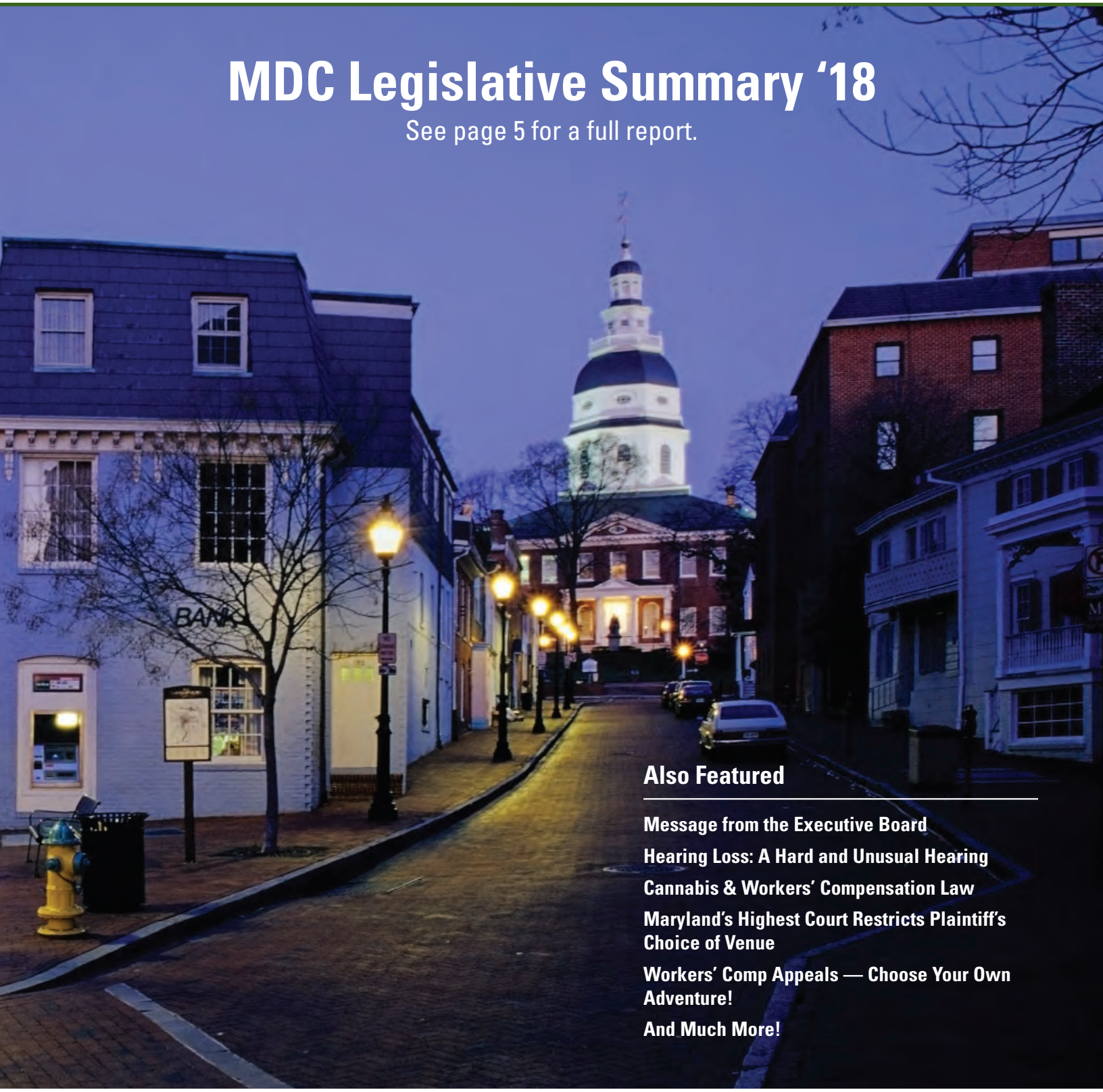
THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

April 2018

MDC Legislative Summary '18

See page 5 for a full report.



Also Featured

Leadership Through Honesty

Welcome to the latest addition of Maryland Defense Counsel's The Defense Line. On behalf of the MDC Board and Executive Committee, thank you all for your continued support of MDC and all its activities.

Dwight W. Stone, II, Esquire

Miles & Stockbridge P.C.

