INSIDE: Legislative Reform, Differing Perspectives, Insurance Commissioner Q&A and More

Delaware Lawyer

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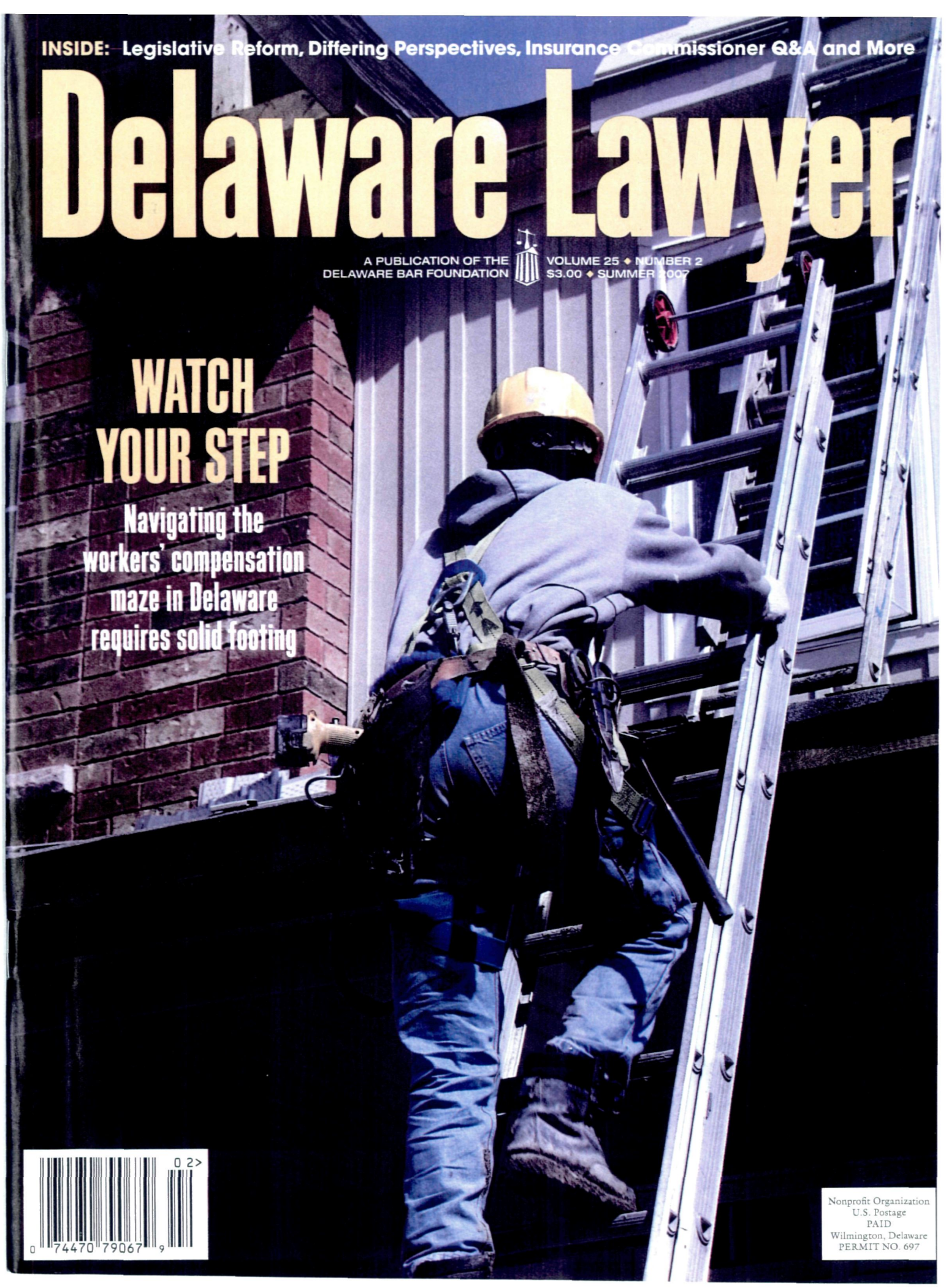

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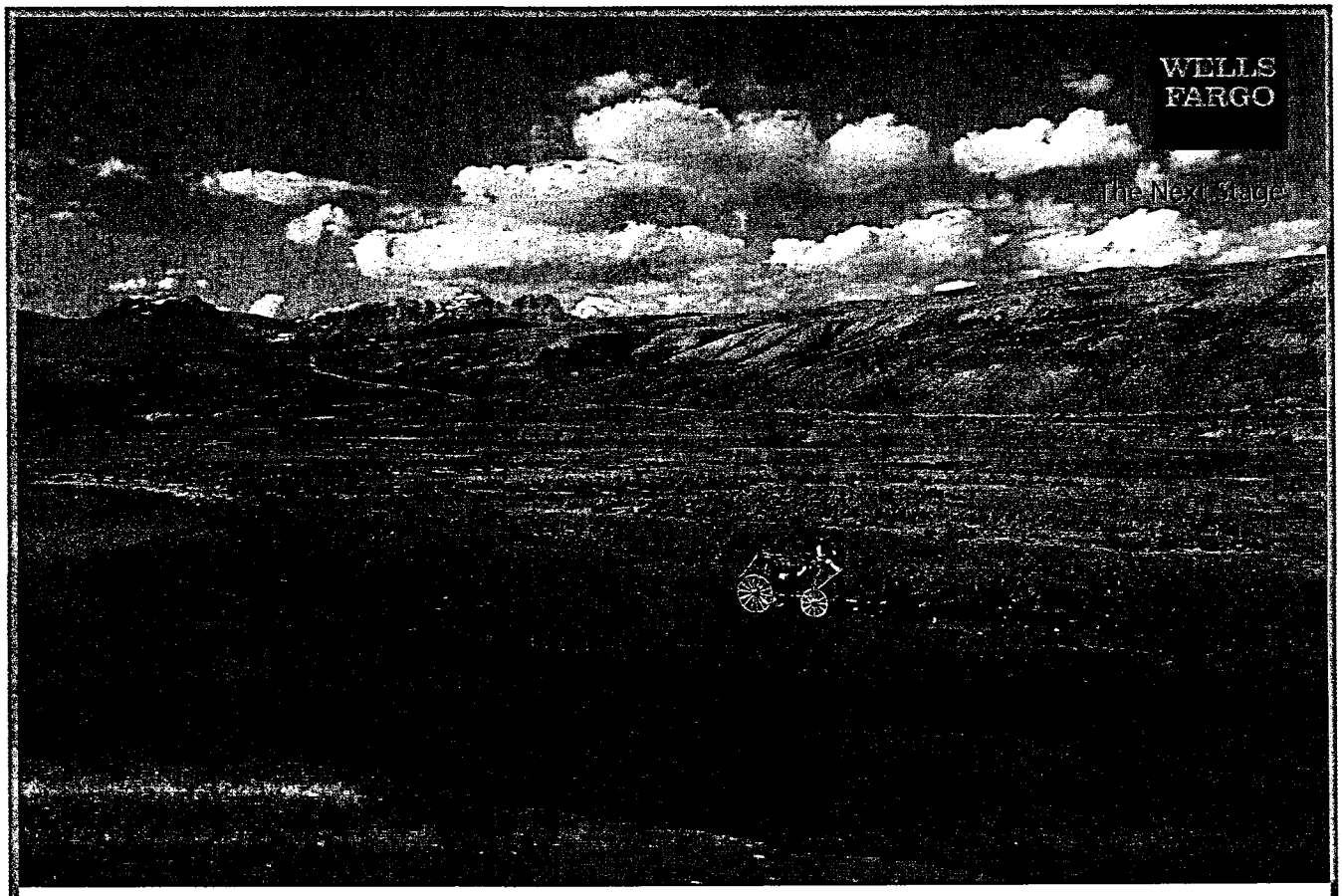

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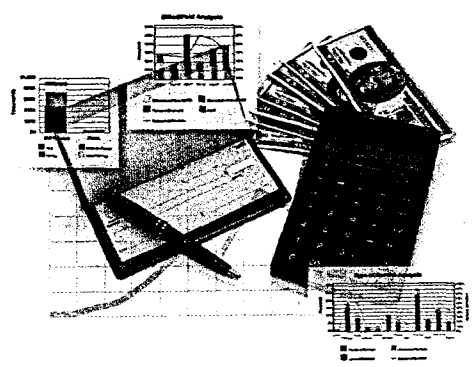

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TRANSPORTATION AVAILABLE

George B. Heckler Jr.
Joeseph W. Weik

This edition of *Delaware Lawyer* is devoted to the topic of workers' compensation. The impetus behind the topic is the recent changes to Delaware Workers' Compensation Statute, which were put into law just a few months ago.

When Senate Bill No. 1 was signed by Gov. Ruth Ann Minner on Jan. 17, 2007, it represented the most sweeping change to Delaware's Workers' Compensation Statute since its original enactment on April 2, 1917. The process that led to the enactment of Senate Bill No. 1 actually began over a year ago with the introduction of Senate Bill No. 362. That bill, which was drafted with the aid of an out-of-state expert, was extremely controversial. Although the bill was voted out of its Senate committee, it never made it for a floor vote in the Senate.

When the Delaware Legislature recessed on June 30, 2006, Senate Bill No. 362 was put on the back burner. During the following six-month period, a Workers' Compensation Core Group, organized by Rep. Bill Oberle, worked long and hard to craft what became known as Senate Bill No. 1.

On Jan. 10, 2007, Senate Bill No. 1 was introduced. From that point forward, it went on a fast track through the Senate, the House Labor Committee and eventually to the floor of the House of Representatives. Seven days later, it was signed by Gov. Minner.

