POSTCARD FROM ORLANDO

EVIDENCE TOPICS FROM THE 2018 NAWCJ JUDICIARY COLLEGE … WITH SOME PENNSYLVANIA NOTES

NAWCJ Judiciary College
Orlando, FL, August 20, 2018

This writer, for the tenth year in a row, attended the National Association of Workers' Compensation Judges "Judiciary College" in Orlando. The College was held on August 19-22, 2018 (as always) at the Marriott World Center. Judges from more than 20 states attended. Attendance at the Judiciary College is invaluable for the WCJ who desires to achieve excellence in his or her profession. The knowledge to which one is exposed – and which can be shared – has, in our field, no equivalent.

1. ***Applicability of the Rules of Evidence.*** An interesting aspect of the Judiciary College is hearing the approach of the various states as to the admissibility of evidence. Those approaches are diverse indeed. In the Vermont, Nebraska, and Texas (administrative) systems, for example, the rules of evidence are not applicable. In Florida, meanwhile, the codified state rules of evidence apply, and the rigorous *Daubert* standard guides the admissibility of expert evidence.

I conceive of Pennsylvania as a mainstream state, that is, one where the rules do not apply, but where all adjudications must nevertheless be based on legally competent evidence. Because of this latter (rather mainstream) rule, in the trenches of litigation we do apply the rules of evidence, and the lawyer or judge who does not know the same risks being regarded as incompetent.

2. ***Specialized fact-finding on expert medical issues.*** The Florida Judge of Compensation Claims (JCC) must not only apply *Daubert* but must act gingerly in consideration of *from whom* that expert medical opinion *comes.* Florida is a state that, as part of reform, has tried to jettison the "dueling doctors" syndrome found in so many workers' compensation systems. In this regard, when a difference in medical opinions exists in a given case, the JCC is *required* to appoint an impartial physician, called an "EMA," or expert medical advisor. It's also critical to note that only *authorized* physicians are allowed to testify in the first place.

As to the mandatory referring-out process, Colorado, Maine, Utah, and Wyoming are other states that have instituted systems of impartials. These devices are reform innovations that were emphasized during the cost crises of the 1980's and 1990's, when frustration with inefficient litigation was at its height. Now, with falling injury rates and costs, and the popularity of compromise settlements, the desire on the part of legislatures to experiment with this type of innovation seems to have waned. Paring off benefits surely strikes reform-minded legislators as much more attractive than the creation of some new bureaucracy.

The Pennsylvania judge has long had the power to appoint his or her own impartial, one that comes with the WCJ's investigative powers. This power is rarely exercised, though Judge Stokes of Upper Darby has often undertaken such appointments. The Act 44 amendments (medical cost containment) also gave the WCJ the ability to appoint a peer to opine on the issue of reasonableness and necessity of medical treatment.

3. ***The unsatisfactory residuum rule.*** Under the Pennsylvania Act, a perennial thorn, intellectual and practical, is the applicability of the *Walker* Rule to workers' compensation proceedings. Of course, under the *Walker* Rule – thoughtlessly imported (in 1987) into our field, like an invasive weed – unobjected-to hearsay cannot support a finding of fact. Any admitted hearsay must be corroborated by legally competent evidence before a decision will be upheld. Even when the party against whom the evidence is being offered *expressly indicates that no objection exists*, the evidence (typically a signed doctor's report) cannot support the WCJ's decision. This kudzu of comp is often called the "residuum rule."

Judges from Georgia reported that its system "recently got rid of the residuum rule" when it adopted (Jan. 2013), for workers' compensation purposes, the general rules of evidence. As noted in the state bar's 2012 Workers' Compensation Law Section *Newsletter*: "Arguments over the admissibility of out-of-court statements are among the most frequent evidentiary issues in workers' compensation claims and in all litigation. The old rules deem hearsay 'illegal evidence,' and such evidence cannot sustain a verdict even if admitted without objection…. The new rules 'legalize' hearsay evidence, and to the extent that there is no proper objection to hearsay, it is admissible and can support a finding or verdict…." Matthew D. Walker, *Georgia's New Evidence Code in the World of Workers' Compensation*, STATE BAR OF GEORGIA WORKERS' COMPENSATION LAW SECTION NEWSLETTER, p.1 *et seq.* (Summer 2012), https://www.gabar.org/committeesprogramssections/sections/workerscompensationlaw/upload/WC_Summer_12web.pdf.