It has continued to be a very busy Spring for MDC. We have hosted a number of excellent Lunch & Learns, as well as our inaugural Awards Dinner in which we honored several deserving deans of the Maryland bench and bar. The turnout from our membership was outstanding and feedback was quite positive. We also made our presence known in Annapolis, as several of our members testified in the Legislature on various issues concerning the defense bar and our clients.

As MDC's soon-to-be President-Elect, I was asked to continue our series of essays in this publication on leadership issues. After deciding that my first and second objectives would be brevity and avoiding "corporate speak" as much as reasonably practicable, I spent some time thinking about the most important qualities of excellent leaders. For me, honesty stands out above all others.

Think about leaders you have worked with or seen in action. Can you think of any that were effective, much less inspirational, by being dishonest? I doubt it. If your experience is anything like mine, the leaders who have inspired you to be most successful were those who demonstrated their honesty on a daily basis and demanded the same from you.

But why is honesty so critical to leading others? I think it is because honesty fosters motivation in team members. For a leader to be a good motivator, he or she must develop an atmosphere of trust and mutual respect, and this requires the leader to be viewed as credible and legitimate. No one wants to be lied to or deceived in their professional life. We all know how demanding the legal profession is and how much more difficult our work can be if we have to deal with truth-challenged colleagues. In contrast, a leader who is a "straight shooter" can make practicing law more enjoyable, rewarding and less stressful.

To create a healthy atmosphere of trust, leaders must be willing to communicate what they are thinking and feeling, even if doing so is uncomfortable (for the leader and/or team members) or unpopular. This should go in both directions: a good leader must be willing to deliver frank constructive criticism of team members as well as admit to her own mistakes. This allows team members to know they are being held to a high standard and expected to continually improve, but the leader's ability to admit mistakes demonstrates that perfection is not required for success and contributes to the spirit that "we are all in this together." If the leader has the bravery to admit mistakes and, at times, uncertainty about the best course of action, this can empower team members to engage in the most open and productive discussion about how to achieve objectives. Rather than being a sign of weakness, such openness and transparency can help engage and inspire the team.

Great leaders do not have to say "trust me"; instead, they earn trust by telling the truth as a matter of course, whether it be good news or uncomfortable news. Their teams achieve better results, their reputations grow, their team members have a good role model and everyone goes home each night feeling better about their work. Plus—as my teenage children have heard me say more than once—"If you don't lie, you don't have to remember everything you have said."

THE DEFENSE LINE

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MDC Legislative Summary '18

John T. Sly and Michael L. Dailey

The Maryland Legislative Session recently ended. Common wisdom said that because this is an election year little would be done. Common wisdom was wrong. Almost immediately upon the Session convening, we found the plaintiff's bar aggressively pushing a number of bills in the Senate and the House of Delegates. Primary among them were: (a) expansion of punitive damages to claims involving negligence; (b) tripling the cap on non-economic damages in medical malpractice cases with multiple beneficiaries, and; (c) repeal of the 20% rule in medical malpractice cases. The good news is that MDC played a large role in defeating all of these efforts.

There were several important bills introduced this year that had potential serious adverse consequences for Maryland employers and insurers. The potentially costly wage stacking bill, backed by the Claimant's bar, was successfully quashed thanks to the hard work and efforts of the MDC. Unfortunately, an MDC backed bill that would allow the Workers' Compensation Commission to consider the Employer/Insurer's claim for a dollar credit for temporary total disability paid to the injured worker during delays in the work-related injury treatment caused by non-work related medical conditions or injuries did not receive a favorable committee report, and never made it to a full floor vote. Self-Insured employers, however, are now included in the law that requires them to report any suspected fraud to the Insurance Commissioner, in writing, or the Fraud Division or appropriate state or federal law enforcement. Finally, the MDC's other backed bill that gives employers/insurers great share of the potential subrogation recovery from a third party case settlement or verdict passed, and it reduces the right of the state Subsequent Injury Fund from sharing in the third party proceeds. That bill was signed into law by Governor Hogan and is effective October 1, 2018.

Our governmental affairs team at Venable, John Stierhoff and Angel Lavin, did a fantastic job of keeping MDC informed of bills that might impact our respective practices and our clients. MDC coordinated with other stakeholders in educating legislators on the impact of proposed legislation. This included individual meetings with legislators, written testimony, and live testimony in both the Senate and the House of Delegates.