Although the bill took immediate effect, there are many changes in the workers' compensation system that will not come into play for many months. Those changes will only take place following the convening of a Health Care Advisory Panel, which will establish and recommend for enactment a medical fee schedule, treatment practice guidelines, forms for transmittal of treatment and return to work information, and physician certification and utilization review for resolution of treatment issues to contain medical costs.

Thus, the issue of workers' compensation reform is far from over. It is not expected that the recommendations of the Health Care Advisory Panel will take effect until mid-2008. At that time, *Delaware Lawyer* may have to revisit the issue of workers' compensation.

George B. Heckler Jr.

Joseph W. Weik

Timothy A. Casey
is a shareholder with the Wilmington, Del., office of Marshall, Dennehey, Warner, Coleman & Goggin. Since entering private practice, he has concentrated on the defense of workers' compensation matters for carriers and self-insureds. Casey is a graduate of the University of Delaware and the Dickinson School of Law. From 1979 to 1982, he served as deputy attorney general for the State of Delaware, where he also served as counsel to the Industrial Accident Board. Casey is included in the 2001 listing of Best Lawyers in America.

Margaret M. DiBianca
is an associate in the Employment Law Department at Young Conaway Stargatt and Taylor LLP. DiBianca divides her practice equally between client counseling and litigation, concentrating primarily on discrimination law. She lectures frequently to human resource professionals about best practices and methods for the prevention of litigation. DiBianca also provides on-site employment law training for supervisors and managers.

Barbara A. Faupel
was employed by the Dupont Company for nearly 32 years. She was injured in an October 2001 work accident and has been totally disabled since that time. She has appeared twice before the Delaware Industrial Accident Board in support of her claim for workers' compensation benefits. She currently lives in Hockessin, Del.

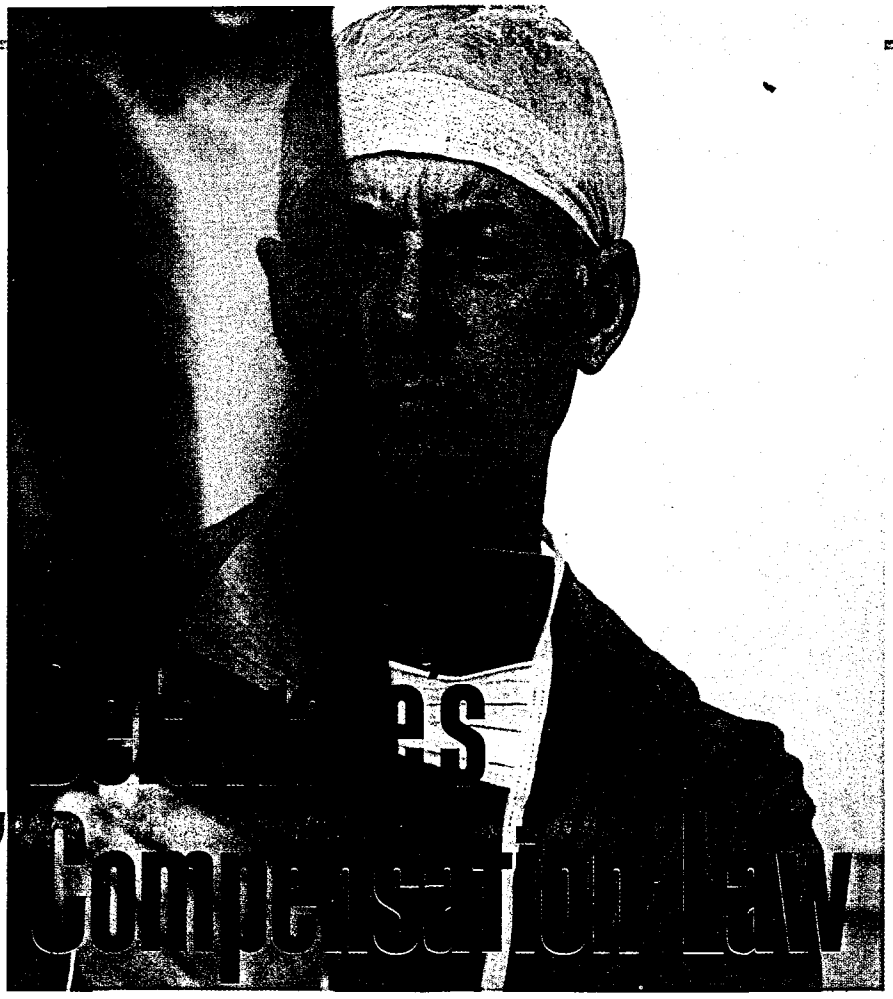
George B. Heckler Jr.
is a partner with the Wilmington law firm of Heckler & Frabizzio and has concentrated his practice on the defense of workers' compensation matters for insurance carriers and self-insured employers. He received a bachelor of arts degree from Baldwin-Wallace College and his J.D. degree from The Dickinson School of Law of The Pennsylvania State University. Heckler is a past chair of the Delaware State Bar Association's section on workers' compensation and is a member of the State of Delaware's Workers' Compensation Advisory Council, the Workers' Compensation Core Group, the Defense Council of Delaware, the Defense Research Institute and the Delaware State and American bar associations.

Harvey Bernard Rubenstein
is a past president of the Delaware State Bar Association and the St. Thomas More Society and received both the bar association's First State Distinguished Service Award and the society's St. Thomas More Award. He also received the bar association's Distinguished Mentoring Award and the American Bar Association's Sole Practitioner of the Year Award.

Joseph W. Weik
is a graduate of the Salesianum School (1970), the University of Delaware (B.A., 1974), and the Dickinson School of Law of Penn State University (J.D., 1978). He has been a member of the Delaware Bar since January 17, 1979. Weik is currently the senior partner in the law firm of Weik, Nitsche, Dougherty & Componovo. He served as President of the Delaware Trial Lawyers Association from 1997 to 1998 and was chairman of the Delaware State Bar Association's Workers Compensation Section from 2000 to 2001. Weik limits his practice to plaintiffs' personal injury and workers' compensation litigation.

FEATURE

George B. Heckler Jr.



Senate Bill No. 1
Reforming Delaware's Workers' Compensation Law

By 2006, Delaware had become the third most expensive state in the country for workers' compensation insurance.

On Jan. 17, 2007, Gov. Ruth Ann Minner signed into law Senate Bill No. 1, which constitutes the first major reform of Delaware's Workers' Compensation Statute since its inception on April 12, 1917. Prior to this reform legislation, procedural changes enacted in 1997 expedited the hearing process thereby eliminating a significant case backlog. These changes resulted in cost savings and insurance premium reductions, which, unfortunately, proved to be short-lived.

By 2005, Delaware was noted to be the seventh most expensive state in the country for workers' compensation insurance, while our neighboring states of Pennsylvania, New Jersey and Maryland were 20th, 29th and 40th, respectively. By 2006, Delaware had become the third most expensive state in the country (preceded only by Alaska and California), with Pennsylvania, New Jersey and Maryland ranked at 18th, 23rd and 40th, respectively.

Pursuant to 19 Del. C. §2301 of the 1997 Amendments, the Workers' Compensation Advisory Group was created to consult with the Department of Labor in conducting its annual review of caseload management. The Advisory Group was appointed by the governor for a term of three years with no compensation, convened by the Secretary of Labor and consisting of the two chairpersons of the respective Labor Committees of each house of the General Assembly, three representatives from the business community, three from labor, two from the Delaware Bar (one primarily engaged in the representation of claimants and one in the representation of employers/carriers), two members of

the Industrial Accident Board and one member from the medical community.

The Advisory Group began meeting in September 2005 at the request of Gov. Minner to provide recommendations for changes to the statute which would reduce the cost of workers' compensation insurance for our state's employers without adversely affecting benefits and the quality of medical care for our employees. According to information provided by the Delaware Compensation Rating Bureau at the Advisory Group's meeting on Sept. 21, 2005, the medical aspect of workers' compensation claims was the primary cost driver. The information presented revealed that 38.6 percent of the total cost of workers' compensation was for indemnity benefits, with the remaining 61.4 percent attributable to medical benefits, which was unique to Delaware. This was not surprising, as Delaware was the only state with no medical cost containment as part of its statute.

By May 2006, the Advisory Group was presented with Senate Bill No. 362, which was met with significant opposition because of concerns regarding the impact of the recommended changes upon business, the insurance industry and labor, and unresolved questions regarding the cost of implementation and extent of any savings to be realized. Although Senate Bill No. 362 was not enacted by the close of the legislative session on June 30, 2006, Gov. Minner remained committed to bringing about the changes needed to maintain a competitive business environment for Delaware, and reform legislation remained a key priority.

In July 2006, Rep. William A. Oberle formed what became known as the Workers' Compensation Core Group to continue the work necessary to reform the Statute. The Core Group was comprised of Rep. Oberle and Sen. Anthony J. DeLuca; Insurance Commissioner Matthew Denn; A. Richard Heffron of the Delaware State Chamber of Commerce; orthopedic surgeon Dr. Bruce J. Rudin; George B. Heckler Jr. of the defense bar and Joseph J. Rhoades of the claimants' bar; Edward J. Capodanno of Associated Builders and Contractors and John J. McMahon Jr. and John J. Casey Jr. of the Delaware Contractors Association; Robert L. Byrd, representing business interests; Samuel Lathem, Harry Gravell and Michael A. Begatto, representing labor interests; Francis J. O'Neill Jr. and Suzanne Raab-Long of the Hospital Association; John F. Kirk III of the Department of Labor; Joseph C. Schoell, the governor's counsel; and actuary Allan Schwartz.

As a result of this effort, medical cost containment is now part of our statute for the first time in our state's history.