Would that the Pennsylvania legislature follow suit and free the workers' compensation community from the one-score-and-eleven years' yoke of the *Walker* Rule.

4. ***ALJ's examination of inadmissible proofs.*** As with any system that has the judge as both fact-finder and interpreter of law, an issue arises as to his or her review of objected-to, impermissible proofs. Chief Judge Switzer of Tennessee recognized the view of many that "you cannot unring the bell," a phrase which voices the concern that once the judge reviews impermissible proofs, his or her thinking will be tainted by such examination. However, in his view, good judges are able to "compartmentalize," and disregard the objected-to proofs, *and only* rely on those which are properly admissible.



5. ***Professor Ehrhardt holds forth on Judicial Notice.*** As he often does at the Judiciary College, the distinguished (and leonine) Florida State University law professor, Charles Erhardt, lectured on evidence for the assembled judges.

Jefferson declared that the view at Harper's Ferry was "worth [a] voyage across the Atlantic." In this same spirit Torrey declares that hearing a lecture from Professor Erhardt is worth a voyage to Orlando – even if it's always during the steamy third week of August.

A key item for Professor Ehrhardt this year was the concept of judicial notice. He discussed, in this regard, Federal Rule of Evidence 201(b)(2). That rule states, in pertinent part, "*Judicial Notice of Adjudicative Facts*…. The court may judicially notice a fact that is not subject to reasonable dispute because it … (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *See* https://www.law.cornell.edu/rules/fre/rule_201#. The Pennsylvania version of this rule (see below) bears the same number and reads essentially the same.

Professor Erhardt, treating judicial notice and the (perennial) issue of the incriminating Facebook post, opined that judges cannot take judicial notice of Facebook and others social media postings – statements made on Facebook posts are hearsay. On the other hand, if it is established that the party whose statement is under scrutiny did indeed execute the post, the declaration of the same can constitute an admission of a party. And, of course, the fact that some items might have been in the Facebook user's "private" area is irrelevant to the critical analysis.

On another Facebook issue, Professor Erhardt completely rejected the idea that a judge can be a "friend" with an attorney who appears before the Judge. Of course, Professor Erhardt does not use Facebook and was quite *contemptuous* of the whole concept. "Who the hell cares," he exclaimed, "what I had for breakfast!?"

As for the Pennsylvania rule, the WCJ has the power to take judicial (or administrative) notice of items, consistent with the Pennsylvania rule. As a WCJ, careful not to rely on incompetent proofs, I would personally follow the relevant provisos in taking notice of an item. The rule, in its entirety, provides as follows:

Rule 201. Judicial Notice of Adjudicative Facts.

(a) *Scope.* This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
(b) *Kinds of Facts That May Be Judicially Noticed.* The court may judicially notice a fact that is not subject to reasonable dispute because it:
(1) is generally known within the trial court's territorial jurisdiction; or
(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) *Taking Notice.* The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) *Timing.* The court may take judicial notice at any stage of the proceeding.

(e) *Opportunity to Be Heard.* On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) *Instructing the Jury.* The court must instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

https://www.pacode.com/secure/data/225/chapter2/s201.html.

The applicability of judicial notice has been addressed by Commonwealth Court in a workers' compensation case. There, the court held that the WCJ had committed reversible error when he took judicial notice of U.S. Labor Department statistics. *See Kashuba v. WCAB (Hickox Constr.)*, 713 A.2d 169 (Pa. Commw. 1998) (WCJ committed error by taking judicial notice of statistics of Bureau of Employment Security that a carpenter in the Scranton area would have earned a certain amount, citing *Savoy v. Beneficial Consumer Discount Co*., 468 A.2d 465 (Pa. 1983) (trial court erred in determining the value of an automobile based on judicial notice of its Red Book value)).