Many people put a great deal of time into MDC's efforts. I would like to particularly recognize the efforts of Nikki Nesbit and Mike Dailey, co-chairs of MDC's Legislative Committee, and Gardner Duvall, MDC's Legislative Branch Liaison. Their efforts, and those of their committee members, were critical to our success. In addition, I would like to thank Michelle Mitchell and all others who testified live in the Legislature on bills of interest. I repeatedly heard from legislators and other interested groups that MDC's voice is important because we bring real-world experience to the issues being considered in Annapolis.

MDC continues to be your voice in Annapolis. If you would like to become involved in legislative efforts or if you have ideas for legislative reform, please let us know by emailing me at: jsly@waranch-brown.com.

John T. Sly is a partner at Waranch & Brown, LLC. He is President-Elect of MDC and serves as Liaison to the Maryland Executive Branch.

Michael L. Dailey is a co-founder of Schmidt, Dailey & O'Neill, located in Baltimore, and he represents employers and insurers in Maryland workers' compensation cases as well as representing clients in general tort liability cases. He is Past President of the MDC, and is currently a Co-Chair of the MDC Legislative Committee and is the Maryland DRI State Representative.

A Chat with the Chairman

Ileen M. Ticer

R. Karl Aumann was appointed Commissioner of the Workers' Compensation Commission in February 2005, and was subsequently named as Chairman in October 2005. He is a Board member and past president of the Southern Association of Workers' Compensation Administrators and is chair of the International Committee of the International Association of Industrial Accident Boards and Commissions. Elected as a Fellow of the College of Workers' Compensation Lawyers in 2015, he has also served since 2010 on the board of the National Association of Workers' Compensation Judiciary, and since 2006, on the Maryland Workers' Compensation Educational Association board of directors.

During Chairman Aumann's tenure at the Commission, the community has reaped the benefits of his oversight in advanced technology, efficiency and responsiveness. I recently had an opportunity to discuss the Chairman's insight into the Commission as well as present some questions of interest.

Accomplishments

Chairman Aumann was quick to point to the level of efficient and compassionate service provided by the Commission to the public as one of his most satisfying accomplishments. The Commission staff takes great pride in providing information not just to the professionals, but also to the citizens that have "how do I" and "what if" questions. He is also understandably proud of the technological advancements of the Maryland Workers' Compensation Commission. Maryland remains the only workers' compensation agency in the country where a compensation claim can be handled entirely paperless. Currently 70% of the claim forms filed at the commission are filed electronically. Recently, the Commission continued with this trend by requiring represented claimants to file their Employee Claim Form electronically.

Insurance Compliance

One area that the Commission will be looking to proactively approach is that of insurance compliance. The Commission will be monitoring cancellations and insurance lapses that are detailed on the NCCI (National Council on Compensation Insurance) database. Rather than waiting for a claim to be filed and then discover the employer is uninsured, the Commission will be taking the initiative by contacting those employers whose insurance has lapsed and proactively scheduling compliance hearings that could result in fines separate and above those currently imposed.

Decisions

As everyone who practices before the Commission can attest to, many of the Commissioners' decisions appear to lack uniformity and outcomes can be very different on similar facts. Chairman Aumann noted that any decision process at the Commission is heavily dependent on cred-

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Editors' Corner

The Editors are proud to publish this edition of *The Defense Line*, which features articles from our members and highlights several recent developments in the area of workers' compensation. **Ilene M. Ticer** interviewed R. Karl Aumann, the Chairman of the Maryland Workers' Compensation Commission, and provides some great insight into the inner workings of the Commission. An article by **H. Scott Curtis**, Assistant Attorney General and Counsel to the Workers' Compensation Commission, illuminates the issues and the intersection of cannabis and workers' compensation law. Several members and esteemed litigators, including **Wendy Karpel** of Montgomery County's Workers' Compensation Unit, **Amy Foster**, Assistant Attorney General for the Maryland-National Capital Park and Planning Commission, **Theresa M. Colwell** and **Lance G. Montour** of Humphreys, McLaughlin & McAleer, LLC, **Julie D. Murray** and **Christopher M. Balaban** of Semmes, Bowen & Semmes, and **James A. Turner**, of Godwin, Erlandson & Daney, LLC, provide summaries of recent cases and developments in workers' compensation law and guidance on their impact in claims handing. Additionally, our members provide valuable summaries of recent decisions from the Court of Appeals. An article by **Benjamin A. Beasley** of Rollins, Smalkin, Richards & Mackie, LLC, discusses a recent case restricting the Plaintiff's choice of venue, **Christine Hogan**, of Wilson, Elser, Moskowitz, Edelman & Dicker, provides a summary of a recent decision concerning default judgments, and **Renita L. Collins**, of Thomas & Hafer, LLP, discusses a ruling regarding the Statute of Repose.