The Core Group began meeting on Aug. 10, 2006 and concluded its work on Dec. 11, 2006. Many elements of Senate Bill No. 362 were utilized in the creation of Senate Bill No. 1. This reform legislation evolved through consensus to unanimity of agreement, as it became apparent that without such agreement success would be unlikely. As a result of this effort, medical cost containment is now part of our statute for the first time in our state's history. No single statutory provision will result in cost reduction; rather, all of the reform provisions together are expected to result in a premium savings of approximately 15 to 21 percent and hopefully more. Self-insured employers should see savings directly and more promptly, starting with the implementation of the fee schedule and practice guidelines referenced below.

The significant changes involving indemnity and non-medical issues include the following: data collection to track system performance and costs; voluntary mediation to resolve issues which previously had to be tried before the Industrial Accident Board; transparency of and control over claimant's attorney's fees, which include disclosure of written fee agreements, prohibition against collection of fees from weekly benefit checks with one exception which must be approved by a Hearing Officer, and reaffirmation of compliance with the Supreme Court's rules regarding fees; authorization for employers/insurance carriers to make medical and indemnity payments without prejudice; clarification of date of accident average weekly wage calculation based upon a 26-week average; mandatory offset/credit against benefits for insurance fraud; suspension of benefits following conviction and during period of incarceration; requirement that out-of-state firms (especially contractors) provide insurance to match Delaware benefits; increased penalties for failure to insure and requirement of prompt insurance carrier notification to the Department of Labor upon policy termination, lapse or cancellation; clarification of obligations of independent contractors, subcontractors and general contractors

with respect to maintaining workers' compensation insurance; promotion of resources available to assist with vocational rehabilitation and return to work without changing existing rights and responsibilities of employers and employees; and adoption of a voluntary safety program with formula for premium reduction for compliance. All of the above became effective Jan. 17, 2007.

The medical issues addressed by Senate Bill No. 1 include the establishment of a Health Care Advisory Panel consisting of 17 members, nine from the medical community and eight lay persons, nominated by the governor and confirmed by the Senate, to serve a three-year term without compensation, charged with developing a complete cost containment system. Subject to development by the panel and adoption by regulation, the statute will implement a fee schedule "payment system" for medical costs and charges – for professional services, 90 percent of the 75th percentile of actual charges (designed to eliminate "outliers" in the system); for hospitals and surgical centers, 15 percent reduction of charges (emergency room services are exempt); for other goods and commodities, 15 percent reduction of charges, to be adopted within six months of the first meeting of the panel. Also, practice guidelines for treatment protocols in major specialties to implement best practices in care and utilization of services are to be adopted within one year of the first meeting of the panel; provider certification for health care providers who meet certain minimum standards and agree to abide by the practice guidelines and the fee schedule, resulting in treatment of workers' compensation cases without pre-autho-

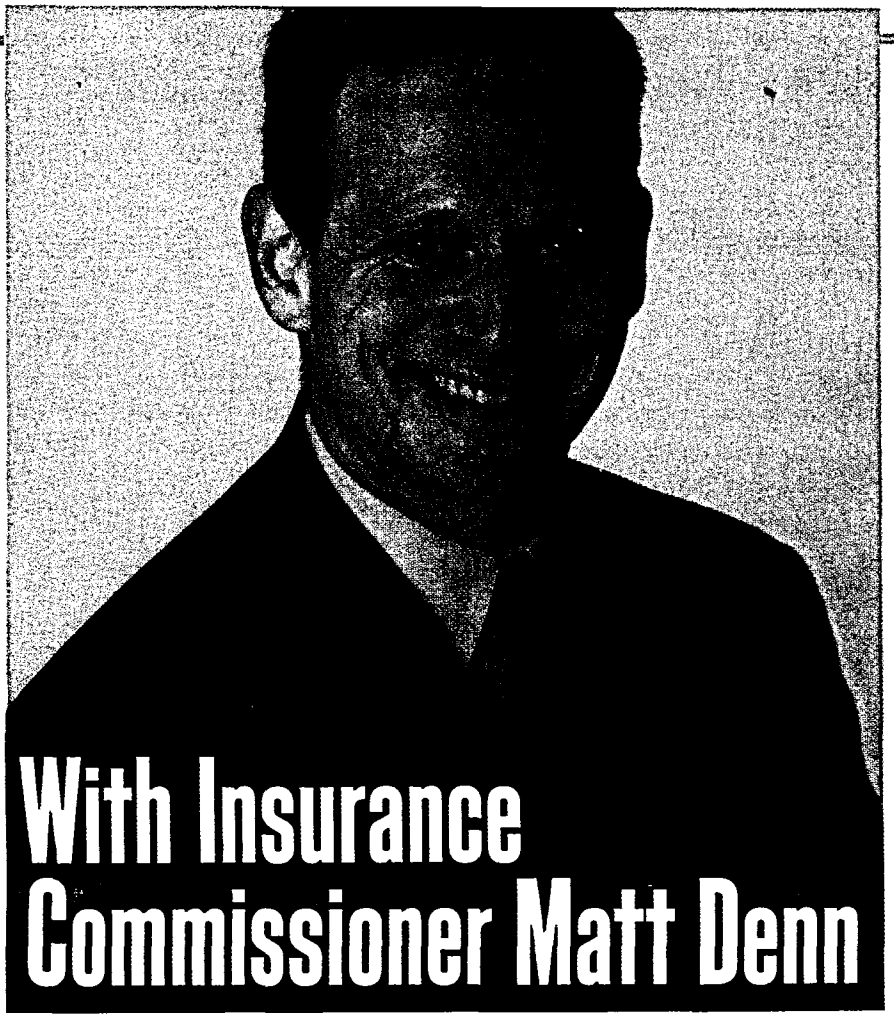
rization by a self-insured employer or insurance carrier, are to be adopted one year after the first meeting of the panel; forms, to include a Physical Capacities Evaluation form, to improve communication about the injured worker with the objective of returning him/her to work more promptly are to be adopted within six months of the first meeting of the panel; improved billing and payment procedures to effectuate prompt pay of health care claims not in dispute, with utilization review of issues concerning fee schedule and treatment guideline compliance in acknowledged compensable claims; sanctions/fines for employer, insurance carrier and health care provider non-compliance are to be outlined; prohibition against balance billing is noted; and requirements are set forth for coordination of compensation and health insurance benefits.

The bill authorizes the Department of Labor to engage a health care information and technology consulting firm, Ingenix, to assist with the development of the medical cost containment system and Web site which will be accessible to all at no charge.

Senate Bill No. 1 also requires a new rating plan to be filed within 90 days of the effective date of the fee schedule, within 90 days of the effective date of the implementation of the practice guidelines and at least annually thereafter. Individual carriers are required to file new rate applications within 60 days of the adoption of the rating plan. There is a "statement of intent" that savings from the medical and related cost containment provisions of the new statute be reflected in rates, so that cost savings are passed along to the consumer.

This reform legislation was the result of the unwavering commitment of Gov. Minner, the exceptional leadership of Rep. Oberle and Sen. DeLuca, and the diligent work of the Core Group. Senate Bill No. 1 was passed by the Senate and the House, unanimously by those members present and voting, and signed into law by Gov. Minner on Jan. 17, 2007. It is anticipated that the reform legislation will result in significant cost savings and insurance premium reduction through a more efficient and improved system for the betterment of all concerned. Perhaps more importantly, the framework is now in place for the data to be collected to determine whether the statutory amendments are achieving the stated goals and for any changes to be made that are necessary to do so. ◆

Margaret DiBianca



Q&A With Insurance Commissioner Matt Denn

The law is intended to reduce the costs of premiums, thus providing direct-to-employer savings by containing health care costs through the rate filing process.

On Jan. 17, 2007, Gov. Ruth Ann Minner signed into law Senate Bill No. 1 entitled "An Act to Amend Titles 18 and 19 of the Delaware Code Relating to Workers' Compensation." The bill represents the most extensive substantive reform of Delaware's Workers' Compensation Statute since it was originally enacted on April 2, 1917. The new bill was the result of a bipartisan effort to reduce workers' compensation premiums for employers without compromising the benefits available for injured workers.

In this interview, reprinted with the permission of the *Delaware Employment Law Letter*, Margaret DiBianca interviewed Delaware Insurance Commissioner Matthew Denn to learn about these changes and the benefits that both employers and workers can expect to see.

Q: ***The new statute includes significant changes to the state workers' compensation system. What motivated the new legislation?***

A: The bill is an aggressive attempt to help the state's employers improve their competitive advantage with the lower insurance costs available in other states, while still maintaining a system that provides workers with the treatment they need to get well and return to work.

Q: ***It is no secret that Delaware employers pay substantial premiums for workers' compensation insurance. Does the new law include any cost savings for employers?***

A: In short, yes. Proponents of the law are optimistic that these changes will

result in serious benefits for employers including over time (and) a 15 percent to 21 percent reduction in insurance premiums.

Q: ***What other benefits can employers expect?***

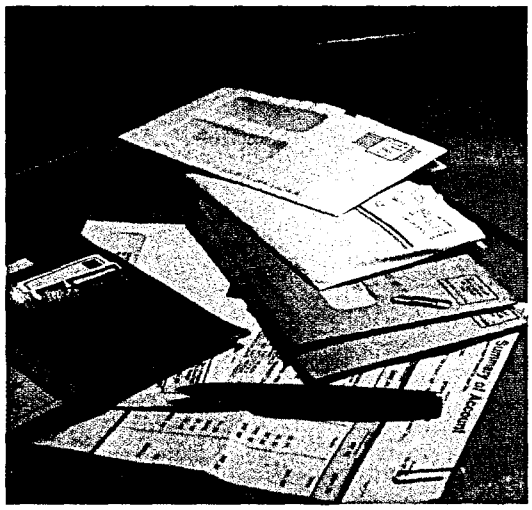
A: The act will likely result in several benefits to employers. For example, the act clarifies how to calculate wage rates for an employee with a limited work history. Also, employers are not required to make indemnity payments for periods when the injured employee is incarcerated. Notably, the law is intended to reduce the costs of premiums, thus providing direct-to-employer savings by containing health care costs through the rate filing process.

