

ALL ABOUT CLAIMS

August 2015

Issue 41

All About Claims is a newsletter published by the Colorado Division of Workers' Compensation designed to provide information to claims practitioners. Please send comments or suggestions for future topics to Adam Gardner by emailing adam.gardner@state.co.us.

ALL ABOUT ELEY



Former chief and now part-time Prehearing Conference Judge Craig Eley, joked that this edition of the All About Claims newsletter should be renamed the "All About Craig" newsletter in deference to the lead article. Judge Eley joined the Division in 2005, following a decades long career in the Colorado workers' compensation system. In May of this year, he left his role as supervising judge and Manager of the Director's Office, to return to duties as a Prehearing Conference Judge working two weeks on and two weeks off. He is semi-retired.

As Judge Eley reflected on some of the highlights of his career, he gave the impression of one who'd enjoyed a full experience and had a wonderful time.

Can you give us a little background on your career to date?

I'd rather not. 40 years and what have I got to show for it? A fake oak desk – that's kind of it.

I was born at an early age in Toledo, Ohio. My dad had just returned from World War II, so he went to college on the GI Bill and I got to go to his graduation when I was one-year old. He was the first one in his family ever to graduate from college, and I was the second some 19 years later.

I grew up in Rockford, Illinois, which is 90 miles west of Chicago. I went to elementary school, junior high, high school and college there. I attended Rockford College, now known as Rockford University, living at home the first two years. The summer after my sophomore year of college, my father, who was employed by Woodward Governor Company, was transferred to its Ft. Collins facility, so my family moved there. I'm the oldest of four kids and I came back to Rockford to finish my last two years of college there as a dorm student.

During my senior year of college, I met with my adviser (who I now realize was probably about 27) and said, "I've applied to law school at Toledo, Ohio, where I have relatives, and in Denver, which is the state where my family lives. I've been accepted at both, but I don't know which to go to." And my adviser said, "Well, I don't know anything about law school,

but I've been to Toledo and I've been to Denver. I recommend Denver." So here I am.

In 1973 I graduated from the University of Denver College of Law, which is now known as the Sturm College of Law (for some reasons, schools feel compelled to change their names after I leave them). The summer after my freshman year, I needed some kind of job in order to afford to stay in school. I had previously worked summers in the Woodward Governor factory, but I felt it was time to find employment in the law. So I looked all summer in the Denver area for a law clerk job without success, until a week before school started in September. Then I got hired by a law firm that Kerry Sullivan, who is now a well-known workers' compensation attorney, was in. It was just him and two other lawyers. Kerry could have only been out of law school a couple of years at that time. They hired me to be a part-time law clerk, which allowed me not to have to drop out of law school. So if lawyers don't like my judicial rulings, I suggest they complain to Kerry.

I later took a different law clerk's job with an insurance defense firm called Zarlengo, Mott & Zarlengo because it offered more hours of work. So when I graduated and passed the bar exam, I became an associate attorney at that firm. I was there eight years as an attorney and had many district court jury trials and workers' compensation hearings. In 1981, I started a solo practice specializing in the defense of workers' compensation claims. After a couple of years, my largest client informed me that it was hiring house counsel (who turned out to be Brad Unkeless) to handle their workers' compensation work. So I decided (I didn't have much choice) to switch over and be a claimant's attorney. I took out an ad in the Yellow Pages and represented workers' compensation claimants for the next 25 years.

In 1983, I was one of the founding members and the first president of the WCEA (Workers' Compensation Education Association) an organization of workers' compensation claimant's attorneys. It was a loose association until the day came when we decided we needed to hire a lobbyist, which required

us to incorporate and start charging dues. Thirty-two years later, the WCEA has grown to be a vibrant organization which has made a significant difference in the development of Colorado workers' compensation law. Although I am currently a judge and have a duty to be impartial, that doesn't prevent me from being somewhat proud of having had a hand in starting an organization with the quality and endurance of the WCEA.

I continued practicing until 2005, when I came to the Division of Workers' Compensation as a prehearing administrative law judge (PALJ). Before applying, I called PALJ Tom DeMarino and asked about the position. Judge DeMarino replied (and for those of you who know Tom, you will understand that the use of capital letters is mandatory) "IT'S THE BEST JOB EVER AND I WOULD DO IT FOR FREE!"