This Spring continues to be busy for the MDC. Much thanks to **John T. Sly** and **Michael L. Dailey** for providing a summary of the recent legislative session and the efforts by members of the MDC in Annapolis this year. The MDC has a number of upcoming events scheduled and we look forward to seeing you!

The Editors sincerely hope the members of the MDC enjoy this edition of *The Defense Line*. If you have any comments, suggestions, or would like to submit an article or case spotlight for publication for a future edition, please contact one of the editors below.

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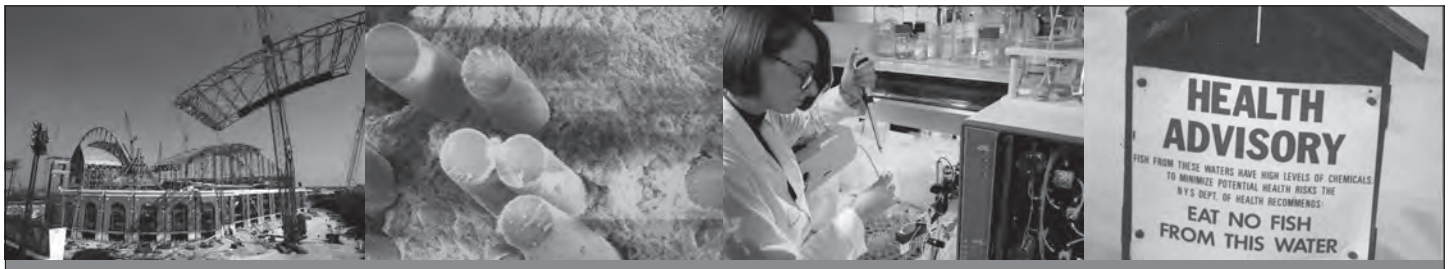

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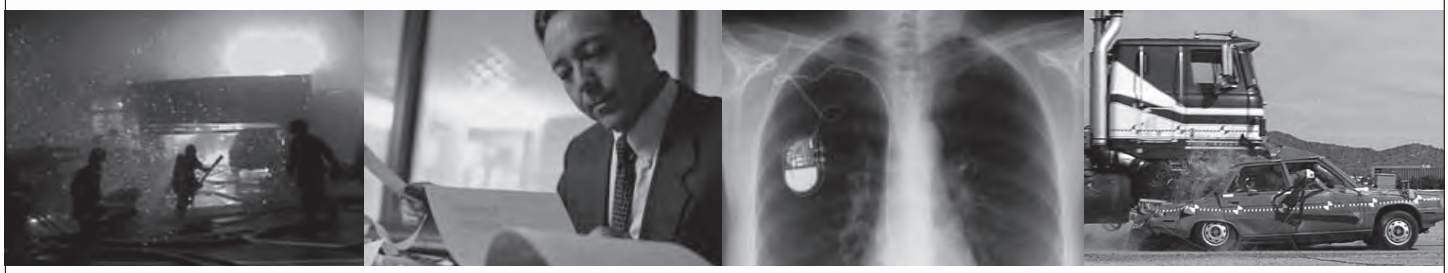

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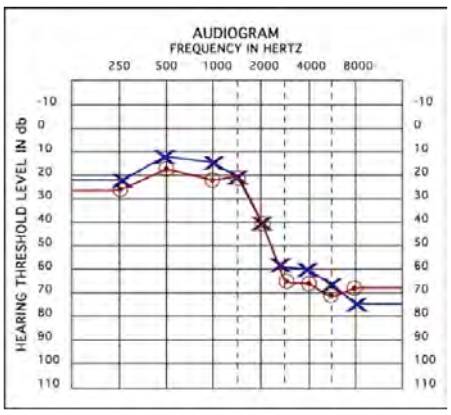
Hearing Loss: A Hard and Unusual Hearing