Q: ***Do those benefits detract at all from the protections offered to injured workers?***

A: Just the opposite. The new law also includes protections for employees. For example, it creates new procedures for the application for and collection of attorneys' fees. Employees' counsel is now required to have written fee arrangements with their clients. An attorney requesting fees and costs must now submit an affidavit verifying their compliance with the ethical rules of conduct. And, attorneys who do collect fees may not do so from the client-employee's periodic benefit payments, absent special circumstances and the approval of the board. Finally, when attorneys' fees are awarded, the fees must first be used to offset any financial obligation the employee otherwise has to his or her counsel.

Q: ***What about timeliness of payments to injured workers? Does the law address how promptly claims are paid and the impact of payments on employers?***

A: Yes, absolutely. The new law implements preventative measures to ensure that those who are injured at work are given access to benefits as quickly as possible. Under the new law, employers and insurance carriers may make benefit payments without waiving their right to later contest the employer's obligation to pay. This enables employers who are in doubt about the validity of a claim to give the employee the benefit of the doubt without later being punished for their willingness to compromise.



One of the most significant changes under the new law is the creation of a Health Care Advisory Panel (with power to) establish a fee schedule for medical costs and charges.

Q: ***Who else does the law affect?***

A: One important feature of the new law is the requirement that out-of-state contractors now must match Delaware benefits when doing business in the state. This ensures that all Delaware workers will receive the coverage they need, regardless of whether their employer is technically classified as a "Delaware employer."

Q: ***What about insurance disputes? Are there any new procedures employers should understand if they are faced with a disputed claim?***

A: Yes. Voluntary mediation is now available before the Insurance Appeals Board. Mediation has long been a featured service offered by the Department of Labor, and the Department of Insurance is very pleased to be able to offer mediation as a low-cost, front-end dispute resolution technique. Also, if the board later determines that insurance fraud was committed, the Department of Insurance is now authorized to order restitution payments be made to the employer or carrier.

Q: ***The law also creates an entirely new Health Care Advisory Panel, which is expected to participate in overseeing the rates charged for medical care provided to injured employees. Who will be on the panel and what is its role expected to be?***

A: One of the most significant changes under the new law is the creation of a Health Care Advisory Panel. The members of the panel will be appointed by the governor and will be charged with the responsibility to establish a fee schedule for medical costs and charges. The goal is to eliminate those health care providers who charge at the very highest rates.

Q: ***Has there been a procedure selected for how the panel will monitor the rates?***

Essentially, the panel will operate as a checks and balances to ensure the new system is operating as effectively as possible.

A: First, the Panel will evaluate the customary fees for seven or eight of the most common procedures. The top 25 percent of the fees will be removed from consideration. Physician's charges will then be established at 90 percent of the 75th percentile of the fees for that procedure. Fees for hospitals, laboratories, pharmacies and other professional services providers will be capped at 85 percent. Emergency treatment is excluded from this fee schedule.

Q: *Will the panel have any other duties?*

A: The panel will also issue protocols for the medical treatment of work-related injuries. The panel will establish a standardized form for use by employers and health care providers during treatment. The goal of the standardized forms is to develop a uniform and consistent reporting system that helps injured workers to promptly return to work. In turn, the data gathered with the forms will enable the panel to determine the effectiveness and costs of the new system. Essentially, the panel will operate as a checks and balances to ensure the new system is operating as effectively

as possible. The Department of Insurance is hopeful that this will enable both Delaware employers and employees to receive the best benefits and protections possible under the new law. ◆

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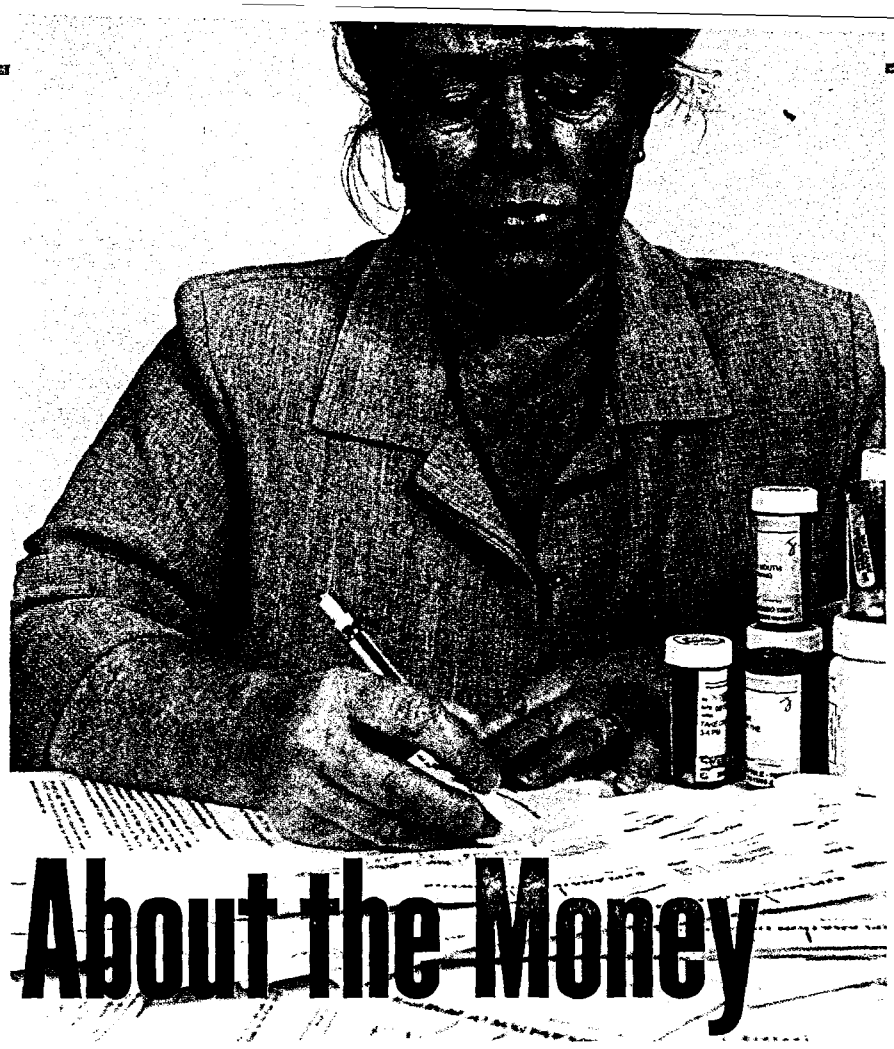
Editor's Note:

As you can see, many of the changes enacted by Senate Bill No. 1 have not yet gone into effect. While the changes to the indemnity and non-medical provisions of the statute became effective the date of its enactment, Jan. 17, 2007, the changes to the medical provisions — notably the fee schedule and treatment practice guidelines — will not take effect until six months to one year after the first meeting of the Health Care Advisory Panel, which is charged with the responsibility of enacting a fee schedule, practice guidelines for the treatment of injured workers, forms for transmittal of treatment and return to work information, certification of physicians and utilization review for prompt resolution of treatment issues. As of this writing, the panel's first meeting was scheduled for May 23, 2007. The medical changes mandated by the statute will, therefore, not become effective until approximately May/June 2008. — JW

FEATURE

Barbara A. Faupel



A Patient's View: It's All About the Money

Dealing with the Delaware Workers' Compensation system has been one of the most frustrating, emotional and stressful experiences of my life.

On Oct. 18, 2001, I received a flu shot while on the job. Thirteen days later, I was taken to Christiana Care Hospital with paralysis. Within 24 hours of admission to the hospital, I was completely paralyzed. Diagnosis: Guillain Barre Syndrome (GBS), which was later diagnosed as the chronic version of GBS called Chronic Inflammatory Demyelinating Polyneuropathy (CIDP). I spent four months in the hospital — two months in Delaware and two months at Magee Rehabilitation Hospital in Philadelphia. At Magee Rehab, I was taught how to walk again (on legs I couldn't feel), wore leg braces and suffered additional neurological problems. Needless to say, this was a catastrophic life event!

I have been asked to share my personal experience as a person now receiving workers compensation benefits due to my work illness. I am sorry to say that dealing with the Delaware workers' compensation system has been one of the most frustrating, emotional and stressful experiences of my life. How disappointed I am that Delaware legislators have allowed the nonsense I have been experiencing to even exist. It appears that the insurance companies are in charge, not the doctors.

As background, in June 2002 I was retired under a Total & Permanent/Incapability Retirement. I had just turned 52. I have always been a single person and have no dependents. My occupation was a private executive secretary. During my 32 years of employment, I always put part of my salary away for my retirement and only two weeks prior to the onset of

my illness, had sold my home and had a contract on a new home. Then, disaster struck!

At the time of my retirement, I asked my Human Resources person about receiving workers compensation benefits. I was told I could apply, but that I wouldn't win. With the enormous financial impact from CIDP, I felt I had no choice but to pursue workers' compensation assistance.

Joseph W. Weik took my case. We went before the State of Delaware Industrial Accident Board and won! I felt such relief at that time, but within 30 days of the Board's decision, we were notified that my employer appealed the case to the Delaware Superior Court.

The Superior Court also ruled in my favor. After winning two court decisions, I truly thought that I could begin to rebuild my life, but I was wrong. Once again, within 30 days we were notified that my employer had appealed my case to the Delaware Supreme Court.