About four years ago, I became the Manager of the Director's Office of the Division of Workers' Compensation – which basically means, do anything Paul Tauriello wants me to do. Paul allowed me to continue to be a judge for as much time as I could fit in, which eventually turned out to be about half a day a week. In that position, I was managing about 10 people in Claims Management, another eight in Customer Service, one person in Criminal Investigations, another person in Medical Utilization Review and the prehearing unit (which is about 6 judges and 3 staff). Also, I was the manager of our Regulatory Analyst. I got to know a lot of great DOWC staffers in that position; people



whom I would never have had the privilege of being acquainted with had I remained solely in the fairly insular position of a judge.

There came a time when I decided I would like to go to part-time. Being a manager is not really possible on a part-time basis, so I took a voluntary demotion and returned to my old position of prehearing judge. Beginning May 1, 2015 I began to work two weeks on and two weeks off. Judge Goldstein does the same, and we alternate schedules. Although such an arrangement would be impractical in most positions, in the unique environment of the prehearing unit, it seems to work well. PALJs have a daily schedule in which we begin the day with 4 half-hour prehearing conferences. These are mini-hearings in which the litigants have some issue to be decided. We hear the arguments, orally rule, and then usually issue a written order within a day. We have no long-term responsibility for any given claim. Once we issue the order, we are done with that claim. If an issue comes up in the future, the hearing to resolve it can be assigned to any of the PALJs.

The remainder of a PALJ's day is spent conducting settlement conferences, which are mediations. The parties voluntarily schedule a settlement conference and we help them resolve their differences, if possible. Again, once the mediation session is over a PALJ

has no further involvement in the claim. Therefore, there is no day-to-day carryover handling of claims, so when my two weeks of work is up, assuming I am caught up on my orders, I can leave the office with no demands on me for further action, advice, etc. I equate it to being an emergency room physician – once your shift is over, a new doctor jumps in and handles whatever is thrown at him or her.

How do you like your new gig as a part-time judge?

At this time, I haven't really had much of a chance to experience true part-time employment because during my first week as a part-time judge I had to fill in for a judge who was ill. This was an immediate demonstration of one of the values of having part-time PALJs. Parties often have to wait for a month or more for a settlement conference, and if a judge is suddenly unavailable we hate to tell the parties to come back in a month. So having a judge on hold, so to speak, allows the unit to have someone to fill in when emergencies occur.

The second week of my first two weeks off I had to prepare for and conduct the Brown Bag Seminar, a case law update I hold on the third Thursday of each month. This involves a number of hours of work which, I have discovered, tends to cut into one's free time.

What are some of the best times you've experienced during your workers' compensation career?

I have been a defense attorney and I've been a claimant's attorney. When you're a claimant's attorney, you realize that you are affecting peoples' lives. That's a good thing and a bad thing, because if you lose a case, you are affecting them negatively and you have to live with that. But when you win a case and you really make a difference in what people can do, and they thank you for it, that's a great feeling – you've helped somebody.

When you're a defense attorney, you help an insurance company. The adjuster may say 'thank you' but really, your effect on that company's future is infinitesimal. It's one case out of thousands and it's usually other peoples' money. If the insurance carrier takes a hit on your case, they can make it up on the next one, or raise the employer's premiums. But with an individual party, it is much more personal and therefore it's more satisfying.

Another in the "best times" category was the camaraderie within the workers' compensation claimant's bar. Sure, they are all competitors, but what claimant walks into which attorneys' office is largely a matter of chance. Consequently, claimant's attorneys share information, strategy and tactics freely, which benefits all injured workers.

What excites or inspires you these days?

For this job, I guess the inspiration is being able to do a little justice. A lot of people think it's the same every day, but it isn't. Attorneys have great imaginations and are always coming up with unusual arguments, causing a judge to read the statute and sometimes think, "you know, I think this crazy guy is right!" Even though we've had this particular version of the statute for about 24 years now, there are still quirks that reveal themselves only upon close scrutiny. I learn something every week.