Wendy Karpel

A hearing loss claim is not like any other claim under the Act. The responsible employer is not the employer of last injurious exposure. Instead, an employee may file a claim against any employer who exposed him/her to harmful noise during his lifetime and has contributed in any way to the hearing loss. LE §9-651(a). That employer is responsible for the full extent of the hearing loss. LE 9-651(a). However, that employer can implead any other employer who exposed the employee to harmful noise in employment. LE 9-652(a). All employers who exposed the employee to harmful noise are equally liable unless evidence is submitted proving otherwise. Hearing loss is a complicated and controversial area of the compensation law. Hopefully, the following hypothetical fact pattern will aid in unraveling the intricacies of the "Say What?" claim.

Dwayne Carson, a retired firefighter in the state of Maryland, worked for the fire department in County Y for twenty-five years. He retired January 31, 2007 at age 52. For five years after retirement, he worked as a construction manager at Construction is Us. He quit on February 15, 2012. He had also worked for Airline X loading bags onto airplanes on the tarmac for about seven years during his career as a firefighter. At age sixty-two, he tested positive for hearing loss. His audiogram at age 62 is as follows:



He also claims that he has suffered from tinnitus as well. Tinnitus (TIN-ih-tus) is the perception of noise or ringing in the ears. A common problem, tinnitus affects about 1 in 5 people. He claims a date of disablement of March 1, 2017, when he obtained the above audiogram. This audiogram is the first hearing test demonstrating that he has a disablement under the Maryland Workers' Compensation Act (the "Act").

Who is the proper employer?

In Firefighter Carson's case, he was exposed to harmful noise in three different jobs. He was exposed while a firefighter, baggage handler at the airport, and as a construction manager. As a result, no matter which employer the employee proceeds against, that employer can and should implead the other employers. All employers that exposed him to harmful noise are equally responsible for the claim unless evidence is produced to prove otherwise.

Practice Pointer: When trying an occupational deafness case, ask for the employee's entire work history. If there are any jobs that involved exposure to harmful noise, ask to suspend the hearing to implead the other employers. Then, get an addendum from the IME (Independent Medical Examiner) doctor to determine if the exposure at the other employment contributed to *any degree* to the occupational deafness.

How to prove disablement?

Compensation for occupational deafness was not allowed until 1951 and only if the employee was no longer able to work in the employment that caused the hearing loss. *Green v. Carr Lowery Glass Co.*, 398 Md. 512, 517 (2007). In 1967, the legislature created the separate provision for occupational deafness so compensation could be granted to an employee who was still able to work in the occupation that resulted in the hearing loss. *Id*. Under this new, more liberal scenario, an injured worker could still be working in the job for which the occupational deafness claim was made but could only receive compensation if the thresholds for hearing loss as prescribed under the Act were met. *Id* at 518. Therefore, for the injured worker to receive compensation his hearing loss must be within the statutorily prescribed parameters and formula found in LE §9-650. *Id*. If there is hearing loss in other decibels not prescribed in the statute, the employee receives no compensation. As a result, **disablement for an occupational deafness claim** also has a unique definition. Disablement is meeting the threshold requirements for hearing loss under LE §9-650. Even if the employee has hearing loss that requires hearing aids, the claim is not compensable if the threshold requirements under LE §9-650 are not met. *Id*.

Practice Pointer: The threshold for a compensable claim is determined by taking the average of the measured decibels on the audiogram at 500, 1000, 2,000, and 3,000 hertz. If the numbers in each ear add up to

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The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

To check out the **MDC Expert List**, visit **www.mddefensecounsel.org** and click the red "Expert List" button in the left hand corner of the home page or access it from the directory menu.

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100 or less, there is no compensable hearing loss and the occupational deafness claim is not compensable as there is no disablement under the Act.

How to Calculate Permanent Partial Disability

To calculate whether the threshold has been met for a compensable claim as well as calculating the extent of the hearing loss, LE §9-650 provides a mathematical formula. It requires that the claimant has undergone an audiogram. A physician does not provide a rating because ratings are not measured pursuant to the *Guides to the Evaluation of Permanent Impairment* (American Medical Association, 4th ed., 1993) (the "*Guides*") as in every other case.