While my case was making its way through the legal system, I was forced to pay thousands of dollars for out-of-pocket medical bills and other related expenses. This was in addition to the amounts paid by my health insurance carrier. My life savings were quickly disappearing. I felt so abandoned.

In 2004, the Delaware Supreme Court, in a 5-0 decision, ruled in my favor. I had finally won and appeals by my employer had been exhausted. The court ruled that my employer was, in fact, responsible to pay me workers' compensations benefits because I was strongly encouraged by my employer to receive the flu shot and I had received the shot during regular work hours.

I had been instructed by Weik to keep track of all expenses relating to my illness and I was to be reimbursed by the workers' compensation insurance carrier. I submitted all materials as requested and then my eyes began to be opened to the horrible system disabled people go through under the Delaware workers' compensation system. You suffer from the effects of your disability and then you suffer the unnecessary frustration of dealing with the insurance company.

The insurance carrier has denied various medications and challenged whether I needed physical therapy and so on. In on-again/off-again resubmitting petitions to the Board, we have had to re-

You suffer from the effects of your disability and then you suffer the unnecessary frustration of dealing with the insurance company.

litigate the same things over and over, a total waste of time and money. Anyone with knowledge of my case and CIDP should help me versus continuing to hinder me.

It has been five and a half years since the initial onset of my CIDP. Although I have come a long way, the stress from dealing with the insurance carrier has resulted in my having to seek psychological counseling. Once this began, I felt like a failure. I've been struggling to regain my life and each time I feel like I'm beginning to get back to somewhat of a normal life, I get knocked down again. The feeling of failure came from knowing that I did not need psychological counseling during my total paralysis. I was, in fact, congratulated by physicians on how well I was dealing with my disability. Now, I need psychological counseling because of my total frustration with the workers' compensation insurance carrier. What bothers me even more is that professionals — lawyers and doctors — have referred to all of this as "The Game." This isn't a game. This is my life!

The following are examples of some of my experiences in dealing with the workers' compensation system:

- My employer has subtracted my total pension check from what I would receive under workers' compensation. Workers' compensation benefits are supposed to be tax-free. However, I pay tax on my total pension and then receive only a very small amount (workers' compensation is less than $4,000 a year) tax-free. No one can explain to me if this is even proper. Can you? Why isn't it calculated to my benefit?
- The insurance company has failed to send my weekly disability check. At one time in 2006, I went five weeks without a check. (Five weeks — this is terrible!) Several calls had to be made from my lawyer's office to my employer's lawyer requesting my checks. Why is this allowed to occur?
- Prescriptions that my physicians write for me are denied by the insurance adjuster. Does the insurance company know more about my medical condition than my physicians? Again, we have to submit the same prescriptions to the carrier and the Board. Each time we have filed a petition, we have won. Then the insurance company will stop payment for the drugs/treatment again. This is done without any notice. I have not been reim bursed for medications that were previously litigated and won since January 2006. At this time, I have spent approximately $2,000 out-of-pocket. How many times do I need to file a petition

to get approval for the same thing that the Board has already approved?

• My physicians are frustrated. They want to know how many times they must rewrite prescriptions. My neurologist even mentioned the frustration in one of his office notes and the negative impact it was having on me. My primary care physician asked me how many times she needs to give a deposition on the same drugs and treatments. More time on everyone's part means more money spent. This is a waste!

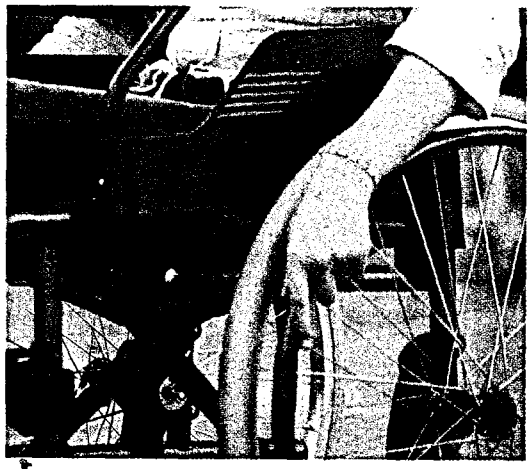
• I saw a psychologist in 2006. After submitting all of my medical records to the insurance company, she was then asked to submit her thesis. This is an outrage!

• I was provided with a billing address for the insurance company, which I gave to all of my health care providers. Then I found out that the insurance company changed their billing address without notifying me or my lawyer. I had three different billing addresses. How can the insurance company do this? Needless to say, this situation delayed payment to my providers.

• Expenses submitted to the insurance company are not paid in a timely manner. Through February 2007, I have not received a penny for any mileage or any medication, etc., since the end of August 2006. This is six months. Can you believe this? Six months and not one penny of reimbursement! The lawyer for the insurance company specifically requested that I submit monthly expense sheets, which I have done. But, the insurance company then ignores the submissions. There is no penalty to the insurance carrier for doing this.

• Payment to medical facilities (hospital/physical therapists/specialists) is delayed for months. I then receive past-due notices from these various facilities telling me the bills may go to collection. I am told that the providers call the insurance carrier over and over, but receive no return phone calls. I have outstanding credit and do not want the insurance company to destroy it. The last large bill from Christiana Care, in excess of $36,000, went unpaid for more than a year after I had been in their facility. The constant bills from the various providers have placed undue stress on me. I cannot put into words the total frustration I feel.

• The insurance company wants to know why I need to go to Johns Hopkins Medical Center. We have already explained that I was referred to Johns Hopkins shortly after my discharge from Magee Rehab due to the rareness of my illness. It has been the chief of neurology at Johns Hopkins who has been overseeing my rehabilitation. My neurologist here in Wilmington consults with him by phone when necessary. Is it really the insurance company's right to challenge my needing this case when my neurologist has referred me and this has been previously approved?



Do not turn your eyes away from those of us who have been injured on the job and suffer with permanent disabilities. Our lives have been forever changed.

In 2006, the Delaware legislature tried to revamp the Delaware workers' compensation system. For me, this would have been a total disaster. It's bad enough now, but proposals made in 2006 would have been even worse.

Do not turn your eyes away from those of us who have been injured on the job and suffer with permanent disabilities. Our lives have been forever changed. In my case, I worry very much about my future. I can't even change my own overhead light bulbs. I've been fortunate to have a supportive family and very good friends who help me out, but I can't rely on them forever. I worry about the workers' compensation system trying to "kick me off" the system. Again, another worry I shouldn't have to be concerned with. Yet, I do worry.

I worry because of the way I have been treated by the system so far, especially where I sent a precedent before the Delaware Supreme Court. The workers' compensation system is not set up to deal with people like me, people with a devastating illness. I was always taught to be honest, tell the truth and that truth would prevail.

This text cannot tell you the actual physical and emotional suffering that I've experienced and continue to experience. The demyelinating process itself was so excruciating that I had to be sedated into unconsciousness. I've been in and out of the hospital on various occasions receiving special treatments and I

have suffered life-threatening complications. I am immune suppressed because of my illness and have been told that if I ever catch the flu, I might not recover. I never want to sit in a wheelchair again. Can you imagine the fear, knowing I could go through everything again if I catch the flu? Unless you have suffered a similar experience, you cannot know how horrible my experience has been. What I should not have to endure is dealing with the workers' compensation insurance carrier fighting me for every step I take forward.

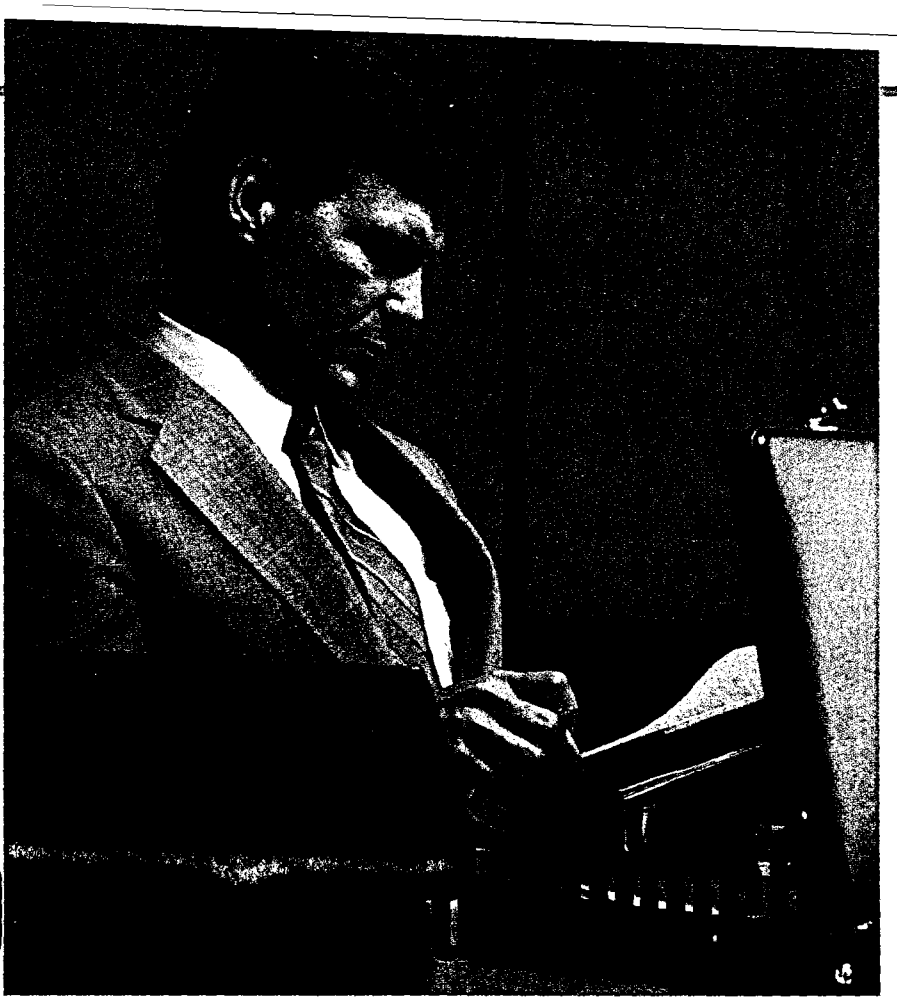
How different my goals in life are now, as opposed to before my illness. When asked at Magee Rehab in early 2002 what my goals were, my reply was to go to the bathroom by myself and put myself to bed when I wanted to versus relying on someone else. Can you imagine these as your goals in life? I have achieved these goals. My goal now is to continue improving.