There is a story (perhaps even a true one) about Oliver Wendell Holmes, Jr., who was a member of the United States Supreme Court for 30

years, until 1932. He was getting a haircut and when he left, the barber said, "Goodbye, Mr. Holmes, go do justice." Justice Holmes turned to the barber and said, "I don't do justice, I interpret the laws. Congress is supposed to do justice." As Justice Holmes perceived, you don't really get to "do justice" very often. If I could enforce my idea of justice, the workers' compensation law would look totally different than it does, but I am not permitted to do that. Indeed, if every judge could just do what he or she thinks best, we would have chaos. But what I've learned is that workers' compensation has a lot of unanswered questions – a lot of territory that exists between the subsections of the statute. That's where you get to do a little justice. This is what inspires me. The statute says, for instance, that from time to time, the insurance company can have a medical examination of a claimant. It doesn't say where, it doesn't say how many times a week, or a month or a year; it doesn't say what doctors you can send a claimant to and what a claimant has to be subjected to in an examination. For instance, is a doctor allowed to jab you with a needle, draw blood in an examination? What about something non-invasive, like an X-ray? Issues like that come before us all the time and give us the opportunity to do a little justice. And all the PALJs try to do what's fair in the circumstances.

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What I also appreciate about this position is that when my kids ridicule me for some lame joke, outdated opinion or blatant ignorance of the current popular culture, I get to look them straight in the eye and ask "do you know what the state pays me to do? Dispense wisdom, that's what!"



Probably the biggest impact PALJs make on the system and the litigants is in settlement conference. It's a pretty rewarding part of the job. If you can help the parties reach agreement on a claim, you may be cutting someone's litigation journey down by 50% or 6 months. Plus, the parties may be saving thousands of dollars for experts to show up in court. This results in a quicker result for claimants and less cost for insurance carriers and employers. Plus, the state is relieved of the expense of one or more OAC hearings, the drafting of a judge's order, and potential appeals. The Beatitudes proclaim, "Blessed are the peacemakers." We settle around 85% of claims that submit to settlement conferences, so I'm hoping that qualifies us to be blessed.

Is there a particular case in which you were involved that has made an impact either personally or professionally?

There were two. One was a volunteer firefighter I represented in 1992. Like most volunteer firefighters, she had a job outside

of the fire department. The statute provides that firefighters and some other types of volunteers who receive no remuneration are entitled to the maximum rate of temporary total disability as of the date of their injury. In this case, the insurance carrier wanted credit for income earned at my client's regular remunerative employment while she recovered from her injury. The carrier argued that unless it received such a credit, the claimant would receive a "windfall." The Colorado Court of Appeals ruled for my client, and stated that if the result is a windfall, it is a windfall which the legislature intended. In the ensuing 23 years, the general assembly has not seen fit to amend the statute, so it looks like it did intend that such volunteers receive maximum temporary total benefits. Not an earth-shaking bit of jurisprudence, but one that is pretty important to those who volunteer to make our society better.

The other case was the last I ever argued before the Supreme Court. My client was a prison guard and claimed a psychological injury. She

was pro se (represented herself) and went to the hearing without an expert psychological witness. The statute provides that you cannot, among a lot of other requirements, succeed in a claim of mental impairment unless you have the “testimony” of an expert. That was always perceived to mean that someone has to show up to testify, or perhaps testify through a deposition. This prison guard lost at the hearing because she had no expert show up to testify, and she lost at the Industrial Claim Appeals Office for the same reason. So she appealed to the Colorado Court of Appeals all on her own, and the Court ruled the expert testimony provision to be unconstitutional.

The state appealed to the Colorado Supreme Court. For reasons still unknown to me, I received a packet of materials on the case from the Supreme Court clerk, which included the brief from the Attorney General, along with a letter asking me if I would represent this claimant. I called the claimant - whom I had never met and didn't meet during the course of the appeal - and said, “The Supreme Court has asked me if I would represent you in this appeal that the state is making to the Supreme Court—is that something that you want?” And she said, “Oh please, yes - I'm terrified.” And I told her, “Well, you have achieved something in the Court of Appeals that most attorneys never accomplish - you had a statute declared unconstitutional. So you've done pretty well so far by yourself.” I represented and I think the Supreme Court really didn't want the statute to be found unconstitutional, or any part of it, so they just said, “You know, testimony means, in the case of workers' comp, a medical report, because those are admissible without foundation in a workers' compensation hearing.” Problem solved. So that made a big difference in how people have to present their cases for mental impairment. Rather than having to pay for a psychologist or physician to testify in person, they can simply submit medical records in support of their claim, as can be done in all other workers' compensation cases. In reality, what kind of impact does it make? Probably not much, because mental impairment cases are pretty rare. They are so hard to win and,

“The Supreme Court has asked me if I would represent you in this appeal that the state is making to the Supreme Court—is that something that you want?’ And she said, ‘Oh please, yes - I'm terrified.’ And I said, ‘Well, you accomplished something in the Court of Appeals that most attorneys never accomplish; you got a statute declared unconstitutional, so you've done pretty well by yourself.’”

in most cases, the benefits awarded are so small that I always advised my clients, “If you don't have a mental impairment now, you will after you get through being deposed, cross-examined and your psych records going back to the third grade get revealed.”

