurance carrier and upon the board written notice of this election. No owner of a sole proprietorship may be considered an employee under IC 22-3-2 through IC 22-3-6 until the notice has been received. If the owner of a sole proprietorship:
    A. is an independent contractor in the construction trades and does not make the election provided under this subdivision, the owner must obtain a certificate of exemption under IC 22-3-2-14.5; or
    B. is an independent contractor and does not make the election provided under this subdivision, the owner may obtain a certificate of exemption under IC 22-3-2-14.5.
5) A partner in a partnership may elect to include the partner as an employee under IC 22-3-2 through IC 22-3-6 if the partner is actually engaged in the partnership business. If a partner makes this election, the partner must serve upon the partner's insurance carrier and upon the board written notice of the election. No partner may be considered an employee under IC 22-3-2 through IC 22-3-6 until the notice has been received. If a partner in a partnership:
    A. is an independent contractor in the construction trades and does not make the election provided under this subdivision, the partner must obtain a certificate of exemption under IC 22-3-2-14.5; or
    B. is an independent contractor and does not make the election provided under this subdivision, the partner may obtain a certificate of exemption under IC22-3-2-14.5.
6) Real estate professionals are not employees under IC 22-3-2 through IC 22-3-6 if:
    A. they are licensed real estate agents;

B. substantially all their remuneration is directly related to sales volume and not the number of hours they worked; and
C. they have written agreements with real estate brokers stating that they are not to be treated as employees for tax purposes.

7) A person is an independent contractor and not an employee under IC 22-3-2 though IC 22-3-6 if the person is an independent contractor under the guidelines of the United States Internal Revenue Service.
8) An owner-operator that provides a motor vehicle and the services of a driver under a written contract that is subject to IC 8-2.1-24-23, 45 IAC 16-1-13, or 49 CFR 376 to a motor carrier is not an employee of the motor carrier for the purposes of IC 22-3-2 through IC 22-3-6. The owner-operator may elect to be covered and have the owner-operator's drivers covered under a worker's compensation insurance policy or authorized self-insurance that insures the motor carrier if the owner-operator pays the premiums as requested by the motor carrier. An election by an owner-operator under this subdivision does not terminate the independent contractor status of the owner-operator for any purpose other than the purpose of this subdivision.
9) A member of manager in a limited liability company may elect to include the member or manager as an employee under IC 22-3-2 through IC 22-3-6 if the member or manager is actually engaged in the limited liability company business. If a member or manager makes this election, the member or manager must serve upon the member's or manager's insurance carrier and upon the board written notice of this election. A member or manager may not be considered an employee under IC 22-3-2 through IC 22-3-6 until notice has been received.
10) An unpaid participant under the federal School to Work Opportunities Act (20 U.S.C. 6101 et seq.) is an employee to the extent set forth in IC 22-3-2-2.5.
11) A person who enters into an independent contractor agreement with a nonprofit corporation that is recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code (as defined in IC 6-3-1-11(a)) to perform youth coaching services on a part-time basis is not an employee for purposes of IC 22-3-2 through IC 22-3-6.
12) An individual who is not an employee of the state or a political subdivision is considered to be a temporary employee of the state for purposes of IC 22-3-2 through IC 22-3-6 while serving as a member of the mobile support unit on duty for training, an exercise, or a response, as set for in IC 10-14-3-19(c)(2)(B)
13) A driver providing drive away operations in an independent contractor and not an employee when:
    A. the vehicle being driven is the commodity being delivered; and
    B. the driver has entered into an agreement with the party arranging for the transportation that specifies the driver is an independent contractor and not an employee.

For the following scenarios, the sole proprietor, partner, or executive officer of the small business will have elected to be included as an employee under the Indiana worker's compensation insurance policy.

Scenario #1

- Plaintiff is the sole proprietor of his roofing business.
- He has elected to be covered as an employee under his worker's compensation insurance policy.
- Plaintiff's business is residential roofing.
- The worker's compensation insurance carrier was notified by the plaintiff that, while working in his business as a roofer, twenty days prior to this notice, he had hurt his back while lifting shingles.
- Plaintiff says that he has two independent contractors working for him who know that he hurt his back on the date alleged.
- Medical records obtained indicate that the plaintiff had pre-existing complaints of back pain with a last office visit to his family doctor complaining of back pain ten days prior to the alleged work accident.

Scenario #2

- Plaintiff is a sole proprietor. Plaintiff's business is making, packaging, and selling cosmetics.
- The business is located in a building/property owned by the sole proprietor in Indianapolis, Marion County, Indiana.
- The sole proprietor lives on a large property outside of Marion County.
- The sole proprietor decides to build a large outbuilding on her property.
- The sole proprietor does not advise her worker's compensation insurance carrier about her plans to build the outbuilding on her property or of her hiring of construction workers to build the outbuilding.
- A construction worker working to build the outbuilding on the sole proprietor's personal property outside of Marion County falls from the roof of the outbuilding and is injured.
- Within four days of this incident, the sole proprietor notifies her worker's compensation insurance carrier of the event and requests that the injured construction worker be covered as an employee of the sole proprietor's business and that worker's compensation benefits and statutory medical be paid.

Scenario #3

- Plaintiff is a sole proprietor whose business is drywalling.
- Plaintiff has elected to be covered an as employee under his worker's compensation insurance coverage.
- Plaintiff reports an injury to his shoulder while installing drywall.
- There are no witnesses to the injury.
- The worker's compensation insurance carrier investigates and finds that the shoulder injury is consistent with what could have happened at work and, thus, accepts the shoulder injury as compensable.
- Authorized medical treatment is provided for the shoulder which concludes with a finding of maximum medical improvement and assessment of permanent partial impairment.
- Following completion of treatment for the shoulder, the plaintiff alleges to have also sustained an injury from the same incident to his neck.
- There is medical indication that plaintiff has pre-existing neck problems and the worker's compensation insurance carrier denies the neck claim.
- The plaintiff files an Application for Adjustment of Claim.