LE §9-650 instructs the parties to take the average measured decibels on the audiogram at 500, 1000, 2,000, and 3,000 hertz. To determine the average, you refer to the audiogram. X's represent the left ear and 0's represent the right ear. As an illustration, Mr. Carson's hearing loss (see the above audiogram) at each of the required hertz levels are as follows:

Hertz	Decibel Level (Left Ear) (the X's)
500	10
1000	15
2000	40
3000	60
Total	125
Hertz	Decibel Level (Right Ear) (the O's)
500	15
1000	20
2000	40
3000	65
Total	140

Calculations are done as follows:

1. The left ear is calculated as follows:
a. Total Decibel Loss = 125
b. Divided by 4: 31.25
c. Deduction of half a decibel for every year over 50: Claimant is 62 at the time of the hearing test requiring a deduction of 6 (62-10 = 12 x .5) 31.25 – 6 = 25.25
d. Deduction of 25: 25.25 – 25 = .25
e. Multiply (d) by 1.5: .25 x 1.5 = **.375 % to the left ear.**

2. The right ear is calculated as follows:
a. Total Decibel Loss = 140
b. Divided by 4: 35
c. Deduction of half a decibel for every year over 50: 6 age deduction. 35 – 6 = 29
d. Deduction of 25: 29 – 25 = 4
e. Multiply (d) by 1.5: 4 x 1.5 = **6% to the right ear**.

3. Binaural Hearing Loss is calculated as follows:
a. Multiply the better ear by 5: .375 x 5 = 1.875
b. Add the worse ear to (b): 1.875 + 6 = 7.875
c. Divide (b) by 6: 7.875 /6 = **1.3125% binaural hearing loss**.

As a result, Mr. Carson has binaural hearing loss at 1.3125% assuming that the hearing loss is related to the job.

Practice Pointer: There is some dispute over the **age that is to be used** to calculate hearing loss. The age used to calculate Mr. Carson's hearing loss was his age at the time of the hearing test. Some claimants argue that the deduction for age should be at the time that the claimant last worked for the employer (thus reducing the deduction for age and increasing the amount of permanent partial disability). The language of LE 9-650(b)(3), the section that permits the age deduction, is as follows:

> (3) To allow for the average amount of hearing loss from non-occupational causes found in the population at any given age, there shall be deducted from the total average decibel loss determined under paragraphs (1) and (2) of this subsection one-half of a decibel for each year of the covered employee's age over 50 at the time of the last exposure to industrial noise.

The proponents of the argument that the age at the time of "last injurious exposure for the employer against whom the claim is made refer to the last portion of the statute which references at the time of the last exposure to industrial noise." However, the statute does not use the term "last injurious exposure." Rather, language that clearly expresses the legislature's intent is "[t]o allow for the average amount of hearing loss from non-occupational causes found in the population at any given age." This caveat requires recognition that hearing loss is found in the population at large solely due to age. Otherwise, when a retired employee's hearing worsens due to aging ages rather than the remote occupational noise exposure, the employer would be responsible for the entire loss as there is no apportionment for age other than provided in the statute. Also, the interpretation that the age deduction is frozen at the time of the last injurious exposure fails when there are multiple employers which all contributed to the hearing loss. The Claimant's interpretation would require different deductions for each employer. The statute does not contemplate such differences. Unfortunately, the Commission has been inconsistent on this issue.

What about Tinnitus?

Tinnitus affects the hearing and is rated as part of hearing loss under the *Guides*. Therefore, it should only be compensable as far as it is captured in the formula established under LE §9-650. For occupational diseases that are not occupational deafness claims, the Act directs physicians to rate all occupational diseases and accidental injuries in accordance with the *Guides*. See LE §9-721 and COMAR §14.09.09.01 and .03. For this reason, the *Guides* are instructive in how to categorize tinnitus. If tinnitus were not covered under the occupational deafness statute, the *Guides* would be used to rate tinnitus. In directing the physician in how to rate tinnitus, the *Guides* advise as follows: "[t]innitus in the presence of unilateral or bilateral hearing loss may impair speech discrimination; therefore, an impairment percentage up to 5% may be **added** to the impairment for hearing loss." *Id*. at Chapter 9, p. 224 (Emphasis Added). Essentially, the *Guides* would simply put the claim back into the occupational deafness realm as the physician can only rate tinnitus if there is hearing loss and it is rated **as hearing loss**. As such, there is no basis in the Act or in medicine to allow a claim for tinnitus to be compensable outside of the occupational deafness statute. Tinnitus affects hearing which under the plain meaning of the statute is "occupational deafness." The rating for tinnitus would be restricted to the mathematical formula outlined in LE §9-650. Whatever complaints related to tinnitus that are captured in the audiogram at the relevant levels is compensable. Just like hearing loss above 3000 hertz is not compensable, complaints related to hearing as a result of tinnitus not captured in the audiogram simply ared not compensable under the Act.