If you hadn't become an attorney, what career path would you have chosen and why?

My first intended path was to be an astronaut. When I was growing up, astronauts were only something that we knew would happen in the future. But I was very interested in astronomy. I didn't know much about airplanes and such, but I was very interested in astronomy. When I was a kid, I read astronomy books and my dad bought me a little telescope. Then when I was in third grade, I mentioned to a kid at school in Rockford that I wanted to be an astronaut. He sneered and said, “you can't be an astronaut because before you can be an astronaut, you have to be a test pilot.” The kid apparently knew quite a bit. “And,” he continued, “you can't be a test pilot if you wear glasses. And you wear glasses.” I went home and asked my dad, who had been in the Navy during WWII on an aircraft carrier with the first American to go into space — Alan Shepard. My dad said to me, “Yeah, you have to have perfect eyesight to fly a plane,” and I sure didn't. End of dream.



Many years later, I watch the movie Little Miss Sunshine, where the heroine’s teen-aged brother had been working his whole life to go to the Air Force Academy. On a family vacation he’s reading some magazine and they discover he’s color-blind. He knew he could not be in the Academy if he is color blind, so he experienced a “my life is over” moment. Of course, this kid had worked his whole life toward this goal. I was only in third grade, so I suspect I took the news a little better.

In your years both as an attorney and as a prehearing judge, what is the one thing you most want to be remembered for?

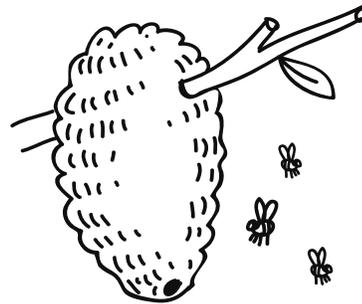
That I helped people – that’s all. Just that I tried to be fair and that I helped people.

Is there anything you’d like to add? About your beekeeping, perhaps?

I have 5 bee hives at the moment. The last two years, my honey has come in second at the Denver County Fair. But the bees make the honey – I have no control over it. I just keep the bees alive. It’s kind of fun and different. I tell people who want to be bee keepers “if you take up bee-keeping, you’ll never have to worry about what to talk about at parties. You could have the most boring job in the world, but if you say ‘well you know, I got stung today when

I was checking my bees...’ people will find you fascinating. They will have a million questions.” I took it up because my daughter suggested it - said it would be good for the environment. It’s true: the more bees there are, the better.

When people ask me why I took up beekeeping, I tell them that my day job involves dealing with attorneys. So at home I like to relax with 60,000 stinging, venomous flying insects.





**SAVE
THE
DATE!**

MEDICAL TREATMENT GUIDELINES SEMINAR GRAND JUNCTION - SEPTEMBER 11, 2015

If you want to know more about Colorado's Medical Treatment Guidelines, join us for this educational opportunity.

This one-day seminar will focus on Colorado's Medical Treatment Guidelines for low back pain and shoulder injuries, two of the most common types of workers' compensation claims. Presenters will demonstrate how to apply the guidelines as a reference tool using clinical case scenarios. Other topics include how to navigate the dispute resolution process, the role of the claims adjuster and concepts of medical/legal causation.

This seminar will be held at the Clarion Inn Hotel, 755 Horizon Dr. in Grand Junction from 8 am to 4 pm on September 11, 2015

For additional information regarding this upcoming conference, contact Kay Bothwell at (303) 318-8763, or by email to kay.bothwell@state.co.us.

The Colorado Division of Workers' Compensation Medical Policy Unit Presents:

2015 Workers' Compensation Educational and Listening Seminar

Rule 16 "Utilization Standards" and Rule 18 "Medical Fee Schedule"
Changes Effective January 1, 2016.