Scenario #4

- Plaintiff is the sole owner of a trucking company which is organized as an S corporation.
- Plaintiff's wife is an employee of the S Corp and works in human resources.
- Plaintiff alleges injury when he was climbing out of his semi-truck and injures his shoulder after slipping and grabbing onto a bar on the side of the truck.
- Plaintiff seeks treatment on his own and does not report the incident to his insurance company for 28 days.
- Plaintiff's wife provides hand-written business records to the insurance company to prove income and to calculate average weekly wage – included in the records are profits of the S Corp which were distributed to Plaintiff as a draw.
- Case Law:

> " 'The general rule is that profits derived from a business are not to be considered as earnings and cannot be accepted as a measure of loss of earning power unless they are almost entirely the direct result of [the claimant's] personal management and endeavor.' " *The Washington Post v. District of Columbia Dep't of Employment Servs.*, 675 A.2d 37, 42 (D.C.1996) (quoting *Clingan **469 v. Fairchance Lumber Co.*, 166 Pa.Super. 331, 71 A.2d 839, 840 (1950)); *cf. Twenty-First Century Concrete, Inc. v. Giacchina*, 20 Va.App. 326, 457 S.E.2d 379 (1995) (holding that claimant was not required to show monetary loss to claimant's corporations in order to receive wage loss benefits where claimant was unable to perform his duties and had to reassign other employees to complete his duties, even though he had authority to draw wages from the corporation due to his ownership interest). "[T]he conduct of a sole proprietorship [may be scrutinized] to determine if the profits are the functional equivalent of wages." *Hotaling v. St. Johnsbury Trucking Co.*, 153 Vt. 581, 572 A.2d 1351, 1354 (1990) (citing 2 Arthur Larson, *Larson's Workers' Compensation Law* § 60.12(e)); *see The Washington Post*, 675 A.2d at 42; *cf. Pishotta v. Pishotta Tile & Marble, Inc.*, 613 So.2d 1373, 1375-76 (Fla.Ct.App.1993) (holding that corporate profits may be considered personal earnings of sole shareholder to extent they are fairly attributable to management and/or labor of sole shareholder rather than labor of others or mere return on capital).

Scenario #5

- Plaintiff owns a partnership with his brother engaging in the business of providing electrical work.
- Plaintiff was injured while working on an electrical project.
- Plaintiff suffered severe injuries and was off work for 6 months, during this time the employee was paid his regular wages by the partnership.
- Plaintiff timely submitted his claim for benefits and compensation to his insurance company.
- Plaintiff claims the wages by the employer should be reimbursed by the worker's compensation insurance carrier.
- Plaintiff's brother, in his capacity as an owner of the partnership, directs Plaintiff to a different medical provider than the employer's insurance carrier and Plaintiff demands the treatment be treated as directed care and paid.
- Plaintiff leaves the partnership and claims permanent total disability but continues to consult with the employer on business matters.
- Should the insurance carrier intervene in the action and hire separate counsel because its interests are directly in conflict with the employer?

Scenario #6

- Plaintiff is an Uber driver injured in a motor vehicle accident while working as an independent contractor for Uber.
- Plaintiff, as a sole proprietor, purchased worker's compensation for his income earned as a driver. Plaintiff elected in writing to be covered by worker's compensation.
- Plaintiff is in an auto accident while on the Uber Application but does not currently have a ride booked or passengers.
- The worker's compensation carrier disputes that the Plaintiff was in the course of employment.
- The worker's compensation carrier disputes the average weekly wage, which is calculated by Plaintiff using gross income. Should expenses, such as depreciation, which are deducted on taxes be included in the calculation of average weekly wage?
- If worker's compensation pays for benefits and compensation, would it be able to subrogate against uninsured or underinsured motorist coverage provided by Uber? Would it be considered a third-party?

Case Analysis #1
Morris v. Custom Kitchen & Baths, 64 N.E. 3d 912 (Ind. App. 2016)

Facts: John Morris was a sole proprietor of Custom Kitchen & Baths, a contracting company that provides residential remodeling services. Morris was injured while working on a volunteer project for his son's youth organization. The project was initiated as part of his son's participation with the Boy Scouts of America. Morris claimed that his injury arose out of and in the course of his employment because he received a substantial amount of business and good will from volunteer projects. SHM and Full Board denied application for benefits on the basis that the injury arose out of a personal activity, not a business purpose.

Finding: Court of Appeals reversed the Board finding that Morris demonstrated a sufficient connection between his interests in improving his business by conducting community service projects and his sole proprietorship and therefore the accident arose out of Morris' employment. The court cited Knoy v. Cary, 813 N.E. 2d 1170 (Ind. 2004) which held that "where the employer's interests in sponsoring an after-hours activity are not merely altruistic, but are also intended to improve the business, the activity may be incidental to employment."

Discussion:

- Should Defendant, hired by the insurance carrier, hire separate counsel?
- Are the interests of the employer/sole proprietorship in conflict with the employee/owner?
- Are the interest of the business entity and the injured worker too intertwined?
- Should the insurance carrier refuse to insure a sole proprietorship that engages in volunteer work?

Case Analysis #2
Dreiling v. Custom Builders, 756 N.E.2d 1087 (Ind. App. 2001)

Facts: Plaintiff was the owner of a sole proprietorship called Custom Builders. While working on a roof, Plaintiff fell 40-45 feet and was rendered quadriplegic. SHM found that Plaintiff had elected to be treated as an employee pursuant to 22-3-6-1(b)(4) which states:

> An owner of a sole proprietorship may elect to include the owner as an employee under IC 22–3–2 through IC 22–3–6 if the owner is actually engaged in the proprietorship business. If the owner makes this election, the owner must serve upon the owner's insurance carrier and upon the board written notice of the election. No owner of a sole proprietorship may be considered an employee under IC 22–3–2 through 22–3–6 until the notice has been received.