I wish I could have given a complimentary commentary on the Delaware workers' compensation system, but I cannot — at least not from my experience. I believe that you, too, know that the system is failing the very people it was created to help. The system has:

- Pitted doctors against one another.
- Created distrust between the insurance carrier and those providing care for the patient.
- Resulted in employers trying to minimize their financial impact. (No one cares about the financial impact the disabled person suffers.)
- Allowed the insurance carrier to cause more harm to the disabled person by the constant fighting to receive benefits to which the disabled person is entitled. In my case, this now requires psychological assistance.
- Driven costs higher because of constant, unnecessary litigation.
- Not assessed any penalty against the insurance carrier for failure to do the right thing.

It's all about money — and whose pocket it's in. ◆

Joseph W. Weik



A Few Goo

The attack on trial lawyers and those who regularly represent tort victims and injured workers has been under a vicious attack by the proponents of so-called "tort reform."

Call me paranoid. I may be wrong, but it seems that no group of attorneys seems to be more openly vilified and criticized than the trial lawyers representing personal injury and workers' compensation claimants. It seems that no matter what the trial bar does, we are always put in the position of having to justify our actions and motives.

This scenario reminds me of the now-famous scene in the movie "A Few Good Men." In that movie, a young Judge Advocates General's corps officer, Lt. Daniel Kaffe (played by Tom Cruise) has a grizzly Marine, Col. Nathan R. Jessep (played by Jack Nicholson) on the witness stand during a murder trial. At one point, Col. Jessep feels the need to defend his beloved Marine Corps and launches into a tirade on the witness stand. It seems to me that if Col. Jessep were a plaintiffs' trial lawyer instead of a marine, his speech might go something like this:

"Son, we live in a world that has torts, and the victims of those torts need trial lawyers. Who's going to help them? The government? The insurance industry? The chamber of commerce? We have a greater responsibility than you could possibly fathom. You weep for corporate America and you curse the money they pay in insurance premiums. You have that luxury. You have the luxury of not knowing what we know: that the civil justice system, while tragic, probably saves lives. And, our existence, while grotesque and incomprehensible to you, saves lives. You don't want the truth, because deep down in places you don't talk about at parties, you want us in that courtroom. You need us in that courtroom. We use words like litigation, compensation and damages. We use these words as the

backbone of a life spent creating something. You use them as a punch line. We have neither the time nor the inclination to explain ourselves to people who rise and sleep under the blanket of the very civil liberties that we provide and then question the manner in which we provide it. We would rather you just said thank you and went on your way. Otherwise, we suggest you pick up a law degree and stand at a podium. Either way, we don't give a damn what tort reform you think you are entitled to."

If you think I enjoyed writing the foregoing passage, there's really only one appropriate response. You're damn right I did.

The Tort Reform Debate

The attack on trial lawyers and those who regularly represent tort victims and injured workers has been under a vicious attack by the proponents of so-called "tort reform." This is more than just a public relations war between the insurance industry and the trial lawyers. It actually involves the highest levels of the United States government. We need only go back a few years when, in one his post-9/11 State of the Union speeches, President George W. Bush mentioned "trial lawyers" three times while never mentioning Osama Bin Ladin once.

In 2005 and 2006, Congress spent more time debating tort reform than the war in Iraq. Just last year, Delaware's Democratic governor introduced Senate Bill No. 362, which would have completely rewritten Delaware's workers' compensation law. If it passed, Senate Bill No. 362 would have drastically altered the way that injured workers are compensated for their losses. Fortunately, cooler heads prevailed and in 2007, Senate Bill No. 1 was enacted, addressing many of the concerns regarding workers' compensation while upholding most of the important benefits that injured workers are entitled to receive.

Our system of compensation under the contingent fee tort system forces us to weed out frivolous claims.

Every year, members of the trial bar have to spend time in both Washington, D.C., and Dover against an onslaught of tort reform initiatives. The battle for our clients' rights does not always end in the courtroom. It frequently involves a trip to Legislative Hall as well.

What Frivolous Claim?

One of the political buzzwords and talking points that we frequently encounter is the claim that our country is riddled with "frivolous lawsuits." As a plaintiff personal injury lawyer, I am personally offended by this argument, knowing that trial lawyers are probably the greatest opponents of frivolous lawsuits. This can be directly traced to the contingent fee system of compensation in which, to quote Vince Lombardi, "Winning isn't everything, it's the only thing."

Our system of compensation under the contingent fee tort system forces us to weed out frivolous claims. To prosecute such a claim would be a violation of not only our ethics, but also our business survival. Frivolous lawsuits don't pay the bills and must be avoided at all costs. This doesn't mean that trial lawyers prosecute only winning cases. There are many close cases where a client deserves representation and it is not always clear whether liability favors the plaintiff or the defense. Plaintiff's lawyers are, however, the first line of defense in weeding out frivolous lawsuits since we are not apt to prosecute a claim knowing that we have very little chance of success.

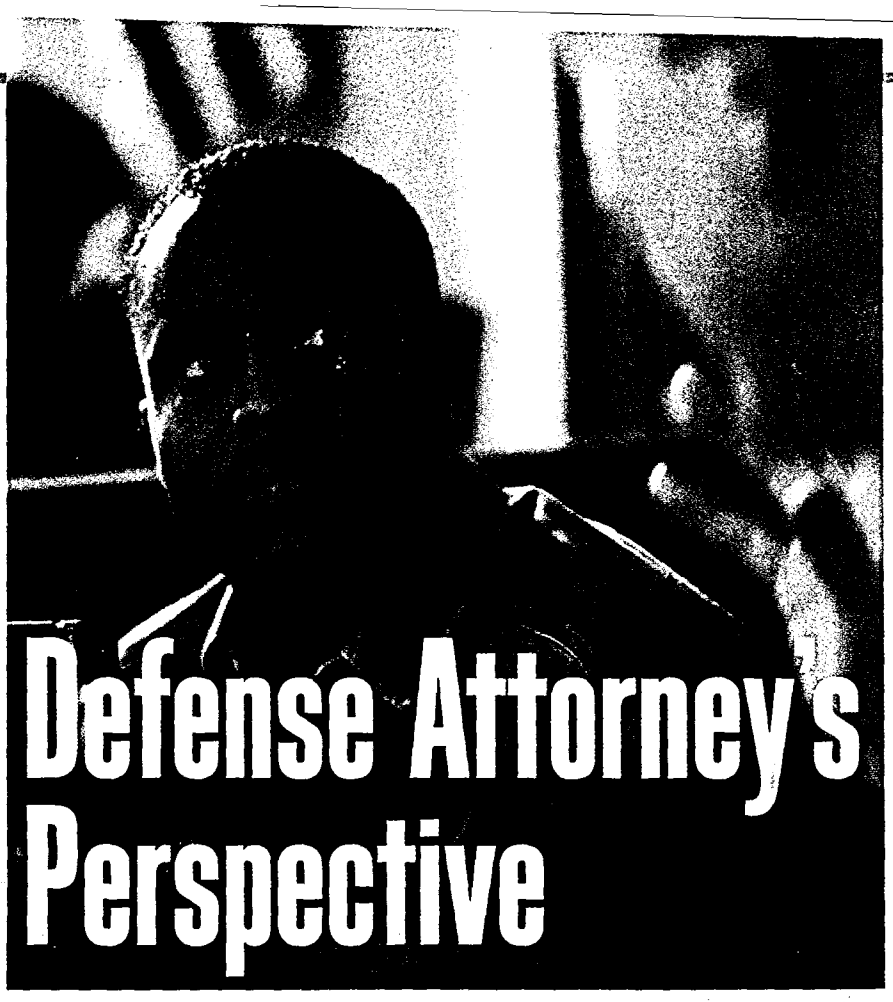
Accepting the Challenge

I have been a trial lawyer for more than 28 years. Early in my career, I handled a variety of cases, both civil and criminal. Over the last few years, I have accepted the challenge of only handling plaintiffs' personal injury and workers' compensation claims.

Despite the criticism I hear about my chosen profession, I will defend my clients' rights to fair and reasonable compensation – no more and no less. No one asks to be an accident victim and no one asks to have their career ruined by an on-the-job injury. When that happens, the innocent victims turn to those few good men and women who are willing to go to bat for them. ◆

FEATURE

Timothy A. Casey



The Practice from a Defense Attorney's Perspective

Sisyphus has become a symbol of the absurdity of ceaseless and pointless toil as well as the necessity to continue to strive honorably in the face of repeated disappointment.

I had initially intended to use The Who's classic "Behind Blue Eyes" as the thematic basis for this brief article. I thought the memorable opening line of "No one knows what it's like to be the bad man" was particularly apropos for a discussion of the role of a workers' compensation defense lawyer. I ultimately came to the realization that many, if not all, of the subsequent lyrics are such that I would not wish to publicly endorse them as being appropriate to defense practice or the practice of law in general.