*Seminars will be held in Colorado Springs, Denver, Grand Junction and Loveland.
See registration form for details.*

Purpose:

1. To update the Workers' Compensation billing and payer communities on changes to Rule 16, Utilization Standards and Rule 18, Medical Fee Schedule, that will be effective January 1, 2016
2. Meet with the public to address any billing and payment specifics that are brought to the seminars (Please bring your current issues with documentation – bill, EOB or EOR and medical records – that justifies billed codes for a one-on-one discussion)
3. Listen to and take back to the DWC's management the Colorado workers' compensation constituents' issues that affect an injured worker's access to health care provider(s), and workers' compensation provider and payer billing and payment concerns.
4. Those attending the Grand Junction training will have the opportunity to make this a two day event by attending our Medical Treatment Guideline seminar on September 11th. For more information, please visit www.colorado.gov/cdle > Workers' Compensation > What's New - 2015 Medical Treatment Seminars.

The **Agenda** will focus on significant Rule 16 & 18 changes including, but not limited to:

1. Use of NP and PA in Colorado Workers' Compensation Claims
2. Use of the UB04 or the CMS1500 billing form
3. ICD-10 CM and PCS
4. Division Medical Bill or Prior Authorization Dispute Resolution Program Updates
5. Professional and facility fee schedule changes:
 - a. Conversion to Medicare's Resource Based Relative Value Scale (RBRVS) and related field(s)
 - b. Conversion factor change(s)
 - c. Place of Service Codes
 - d. Fee adjustments for NP and PA provided services
 - e. Criteria for Radiology Consultation Reports
 - f. PRP and Stem Cell Injection Fees and Requirements
 - g. Clinical Drug Screening requirements, codes, and fees
 - h. Biofeedback requirement(s) and fee(s)
 - i. Recognized and non-recognized Special Services, Procedures and Reports as identified in CPT's Medicine Section.
 - j. Clarifications concerning billing psychological/psychiatric testing and services
 - k. PM&R requirements – time, treatment plans with functional goals and fees and new "Z" codes
 - l. Urine drug testing changes
 - m. Requirement for various Division Reports – Functional Assessments and Chronic Opioid
 - n. Fees for hospital and freestanding diagnostic testing facilities
 - o. New out of state pharmacy requirements
 - p. Updates to the ambulance fee schedule
6. Opportunity for the public to exchange information with each other and with a Division representative.

Registration Form

This form is fillable. Use the tab key to navigate each field, or type your response directly onto the form (point and click to fill in each line). When finished, save the form and email to nina.fresquez@state.co.us. For questions, contact Nina D. Fresquez, Program Assistant, Medical Policy, at (303) 318-8766.

Complete one registration form per person attending.

Because space is limited, you will receive a confirmation or a notification that your name has been placed on the waiting list for the next workshop.

Name _____
Business Name _____
Address _____
City _____ State _____ Zip Code _____
E-mail _____
Daytime Phone # _____ Daytime Fax # _____

Medical Fee Schedule Seminar

Dates and Locations:

Thursday, September 10, 2015; 1:00 p.m. to 5:00 p.m. at the Clarion Inn, 755 Horizon Dr., Grand Junction, CO 81506

Monday, September 14, 2015; 1:00 p.m. to 5:00 p.m. at the Medical Center of the Rockies, Long Peak Room, 2500 Rocky Mountain Ave., Loveland CO 80538

Thursday, September 24, 2015; 1:00 p.m. to 5:00 p.m. at the Memorial Administrative Center, Class Room B, 2420 E. Pikes Peak, Colorado Springs, CO 80909

Friday, October 9, 2015; 1:00 p.m. to 5:00 p.m., Department of Labor & Employment, 12th Floor Executive Conference Room, 633 17th Street, Denver, CO 80202

Thursday, October 15, 2015; 1:00 p.m. to 5:00 p.m., Department of Labor & Employment, 12th Floor Executive Conference Room, 633 17th Street, Denver, CO 80202

Profession:

Employer

Self-Insured Employer

Insurance Company

Provider Office

Hospital

ASC

PPO

Third-Party Administrator (TPA)

Bill Review Company

Computer Programmer for Medical Fee

Schedule changes

Other: _____

WHAT'S NEW?

The Division has released updates to two publications! These new publications are available both online and in hard copy through our Customer Service Unit:

- [Adjuster's Guide](#), July 2015
- [2015 Workers' Compensation Act](#) (Unofficial publication of the Colorado Revised Statutes)

COMING SOON!

- Employee's Guide - update to (Spanish version)



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"Quality and excellence in all we do."