Full Board reversed the SHM finding that Plaintiff did not elect to be treated as an employee and was not charged a premium by the insurance carrier for coverage under the Indiana Worker's Compensation Act. Plaintiff alleged he told his agent and the insurance company that he wanted to elect coverage.

Finding: Court of Appeals affirmed the Full Board, finding that Plaintiff did not serve written notice upon either the insurance carrier or upon the Board.

Discussion:

- Does the insurance carrier have a duty to inform the sole proprietor of his/her obligation to notify the appropriate entities in writing?
- If the insurance carrier charges a premium for the sole proprietor, does this suffice as written notice?
- Does the payment of the premium, even if it is construed as written notice to the insurance carrier, suffice as written notice to the Board?

- If the sole proprietor communicates to the insurance carrier in some other fashion that he/she elects coverage – does he/she have another cause of action against the agent for failure to provide the information needed to elect coverage?

Section Three

"In the Course of" in the Digital World: Working from Home, on Mobile Devices, and the Gig Economy

Materials that are furnished were prepared by
Krysten M. LeFavour for a previous presentation.

Section Three

"In the Course of" in the Digital World: Working from Home, on Mobile Devices, and the Gig Economy

How Technology is Changing the Way We View in the Course of Employment

How Technology is Changing the Way We View In The Course of Employment

Hon. Krysten LeFavour, Indiana Worker's Compensation Board
ICLEF Advanced Worker's Compensation, July 27, 2017

Advances in technology have made it possible for many people to work remotely on a full-time or partial basis. Telecommuting allows employers to retain talented workers, and businesses have found that it increases productivity, efficiency, and employee morale. Furthermore, employers can incur less overhead, do not need as much real estate, and have less employee turnover. Environmentally responsible companies have further touted the reduction of their carbon footprint because employees are not travelling back and forth to work.

According to the Bureau of Labor Statistics, 24 percent of employed people did some or all of their work at home.[1] A Gallup poll found that 37 percent of American workers have telecommuted, a four-fold increase since 1995.[2] Flexjobs.com estimates that overall there has been a 115 percent increase in telecommuting between 2005–2015.[3] Many companies are expanding their telecommuting policies. Dell Corporation, for instance, expressed a goal to raise the number of telecommuting employees to 50% by 2020.[4] The federal government passed the Telework Enhancement Act of 2010. Under this Act, the federal government provided authorization to its agencies to allow their employees to develop plans to work from home.

Working is no longer about going to a particular location and putting in hours from 9-5. Working is about serving clients, executing projects, creating programs, and managing or participating in a remote team with people from all over the world. In addition to employees who primarily work from home, many employees "log on" in the evenings or weekends to check emails or finalize projects. Many employees have access to their work on mobile devices, allowing them to work from anywhere. With the growing ability to communicate effectively through remote technology, telecommuting will continue to grow.

The growth in remote employment raises many questions regarding when an employee is in the course of his or her employment. Practical issues arise when an employee is injured while working from home. The majority of at home accidents will be unwitnessed. Therefore, the compensability of the accident will be based on the credibility of the injured employee. There are questions of law which will arise such as: Should the employee be treated as a travelling employee? How do we define a deviation from employment when an employee is at a home based location? Does the personal comfort doctrine still apply? What risk does an employer have

[1] 38 percent of people in management, business, and financial operations and 35 percent of people in professional and related occupations did some or all of their work from home. United States Department of Labor, Bureau of Labor Statistics, July 8, 2016.
[2] State of the American Workplace Report, Gallup Poll, 2017
[3] The 2017 State of Telecommuting in the U.S. Employee Workforce, www.flexjobs.com
[4] Trends in Telecommuting, March 2, 2017 – Human Resource Executive Online

when an employee is working in a hazardous environment and the employer has no control over the work premises? These questions and many others have not been specifically addressed by legislation or case law in Indiana, but they will be posed to attorneys and the Indiana Worker's Compensation Board with increasing frequency as more workers work from home.

I. Telecommuting - Definition

Telecommuting is defined by Merriam Webster as follows: "to work at home by the use of an electronic linkup with a central office." However, telecommuting can be broader than working from home and can include other remote locations like a coffee shop, library, or other location. Technological advances have increased the ease by which a worker can telecommute through internet programs, email, webcams, instant messaging, and teleconferencing.

There are varying degrees of telecommuting which impact the analysis of whether an employee is in the course of employment. The question can depend on whether an employee works full-time from their home or whether they work from home on a sporadic or occasional basis, whether the employer's equipment is kept in the home, whether the work from home is merely for the convenience of the employee or for the benefit of the employer, and whether the employee is on call for more than certain hours of the day. For those employees who don't work from home full-time, but check emails or finish a project on an occasional basis, some jurisdictions have found that the employee is only in in the course of their employment when they are performing duties which are directly related to their employment.

II. In the Course of Employment – General Rule

The phrase "in the course of employment" refers to the time, place, and circumstances under which an accident occurs. Specifically, "(a)n accident occurs in the course of employment when it takes place within the period of employment, at a place where an employee may reasonably be, and while he is fulfilling the duties of his employment or is engaged in doing something incidental thereto." *Wayne Adams Buick, Inc. v. Ference*, 421 N.E.2d 733, 735 (Ind. App. 1981).

"Arising out of" and "in the course of" are two separate and distinct elements; the "arising out of" element refers to the causal connection between the accident and the employment, while the "in the course of" element refers to the time, place, and circumstances of the accident. West's A.I.C. 22–3–2–2(a). Both the "arising out of" and the "in the course of" elements must be met before compensation is awarded, and the person seeking compensation bears the burden of proving the elements. *Arnold v. Rose Acre*, 966 NE. 2d. 107 (Ind. App. 2012). The proof by the employee of an element of a claim does not create a presumption in favor of the employee with regard to another element of the claim. Ind. Code 22-3-2-2.