Upon further reflection, I concluded that the mythical figure Sisyphus was more apt. Sisyphus was the King of ancient Corinth who was condemned by the gods for his excessive cleverness. The maddening nature of his punishment was to continually roll a huge boulder to the top of a steep hill, at which point the boulder would escape his grasp as he reached the summit. Sisyphus must then begin the same task again with no perceptible hope of success. Sisyphus has become a symbol of the absurdity of ceaseless and pointless toil, as well as the necessity to continue to strive honorably in the face of repeated disappointment.

The first boulder defense attorneys must be prepared to deal with is claimant's counsel's contention that the self-insured is a heartless manipulator of their employees or that the carrier is yet another representative of the monolithic insurance industry out to exploit injured workers and increase their already vast profits. In fact, the defense attorneys can expect to deal with adjusters with burgeoning caseloads of their own. The actual employers, small and large, are uniformly overwhelmed by the constant expansion of the risks covered by workers' compensation and

(prior to the recent legislation) uncontrolled medical expenses.

It is difficult to explain the rationale of a system with no directed care, utilization review and medical management to employers who face restrictions on their own private medical coverage. Employers are equally frustrated when they endeavor to provide safe work places far beyond the Occupational Safety and Health Administration guidelines and still have no recourse when employees are injured as result of their own intoxication, failure to follow safety instructions or willful disregard of their own safety.

In compensable cases, large and small employers with existing sophisticated return-to-work programs are frustrated by limitations on their ability to communicate with treating healthcare professionals in order to ascertain the reasonable and appropriate work restrictions and the small minority of healthcare providers who unreasonably provide blanket no-duty slips, even when there is little or no objective indicia of significant disability. Even the most unsophisticated employers are concerned that the Delaware Workers' Compensation Act provides for no differentiation between conditions that pre-existed employment and those that were actually caused by a work accident or work duties. It is hard for the conscientious employers to comprehend that there is no meaningful distinction under the Delaware workers' compensation system between those risks associated with employment and those faced by everyone in everyday life.

In dealing with the employers, particularly the self-insured, it is clear that they understand the far-reaching costs of workers' compensation claims. Not only is there the actual cost of benefits and medical expenses for the self-insured employer and the ever-increasing workers' compensation premiums for the insured employer, there are concerns regarding the lost productivity of the injured worker and disruption in the work place with regard to other employees. There is also indirect loss of productivity in the form of the common phenomenon of resentment among other employees because of the redistribution of work duties when an employee is offered accommodating work or because of the perception that the injured worker is "gaming" or "milking" the system.

Any practicing defense attorney must acknowledge that this system is tilted both philosophically and statutorily.

For employers there is also the cost of administrative time and distraction, the potential impact of worker's compensation claims on the Family Medical Leave Act, the Americans With Disabilities Act and other claims, and the long-term cost of dealing with an adversarial employee/employer culture at their worksite. In my experience, all employers want legitimate claims paid promptly with appropriate medical care and work to facilitate the return to work of the injured worker as soon as possible. Most employers are simply seeking clear guidelines as to what they are expected under the statute and predictability as to the outcome of litigated cases.

The Delaware Workers' Compensation Act is similar to other compensation statutes. Workers' compensation is essentially employer-financed, no-fault insurance that compensates employees who are disabled due to industrial injury, the repetitive effects of their work activities or an occupational disease. Their entitlement to workers' compensation benefits is an administrative remedy based upon the statute alone. It is no defense to show that the accident was entirely the claimant's fault or that the employer was free of fault. All workers' compensation is considered social legislation and the administrative agency and the courts are mandated to interpret the law in the light most favorable to the claimant.

Whatever the phraseology, the concept is that where the evidence is in balance or close to balance, the decision goes to the claimant. To reluctantly use a lame sports analogy, in baseball, when the base runner and ball simultaneously arrive at first, the tie goes to the runner. In workers' compensation, the problem occurs when this doctrine is invoked when the runner is halfway down the line. Giving the benefit of the doubt to the claimant is appropriate, but the reflexive use of this by the board and the courts to justify awards is the bane of the defense attorney's existence.

Any practicing defense attorney must acknowledge that this system is tilted both philosophically and statutorily. The defense practitioner must acknowledge and accept that fact in undertaking the representation of insurers and self-insured employers. The defense attorney must realize that the tilt permeates the entire system from the Industrial Accident Board and the understaffed and overworked Division of Industrial Affairs to the reviewing courts with other priorities and unveiled disinterest in the subject matter.

Defense attorneys know they must overcome not only the statutory and unspoken presumptions in favor of the claimant, but also the pervasive attitude that the claimant will prevail regardless of the merits of the employer's case or the weakness of the claimant's own case. The challenge on the part of the defense is to show the finder of fact and the courts that these presumptions should not apply in the particular case at issue.

It is difficult to emphasize the implications of this presumption in everyday practice at the board. The idiopathic fall, the heart attack, sick building syndrome, complex pain syndrome, the suicide, fibromyalgia, mental illnesses and the whole range of human experience and employment may be brought within the coverage of the Workers' Compensation Act, so long as the incident happened during the workday on the employer's premises or otherwise arguably within the course and scope of employment. The underlining presumption is that if there is relationship in time to any work activity, the claimed injury will be presumed to be compensable.

In confronting this presumption, the defense attorney must investigate the facts and be prepared to either acquiesce to that presumption or present an effective defense to rebut the presumption of compensability and the attitude that no claim is defensible. The continuing challenge is to avoid the mindset that you have little chance of winning a case outright. While the defense attorney must also focus on acknowledging the litigation realities of each particular case, they must use their skill and experience to reduce, defend or mitigate any award. They must concurrently resist their own internal pessimism that the claimant will recover; no matter how many times that rock has rolled back down the hill.

Another challenge of defense practice is that a high-volume workload is generally required to sustain a viable workers' compensation practice. Because of the volume of cases, the proliferation of mandatory practice guidelines by carriers and employers and the velocity with which Delaware workers' compensation claims move from inception to conclusion, the cases do not allow the kind of time, preparation, investigation, and reporting that those familiar with the defense of liability claims are familiar. In most cases, the defense attorney uses as his or her informational resources the file of the compensation carrier or self-insured employer. Workers' compensation defense attorneys rely more significantly upon the information supplied by the client and carrier and we are increasingly restricted from choosing our medical consultants, vocational experts, and other investigators; this function being handled by the claims examiner.

The defense attorney must strive to ensure that the presentation of his or her case is clear and better prepared than that of the claimant.

As all Delaware workers' compensation practitioners are aware, there are no provisions for discovery depositions or the use of interrogatories. Our discovery tools are extremely limited and this has been exacerbated by healthcare providers' reluctance to produce medical records on a timely basis because of Health Insurance Portability and Accountability Act considerations. It is imperative however, that a defense lawyer control his or her case load so that each matter can be handled professionally and adequately, at the same time keeping the client informed as to the status of the matter as to allow the employer or insured to make as informed a decision as possible in the key issues in the case. The challenge is to bring your experience and training to the often limited information available.

It is necessary for the defense attorney to obtain and review the employer's personnel file, medical records, the accident reports and any investigative reports. Obviously, a defense attorney must be knowledgeable regarding Delaware workers' compensation statute as well as all applicable case law. At a minimum, a defense lawyer must know how to recognize the value of the claim, recognize the limits of the claim, and provide their client with the known proclivities and tendencies of the Industrial Accident Board.

In any case, the defense counsel should review in the following records and documentation: All medical records and reports, hospital records regarding medical or surgical treatment rendered to the claimant, employment records, wage information, any investigative reports, surveillance films, expenses and photographs, employer's report of injury, any applicable occupational safety and health administration records and report, materials safety data sheets, witness statements, documentation regarding vocational and physical rehabilitation, and court records regarding prior Delaware or other jurisdiction workers' compensation and insurance claims.

The defense attorney's basic review of Delaware workers' compensation claim must cover the issues of jurisdiction, employment relationship, course and scope of employment, and notice and statute of limitations. Also, medical issues must be clearly defined as to the nature of the claimant's symptoms and diagnosis, as well as its relationship to work activity and medical causation.

A practicing defense attorney must be able to prepare a witness for direct and cross examination, be able to effectively examine medical and vocational expert witnesses and present his or her position persuasively. In many cases there is large volume of medical documentation, which defense counsel must be able to understand and manage effectively.

When representing either a self-insured employer or an insured employer, it is also necessary that the defense attorney have at least a rudimentary knowledge of the following: The Americans with Disabilities Act (and corresponding state handicapped discrimination laws); the Family and Medical Leave Act (both the federal and state provisions), The Age Discrimination and Employment Act, the Occupational Safety and Health Act, the Labor Management Relations Act, the Employee Retirement Insurance Security Act and Social Security Disability Law, where appropriate. In negotiating settlements, the defense attorney must be conversant with and aware of the possible liability under Medicare's secondary payor provisions.

The defense attorney must strive to ensure that the presentation of his or her case is clear and better prepared than that of the claimant. The defense attorney must acknowledge the above described attitude as well as legal and procedural barriers to presenting an effective defense of their client. All effective defense attorneys know that honest presentation of the claim and fair dealing with the other side are essential if one wishes to maintain a successful practice in this field.

It is equally important that the practitioner avoid an overwhelmingly pessimistic view of the potential outcomes, no matter how many times they have unsuccessfully tried to push the rock up the mountain. Ultimately, an honest, professional presentation of the employer's position is the defense attorney's satisfaction. Sometimes the struggle itself must be sufficient. ◆

(Continued from page 28)

North Carolina, 452 U.S. 18 (1981), the struggle to find a constitutional right to legal counsel in civil cases was thwarted. In that case, the U.S. Supreme Court ruled that an indigent parent facing termination of her parental rights in a state proceeding had no categorical due process right to counsel since there was no deprivation of physical liberty.