Practice Pointer #1: If the Commission expresses an interest in rating tinnitus separately, the claim must be pursued under LE §9-502. The Claimant would have to prove a disablement and a date of disablement related to the tinnitus. Remember, a person is entitled to a compensable occupational deafness without a traditional disablement. Disablement occurs for an occupational deafness claim when the threshold requirements are met under LE §9-650.

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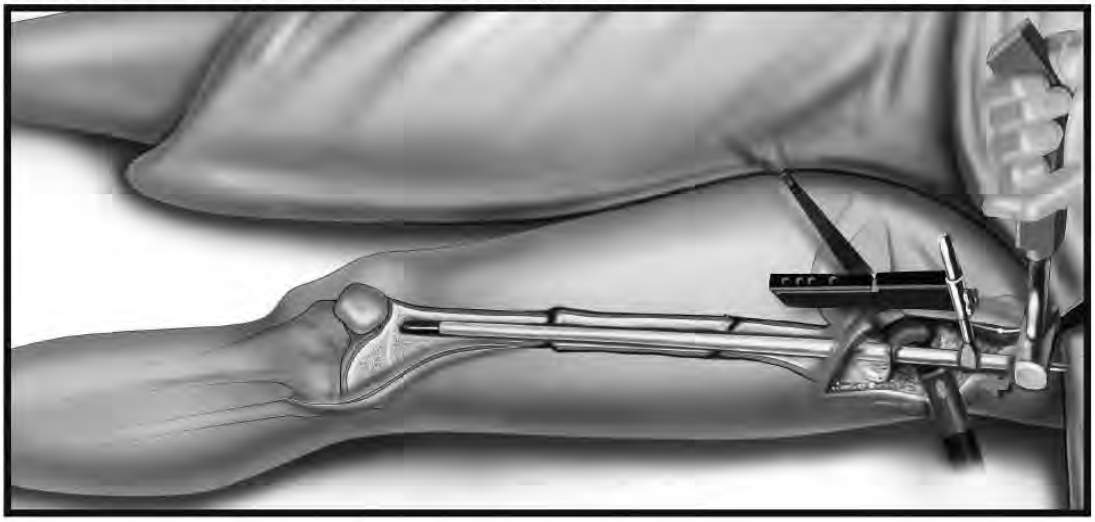
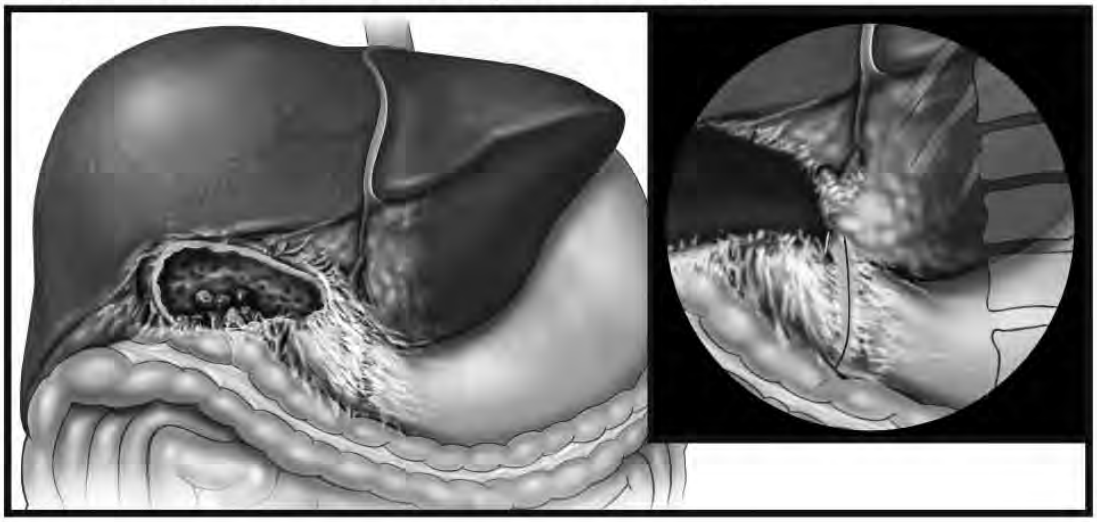