III. Location – In a place where an employee may reasonably be

The analysis of whether an employee is in the course of his or her employment, often begins with their location, is the employee in a place where they should reasonably be? When the home is considered the fixed situs of employment, the fact that an employer has no control over the work conditions or premises is not a bar to compensation. Professor Larson explained that the risks of the home environment are now the risks of the work environment: "[O]nce it is established that the home premises are also the work premises…it follows that the hazards of home premises encountered in connection with the performance of the work are also hazards of the employment." Workers' Compensation Law: Cases, Materials, and Text, Lex K. Larson, Arthur Larson (2013). When an employee works from home, it is possible to have no defined location which is considered the work premises. The employee could work at a coffee shop, in their vehicle, on their couch, or from a home office. This creates a significant amount of uncertainty regarding where the employee may reasonable be. The employer further has little control over whether the employee has a safe workplace. Many employers require the employee to designate a work space and provide office equipment and supplies. This approach can significantly narrow the work environment. An employee may still be in the course of employment when they are in other parts of their home, but the "home office" will provide some boundaries.

In *Wait v. Travelers Indemnity Company of Illinois*, 240 S.W. 3d 220 (Tenn. 2007), the Tennessee Supreme Court found that an employee who was assaulted by a third-party while on her lunch break in her kitchen at home was in the course of employment. Wait had an employer-approved home office because the employer lacked office space. Wait converted a spare bedroom in her home and the employer provided all of her office equipment and supplies. Wait did all of her work from home and occasionally had other co-workers to her home for meetings. There was no designated work hours or conditions on the nature of her work space. The court found that the employee's kitchen was comparable to kitchens and break rooms that would routinely be provided at traditional work sites and nothing suggested that the employer restricted the employee's activities during working hours. Wait allowed a neighbor into her home while eating her lunch and was brutally assaulted. The court found that injuries sustained during personal breaks are compensable under the Tennessee Workers' Compensation Act. The court went on to find that unless otherwise instructed by an employer, an employee working from a home who briefly had a visitor did not necessarily depart from their work duties. The court distinguished this brief interruption from a prolonged or planned social visit. The court concluded that because Wait was engaged in a permissible personal break incidental to her employment, she remained in the course of employment. Specifically, the court determined that "the time, place, and circumstances demonstrate that the injuries occurred while the plaintiff was engaged in an activity incidental to her employment." *Id.* at 227. Tennessee's definition of "in the course of employment" is the same as the legal definition in Indiana. The court ultimately determined that the employee's injuries were not compensable because the assault by the neighbor was not an employment risk and therefore did not arise out of the employment.

In two cases from Utah and Connecticut, the state courts found that a home based employee was in the course of employment while outside on their driveway. In *Ae Clevite, Inc.*

v. Labor Com'n, 996 P.2d 1072 (Utah Ct. App. 2000), the court determined that the injured worker was in the course of his employment when he was salting an icy driveway so that a work package could be safely delivered. The injured worker was a district sales manager that worked solely out of his home. The employer did not have an office in Salt Lake City, Utah, where the injured worker was based. The employee's job duties included doing paperwork from home and making sales calls. The court determined that the employee's home was the "work situs" and affirmed the award of workers' compensation benefits. The Commission concluded that the employee's injury arose in the course of his employment because his efforts to make his driveway safe for the delivery of work-related materials was "reasonably incidental" to his work. The court agreed that the salesperson's injury arose out of, and in the course of, employment, even though the salesperson was not performing work-related duties and was not in an employer-controlled area when the injuries occurred.

In another case which extended the area that the employee was in the course of his employment to the driveway area of the home is *Tovish v. Gerber Electronics*, 630 A.2d 136 (Conn. 1993). In this case the court found that a salesman's injury was compensable when he suffered a heart attack after shoveling his driveway. The salesman worked out of his home and had started his work duties for the day, sending emails and working on paperwork. He then told his wife that he needed to shovel the driveway to call on customers. The court pointed out that the salesman "worked out of his home" and therefore he was "at a place where he could reasonably be" on the date of the injury. The court cited the fact that the salesman set his own itinerary and hours for customer visits and the salesman's typical work day had already begun when he commenced shoveling the driveway and therefore his actions were incidental to his employment.

These three cases did not limit the location where the employee should reasonably be to the "home office." There was no agreement between the employer and employee in these cases that the work be done at a particular location. In addition, in two of these cases, the employee not only worked from home, but also travelled as part of their job duties. In the Wait case, the employee was not directly providing a service to the employer, but the personal comfort doctrine or convenience rule was applied which is that acts necessary to life, comfort, and convenience of a workman while at work, though personal to himself, are incidental to the work. *Wasmuth-Endicott Co. v. Karst*, 133 N.E. 609 (1922).

IV. Time - Within the period of employment

Another important element to determine if an employee is in the course of his or her employment is whether an accident occurs within the period of employment. When an employee works from home, there is often no defined work shift. The employee can potentially have the freedom to work when it is convenient for their schedule or they may be on call twenty-four (24) hours a day. This can raise a multitude of questions regarding whether an employee is in the course of their employment. Many courts that have addressed the issue of whether an employee is in the course of their employment while working from home will attempt to determine when

the employee "typically" worked. This can be a very difficult task. Additionally, employers have to be cautious to remain compliant with the Fair Labor Standards Act (FLSA). The FLSA does not prevent telecommuting, but non-exempt employees are still entitled to overtime when they work more than forty hours per week and it is difficult to monitor the actual hours worked by a telecommuting employee. Both of these motivations should encourage employers to set reasonable guidelines for work hours if possible when an employee works from home. The following cases discussed the hours worked by the employee when analyzing whether an employee was in the course of his or her employment.