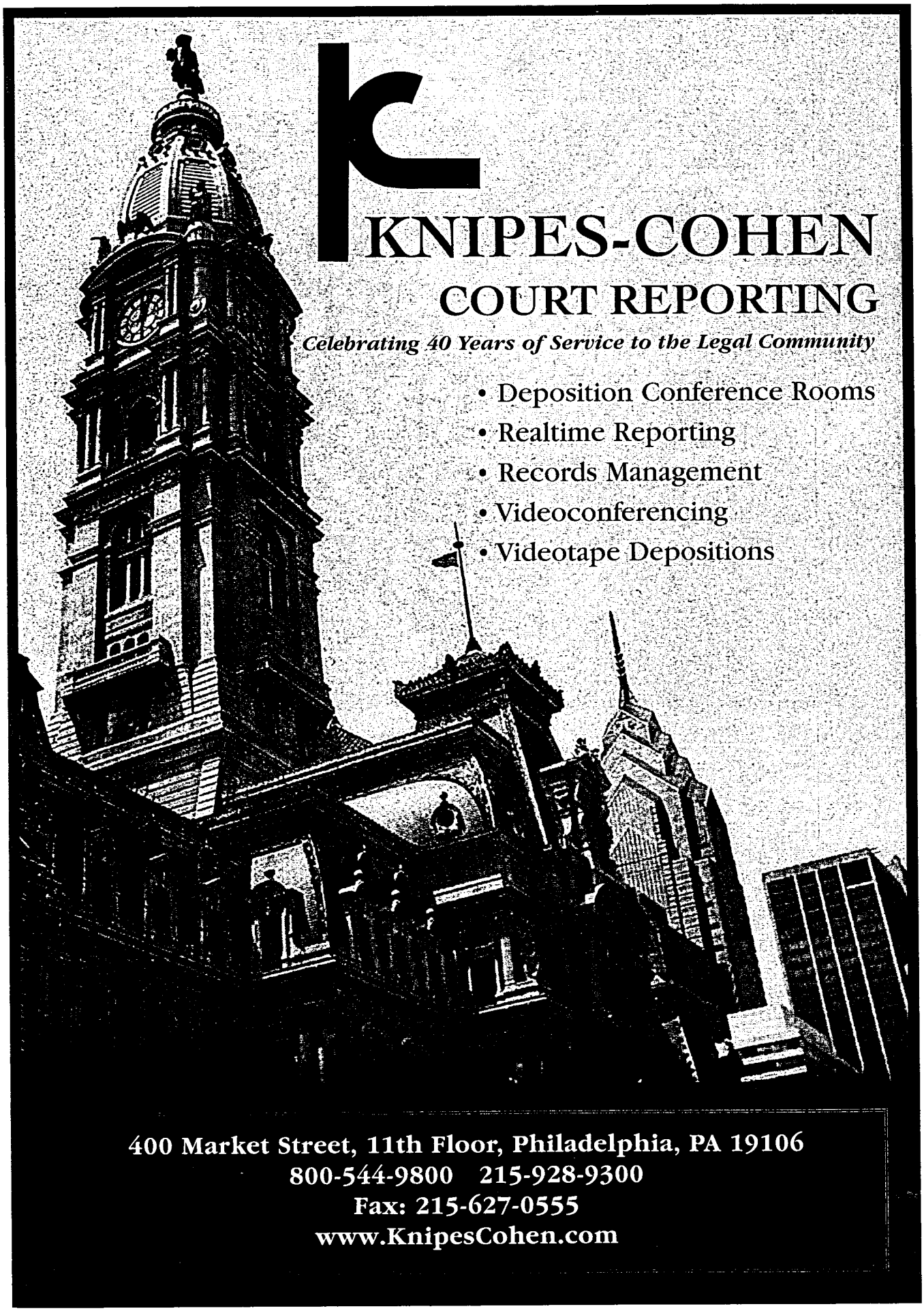
Yet, while more than 25 years have elapsed since *Lassiter*, the vision of a "civil *Gideon*" has not gone away. Many scholarly articles have appeared in support of an indigent's right to counsel in civil cases, and calls have been made to build a national coalition among the advocates. [*See* CLEARINGHOUSE REVIEW JOURNAL OF POVERTY LAW AND POLICY (July-August 2006, Vol. 40, Nos. 3-4).1]

More than 20 states have seen fit to create "access to justice" commissions for the principal purpose of drafting legislation creating a right to counsel in civil cases. Last year, California's commission, overcoming complex questions concerning the basis and scope of the right to counsel, drafted a model statute. The American Bar Association has urged all federal, state and territorial governments to provide legal counsel to low-income persons in those proceedings "where basic human needs are at stake."

These initiatives in support of a right to counsel in civil cases illustrate several important points. First, there is an increasing need for indigents to have legal assistance in civil cases, and that need has not been met. Second, having a lawyer makes a difference. Thus, while everyone agrees that the IOLTA program fills an important gap, it is evident that Delaware must look at this issue in a comprehensive — indeed, legislative — context. It appears to be the direction in which many other states are headed. Will Delaware join the vanguard? ◆

FOOTNOTE

1 Available online at http://www.povertylaw.org/clearinghouse-review/issues/2006/2006-july-aug.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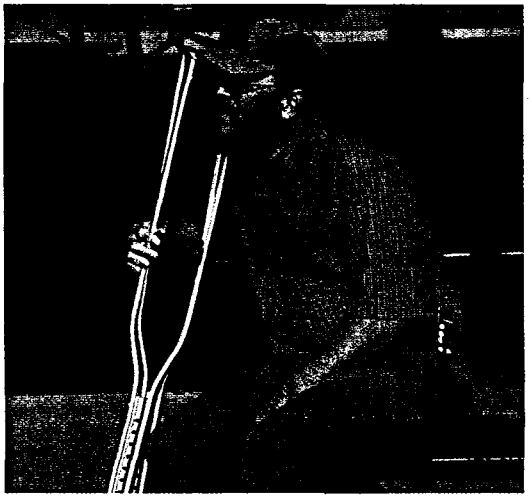
Harvey Bernard Rubenstein

Meeting the Demands of Legal Services for the Poor

Supported by the rationale that making legal services available for poor people was a critical goal in the administration of justice in Delaware, our Supreme Court adopted the Interest on Lawyers' Trust Accounts program.



When the Delaware Bar Foundation was established in 1981 as an independent nonprofit corporation, there was nothing in its certificate of incorporation indicating that legal services for the poor was a priority or even a mission to be pursued. The Foundation's stated purposes were quite typical, even bland by today's standards: to improve the administration of justice; to promote study and research in the field of law and the continuing education of lawyers; to publish legal treatises and preserve rare books and documents; to accept gifts and bequests, and, of course, to perform all acts advancing those purposes.

Then, in 1983, everything changed. Supported by the rationale that making legal services available for poor people was a critical goal in the administration of justice in Delaware, our Supreme Court adopted the IOLTA (Interest on Lawyers' Trust Accounts) program. Some lawyers chose to take advantage of the program's opt-out provision, but most did not, and the program got off to a fast start.

By rule, the Supreme Court charged the Foundation board with general administrative responsibility for the IOLTA program, including the duty to review all grant applications and make annual recommendations for court approval. Since IOLTA money was fairly plentiful in those early days, many programs advancing the administration of justice were able to receive funding.

Even before IOLTA funds began to decrease, it became clear to the Foundation board that grants from those funds should be used exclusively to provide legal services for the poor. Today, while IOLTA funds seem to be on the rebound, they are still insufficient to meet the financial needs of the principal legal service providers — CLASI (Community Legal Aid Society), LSCD (Legal Services Corporation of Delaware) and DVLS (Delaware Volunteer Legal Services). Consequently, all IOLTA grants recommended by the Foundation board are for the sole purpose of providing legal services to the poor.

For several years now, with the assistance of State Rep. Robert J. Valihura Jr., the Foundation has made application to the State of Delaware to provide funds in the general budget, and the governor and the legislature have responded by making $275,000 available for legal services for the poor. This past year, the budget office went further and created a specific line item in the budget. The state thereby has recognized that it has a responsibility to those who do not have the financial resources to obtain legal assistance. It has stepped up to the plate, which has helped.

At the same time, the Foundation and the Supreme Court's IOLTA committee have urged banks to increase their interest rates on IOLTA funds. Wilmington Trust Company has been a consistent leader in recognizing its public responsibility in that regard. In addition, for the longer term, the Foundation has set up an endowment fund and has launched a campaign to meet its goals.

In an effort to increase the availability of IOLTA funds, some states (such as Indiana) have switched from an opt-out system to one of mandatory participation. Moreover, banks have been encouraged to raise interest rates on IOLTA accounts to a level comparable with their other deposit accounts. As a result, IOLTA programs in certain states have realized enough money to fund all of the civil legal aid grant proposals they received. In Delaware, few lawyers who are eligible now opt out, and banks with the largest IOLTA balances have been responsive to requests to increase the interest rates for those accounts.

On the national scene, however, a different prospect is playing itself out. A campaign has been building to recognize a constitutional right to counsel in civil cases. It started, essentially, with *Gideon v. Wainwright*, 372 U.S. 335 (1963). In Gideon, the U.S. Supreme Court found that the state was required to provide counsel to indigent persons in criminal cases leading to imprisonment. This right to counsel, derived from a sense of fundamental fairness and the right to a fair trial, was held to be grounded in the Sixth Amendment and applied to the states through the 14th Amendment.

However, in *Lassiter v. Department of Social Services of Durham County,*

(Continued on page 26)

"Most people have to hurry,
They do not stop to see,
I'm glad that God made Pop-Pop,
Not rushed and young like me."

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