In *Renner v. AT&T*, 218 N.J. 435 (NJ 2014), the question of whether an employee was in the course of her employment was complicated by the fact that testimony showed that she worked around the clock and frequently more than forty (40) hours per week. Renner typically worked from home three or more days a week and went to the office twice a week. On the night before her death Renner was working on a project that had to be completed the next day. She told a family member that she would work through the night if needed, which was borne out by email communications. She called EMS the next morning and was found at her work station in distress. It was determined that she sustained a pulmonary embolism. The court found that she was in the course of her employment because of the round the clock nature of her job. Although she was in the course of her employment, she was denied compensation because the New Jersey legislature had enacted a law which required a "work effort or strain involving a substantial condition, event or happening" to support a compensable cardiovascular claim. The court found that Renner was unable to meet her burden of proof on this issue.

In another case where the employee was on call twenty-four (24) hours a day, the court found that she was in the course of her employment while commuting home. This case is not a "work from home" case, but illustrates how the analysis is affected when an employee works around the clock. In *Wythe County Community Hospital v. Turpin*, 2011 Va. App. LEXIS 299 (Oct 4, 2011), the employee worked weekends as a travelling nurse and was on call all weekend. She was contacted by her employer on her personal cell phone and a pager which was provided by the employer. She was driving home from an employer sponsored in-service training when she saw her phone in her pocket illuminate indicating that she was receiving a call. Renner assumed it was a work related call and was distracted and slid off the road. In hindsight it was determined that she was receiving a personal call, but the court found that she was in the course of her employment because she was on call and therefore was more distracted and attentive to calls because they could be from her employer.

In *Werner v. W.C.A.B (Greenleaf Service Corp)*, 28 A. 3d 245 (PA 2011), the court did not give as much weight to the fact that the employee did not have set work hours and determined that the employee needed to be furthering the interests of the employer to be in the course of his employment. Werner was working as a sales employee from the home office in his basement on equipment provided by the employer. On the morning of his accident, he was sending work emails from the basement. He also sent personal emails that morning. Testimony showed that Werner had no required work hours and that he was allowed to conduct personal affairs on his computer as well. On the afternoon of the accident, a family member found him in the chair of his home office in the basement where he had passed away. There were also blood droplets in various parts of the house, including where he typically Werner typically went out to

smoke. The coroner found that he had died from blunt force trauma to his head, likely from falling. The court noted that the rule in Pennsylvania regarding whether the employee is in the course of their employment is different if the employee is on or off the employer's premises. When the employee is on the employer's premises, which is under the employer's control, and is required by the nature of the employment to be there, an accident is in the course of his/her employment even if they are not actually working. Additionally, the court found that an accident can be in the course of employment, on or off the employer's premises, while furthering the employer's business. The court concluded that there was not sufficient evidence to prove that Werner was engaged in furthering the employer's business and therefore could not prove that his death was in the course of his employment. The court therefore applied the "off premises" analysis to the home based employee.

In *Halsey Shedd RFD v. Leopard*, 44 P.3d 610 (Or. App. 2002), the employee was on call when he fell in his driveway while heading to his vehicle to go to church. The court determined that he was in the course of his employment, but that he was engaged in a personal activity and therefore his injury did not arise out of an employment risk. The employee was a firefighter and was on duty at the time of his accident, which meant that he was required to respond to all emergency calls. The employer provided him with two work pagers and a work truck. Before he fell, he walked across his driveway toward the truck while carrying a friend's child, and one of his pagers went off. He reached down and took the pager out. His foot slipped on dirt and gravel, and he fell, injuring his ankle and leg. When asked what caused his fall, the employee said that he "slipped." The court noted that the employee specifically said that responding to the pager did not contribute to his fall. The court found that because the employee fell while walking to the work truck and checking his pager, he was "in the course of" his employment. The court concluded; however, that the employee was primarily engaged in a personal activity of going to church, and many of the circumstantial facts involved (e.g., the decision whether and when to go to church, carrying the child as he did so, the composition of his driveway, etc.) were not employment related. Therefore, they concluded that the employee's activity at the time of the injury was significantly personal in nature and therefore the accident did not arise out of the employment.

V. Duties of employment - While fulfilling the duties of employment or engaged in doing something incidental thereto

The final element pertains to the duties that the employee is performing at the time of the accident and whether they are in furtherance or incidental to the employment. This element becomes even more important when an employee is telecommuting. If an employee is working on duties that are directly beneficial to the employer, the location and time elements are typically not necessary and the employee is found to be in the course of employment. The more difficult case is one where the activities are not clearly in furtherance of the employer's business.

In *Verizon Pennsylvania, Inc. v. Workers' Compensation Appeal Board (Alston),* 900 A.2d 440, 444 (Pa.Cmwlth.2006), the employee worked three days a week from the employer's office in New Jersey and two days a week from an office in the basement of her home. On a day

that the employee was working from home, the employee was drinking a glass of juice in her kitchen, when she received a work-related telephone call from her supervisor. Determining that the telephone call required immediate attention, the employee, still on the telephone, began descending the stairs to the basement to return to her home-office. On the descent down, the employee fell, injuring her neck. The employer argued that the actions of the employee were not in furtherance of the employer's business or affairs at the time of injury because the employee had left her home-office in the basement to get a drink in the kitchen. The court found that the employee suffered injury during her normal working hours at her "at-home" work site, which was approved by the employer, and the injury occurred while talking on the telephone with her supervisor and returning to her computer to attend to a business matter that the supervisor called to discuss. Therefore, the court found that the employee was clearly engaged in furthering the employer's business at the time she was injured, despite the fact that she had briefly departed from her work station to attend to her personal comfort.

In *Moore v. Family Service of Charleston County*, 269 S.C. 275, 237 S.E.2d 84 (1977), the court affirmed an award of benefits in favor of a marriage and family counselor who was descending the steps from the second floor in her apartment and suffered injuries when she fell down three or four steps. She was carrying large books down the steps and fell as she was trying to catch the books. Her employer had directed her to bring the books home the day before along with a case file and to be prepared for an interview with a family the next morning. Moore worked on the case and read the books until one or two a.m. She was carrying the four books with her right arm against her body while she descended the stairs. The court found that the work was required by her employer and was "incidental" to her employment, and therefore when she was carrying the books she was in the course of her employment.

The court in Security Union Ins. Co. v. McClurkin, 35 S.W.2d 240 (Tex. Civ. App. Galveston 1930), affirmed a judgment awarding workers' compensation benefits to superintendent of sales who was injured when he stepped on a needle which was on the floor at or near the telephone in his home. The employee had just completed a telephone conversation with another superintendent about a business related concern. The court held that the employee was "performing the duties of his employment" and furthering the business of his employer by answering the call and was therefore in the course of his employment. The court further found that the risk or hazard taken by the employee in answering the call was taken in order to perform the duties of his employment. The court was persuaded by the fact that the employee had a duty to answer calls at all times while at home and therefore any risks associated with answering those calls was arising out of the employment.

In *Wilkins v. Prudential Insurance and Financial Services*, 338 N.J. Super. 587 (App. Div. 2001), the employee was an insurance salesman who worked from home. He went to the Prudential office two days per week for meetings and met clients at their homes. The employee was injured in the parking lot (not owned by Prudential) while leaving the Prudential office. The court held the employee's conventional place of employment was his home and the accident was compensable because the employee was engaged in a special mission while at the Prudential office. Although, the accident in Wilkins did not occur while he was working at his home office, the decision is significant since the court recognized employee's home as the conventional place

of employment. This is important because in many cases, the question of whether the employee is directly engaged in work duties is the most important element if a person is off the premises of employment as noted in the next case.

In *Jumpp v. City of Ventnor*, 177 N.J. 470 (2003), the employee was a travelling employee that was injured when he picked up personal mail along his work route. Although Jumpp was not a home based employee, the case is illustrative regarding legislative response to the increasingly broad nature of accidents considered to be in the course of employment. In the years prior to Jumpp, the New Jersey legislature had become increasingly alarmed about a number of cases that had substantially expanded what would be considered in the course of employment. The legislature therefore enacted a statute which held that off premises accidents were only compensable when they occur in the direct performance of the employee's duties. This analysis could significantly narrow the accidents which are considered in the course of employment if the home of the telecommuting employee is considered "off-premises."

VI. Comparison to Travelling Employees

A travelling employee is generally considered to be in the course of employment continuously during the entire trip except during a distinct departure on a personal errand. *Olinger v. Mosbey*, 427 N.E.2d 910 (Ind. App. 1981). Due to nature of a traveling employee's job, stringency of "arising out of and in the course of the employment" requirements of Workmen's Compensation are relaxed. *Id.* (*citing* IC 22-3-2-2 (1976 Ed.). Many courts use the travelling employee rules for telecommuting employees.

In *Sandberg v. JC Penney*, 260 P.3d 495 (Or. App. 2011), the employee was a custom decorator for JC Penney. She worked one day a week at the employer's studio, but the rest of her employment was from home. She also travelled frequently to customer's homes. On the date of the accident, she was transferring fabric samples from her garage at home to her van when she tripped over her dog and broke her arm. The workers compensation board in Oregon found that the injury was not compensable because the home environment was outside of the employer's control. The employee argued that she was similar to a traveling employee. The board's contrary conclusion was based out of a concern about the employer's lack of control over the risk. The Oregon Appeals court found that the concern was unwarranted because, "although the employer may not have had control over employee's dog, it had control over whether employee worked away from the studio." The court went on to find that if, as a condition of employment, an employer exposes workers to risks outside of the employer's control, injuries resulting from the risks can be compensable. Thus, if a worker meets with customers in their homes, injuries resulting from a risk in a customer's home can be compensable, even though the employer has no control over the customer's home. The court compared this to the rationale behind the "traveling employee rule," which provides that, when an employee is required to travel as a condition of employment, injuries resulting from activities necessitated by the travel can be compensable, even if the worker is not performing a work task at the time of injury. *Id. (citing Scardi,* 218 Or.App. at 408, 410, 180 P.3d 56).

In a number of jurisdictions, workers' compensation benefits have been awarded to workers who have suffered an injury en route to or from their home where the home is established as a "work situs" or a place of employment for the purposes of workers' compensation coverage. For example, in the case of *Bentz v. Liberty Northwest*, 2002 MT 221, 311 Mont. 361, 57 P.3d 832, 15 A.L.R.6th 893 (2002), involving a sales representative of a printing company who was allowed to work primarily out of his home office but was required to go into the employer's office at least once a week to perform several of his job duties, and suffered an injury to his hip after he slipped and fell on ice when he stopped by his mailbox about two blocks from his home to pick up the mail while traveling from the office to his home, the Supreme Court of Montana affirmed a judgment awarding him workers' compensation, holding that traveling was a condition of his employment and that he was traveling between two jobsites in the course and scope of his regular employment, and therefore his travel could not be characterized as merely "going and coming" to work.

VII. Sporadic or Occasional Telecommuting

The regularity of the work at home may be a strong factor in favor of finding in the course of employment because the home is recognized as part of the employment premises when the employee regular completes their job duties at home. Workers' Compensation Law: Cases, Materials, and Text, Lex K. Larson, Arthur Larson (2013). Many employees who work from home are not considered "home-based" employees, they work from home only as needed to answer emails or because they have to put in extra hours. It is much more difficult to determine whether an employee is in the course of their employment when they do not regularly work from home. The following cases illustrate the importance of the determination of whether the employee typically works from home or only on an occasional basis.

In *Joe Ready's Shell Station & Café v. Ready*, 65 So. 2d 268 (Miss. 1953), the employee worked as a bookkeeper for a gas station and café. She typically worked at the employer's location, but at night she would bring the bookkeeping home and work on it from her couch. A friend left a gun that was owned by her husband and on the employee's couch. The employee returned home from the Café and moved the gun from the couch so she could sit down to work on her bookkeeping. The employer's books were on the coffee table in front of the couch. The gun discharged and she was injured. The question that comes up in this case is similar to many cases that involve employees that do brief work while at home. Are the actions they are taking the same as they would if they were attending to personal business? Wouldn't the employee have moved the gun if she was sitting down to watch TV instead of work? The court found that the employee was in the course of employment, and some of the important factors were that she had done the bookkeeping work at home every night for five years, she sat on the same couch, and worked from the same table. The court found that the movement of the gun was a risk of employment because it needed to be done so that she could perform the bookkeeping and therefore it was in furtherance of the work on behalf of her employer. The regularity of the work in this case convinced the court that the home was the employment premises.

In *Glasser v. Youth Shop*, 54 So. 2d 686 (Fla. 1951), the employee was the manager of a youth shop. The employee did not typically work from home, but had brought work home which he worked on from the second floor of his home. The employee injured himself when he slipped and fell on the stairs and injured his shoulder. The manager was carrying his daily record book and other papers in a folder. The court found that the employee was not in the course of his employment because he was not on the stairs because of his employment, but he would have been there in any event, regardless of whether he had brought his work home from the store.

In *Levi v. Interstate Photo Supply Corp.*, 46 A.D.2d 951, 362 N.Y.S.2d 70 (3d Dep't 1974), an import manager of a photo supply company who was shot in his home by an unknown assailant was determined to be in the course of his employment. The employee had returned home after he concluded a business meeting and intended to work on paperwork from home. The employer approved this practice when it was impractical for an employee to return to the office. The employee did not typically work from home, but on the day of the fatal accident, the employee was instructed that if he decided not to return to the office, then he should call his supervisor and do additional work when he got home. He also had work-related papers in his briefcase. The court determined that on the date of the accident the employee's home had become the place of employment and, in journeying there at the conclusion of his business meeting he was "in the course" of his employment. This was an unusual ruling based on the fact that the home was not the employee's usual place of business, but the court did make a point of expressing that the employee regularly worked from home under these circumstances.

VIII. Deviation

In any analysis of whether an employee is in the course of their employment, if it is shown that the employee engaged in a purely personal deviation, they will not be considered in the course of their employment. An excursion or deviation from employment for employee's personal matters will effectively deny any compensation for injuries therein incurred. *Wayne Adams Buick, Inc. v. Ference*, 421 N.E.2d 733, 735 (Ind. App. 1981).

IX. Defining the Employment Relationship

With the number of employees telecommuting on the rise, it is a benefit to both parties to define the boundaries of the work environment and duties. Some helpful measures include:

a. Instituting a Telecommuting Agreement – This agreement can help communicate what each party expects. It can outline the location, time, and duties that the employee is expected to undertake.
b. Guidelines for a home office – the employer and employee can agree to a designated work area, workstation setup, and safety measures, including ergonomics. The employer can also provide safe equipment which would limit the risk of injury.
c. Periodic checks of the employee's home office and advice to identify and eliminate work safety hazards.
d. Set fixed work hours, breaks, and lunches.

X. Hypothetical Problems:

1. A husband and wife, principal officers of a publishing corporation conduct business solely from their home. They often entertain customers in their home. The wife is injured while painting the house.

2. A game warden, who had no fixed hours or place of work, and who sometimes slept in his car in the woods while on night patrol, was found dead of monoxide poisoning in his car on a secluded side of the road. In the car was also a female companion.

3. An employee who works from a home office in their basement has flooding issues which cause mold throughout the basement. The employee begins to suffer health effects from the exposure to the mold.

4. Employee, a gradeschool teacher, when injured in a car accident on her way to school, had with her in the car a small bag of thread spools for use in art class, materials graded at home the previous evening, and a few books including her teaching manual.

5. A paralegal works regularly from her home office. She is at a personal dinner party at a restaurant when she steps outside to answer an email from her supervisor in the late evening when she is attack/mugged outside of the restaurant.

Section Four

Enforcement of and Challenging the Worker's Compensation Board IME

Impact of Bush v. Robinson

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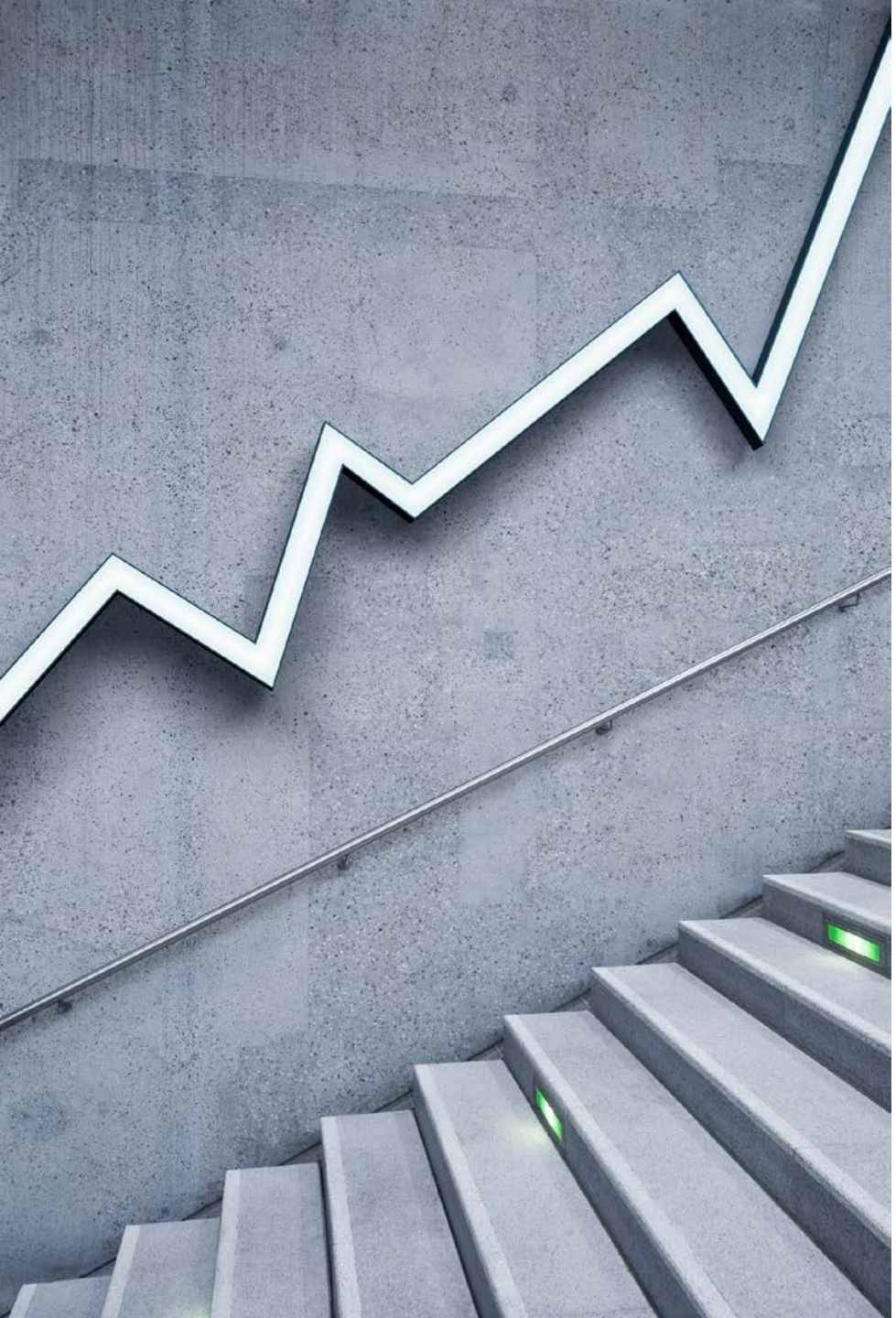
Section Four

Enforcement of and Challenging the Worker's Compensation Board IME Impact of Bush v. Robinson..... **Charles W. Jewett**
Tracy A. Thompson

PowerPoint Presentation



Enforcement of and Challenging the Worker's Compensation Board IME

IMPACT OF BUSH V. ROBINSON

FACTS OF BUSH V. ROBINSON

- In 2010, Plaintiff suffered a work-related injury.
- In 2012, Plaintiff complained of back pain to the doctor provided, Dr. W.
- Dr. W diagnosed Plaintiff with lumbar spondylosis, an exacerbation of the injury Plaintiff suffered in 2005.
- In 2013, Plaintiff saw Dr. B who also diagnosed Plaintiff with lumbar spondylosis.
- Plaintiff underwent a Board IME from Dr. S, who recommended a lumbar and cervical MRI.
- Based on the cervical MRI, Dr. S. recommended that Plaintiff be sent to a spinal surgeon specializing in cervical disorders.
- Defendant objected and requested a hearing.

PROCEDURAL HISTORY

- At the initial hearing, the Judge ruled in favor of Defendant.

- Upon review by the full Board, the Board affirmed the Judge’s ruling in favor of Defendant.
- Upon final appeal, the Court of Appeals affirmed the Board’s decision in favor of Defendant.

MECHANISMS TO DISPUTE

- If either party disagrees with the opinion of the independent medical examiner, the party shall apply to the board for a hearing under IC 22-3-4-5.

WHAT DID THE SINGLE HEARING MEMBER BASE HIS DECISION ON IN BUSH V. ROBINSON?

- In 2005, Plaintiff injured his back and neck in an MVA.
- In 2006, Plaintiff had an MRI that revealed cervical issues.
- In 2006, he reported to a doctor that his neck was still in pain.
- With regards to his 2010 work injury, Plaintiff never complained of neck pain, only lower back pain.
- Both Dr. W and Dr. B diagnosed Plaintiff with lumbar spondylosis, an exacerbation of his 2005 injury, there was no diagnosis of a cervical injury.
- Dr. S was the only doctor to diagnose Plaintiff with cervical issues as a result of the work injury.
- The 2013 cervical MRI was nearly identical to 2006 cervical MRI.

WHAT DID THE COA SAY IN AFFIRMING THE JUDGE'S DECISION

- Indiana's worker compensation statutory scheme does not create a presumption that a Board IME is correct.
  - The existence of a mechanism to dispute the results of a Board IME is what the COA relied upon in coming to this decision.
- The Indiana Worker's Compensation Board is free to accept or reject expert testimony, unless evidence is undisputed and leads inescapably to a contrary conclusion.
  - Because this is a factual determination left to the Board.

QUESTIONS FOLLOWING BUSH V. ROBINSON

- What type of contrary evidence is required to challenge a Board IME?
- How free is the Board to accept or reject a Board IME?
- How does this impact Defense counsel?
- How does this impact Plaintiff’s counsel?

DISCUSSION

- What do the parties do after the Board IME?
- What are the unintended consequences of Bush v. Robinson?
- If parties are negotiating settlement after Board IME results or waiting for additional medical records, do they still need to apply for a hearing to object?
- What constitutes contrary evidence?
- Is it enough for a party to solely rely on the Board IME?