Laparoscopic Cholecystectomy



(HEARING LOSS) *Continued from page 11*

Practice Pointer #2: Even if tinnitus were not covered under the occupational deafness statute, there is no basis to give an 'other cases' award for tinnitus. LE §9-627(d)(2)(ii) states that compensation due to loss of hearing of both ears is out of 500 weeks. Since **tinnitus is rated as hearing loss** and hearing loss is rated to the ears, there is no argument that an additional body part is involved triggering the "Other Cases" section of the LE §9-627(k). Rather, as part of hearing loss, tinnitus is listed in the schedule under subsection (d). LE §9-627(k) only permits a rating to "other cases" where "…permanent partial disability [is] not listed in subsections (a) – (j)." As hearing loss is listed in subsection (d), there is no basis to compensate tinnitus under the "other cases" section of the statute.

The Carson Claim

Having reviewed the law, what benefits should be awarded Mr. Carson? In the end, Mr. Carson has a compensable occupational deafness claim probably against all three of his employers: the County, the airline, and the construction company. All three are responsible because all three employers exposed him to harmful noise on the job. Liability is deemed equal among the employers unless the employers present contrary evidence. As Mr. Carson is 62 years of age, much of his hearing loss is due to the natural aging process. He is entitled to an award of 1.3125% **binaural hearing loss** for occupational deafness. This award would include his compensation for complaints due to tinnitus. Based on the mathematical formula set out in the Act, Mr. Carson's monetary award would amount to $1,151.72. He would also be entitled to lifetime causally related medical benefits which would include hearing aids.

Wendy Karpel concentrates her practice in workers' compensation litigation and heads the Montgomery County Attorney's Office's Workers' Compensation Unit. She is a graduate of Haverford College and earned her law degree from Tulane University School of Law. Wendy has argued many reported decisions at the Maryland Court of Special Appeals and Court of Appeals and lectured on the topic of workers' compensation in many venues. She is a full professor at University of Maryland University College, a Past Chair of the MSBA Negligence, Insurance and Workers' Compensation Section, a Past President of the Maryland State Women's Bar Association, and currently serves on the Board of the Maryland Defense Counsel. Wendy has won the Teacher Recognition Award at UMUC, been included on the Maryland Super Lawyers list, been named by the Daily Record as one of the "Top 100 Women in Maryland," and been awarded the Maryland Association of Counties' Recognition Award for all the work that she has done on behalf of counties throughout the state of Maryland.

(CHAIRMAN) *Continued from page 7*

ibility of witnesses and documentation provided. Additionally, just as with any judge or attorney, each Commissioner brings their own perspective and life experiences into the courtroom. This diversity is seen as a benefit to the Commission, and Commissioners often exchange their ideas and philosophies. Agreement may not be found in every discussion, but open and honest discourse encourages reflection and reexamination.

Assessments

On those occasions where there is a disagreement between the insurer and the Subsequent Injury Fund and/or Uninsured Employer's Fund as to the amount of any assessment, Chairman Aumann's advice is to "file issues" and be prepared to present a logical argument to the presiding Commissioner.

Independent Medical Evaluations

Since 2014, the Commission regulations have given the employer/insurer the opportunity to request reimbursement for fees charged when injured workers fail to attend a scheduled independent medical examination (IME). The amount of the reimbursement is currently maxed at $125.00. In our discussion, the Chairman indicated that there was no formal investigation or data collection in determining that amount and that, if presented with compelling arguments, the Commission could readjust that amount either up or down; it is incumbent on the parties to present reasoning for any change. The Commission may also entertain a conversation regarding increasing the amount where there is a pattern of missing IMEs in any single claim.

Commissioner Location Assignments

This "thankless job" is handled by Commissioner Godwin. Attempting to meet the needs of the various Commissioners, while at the same time assuring that one jurisdiction is not bound to one Commissioner, is a painstaking and time consuming task. All attempts are made to "mix things up."

Settlements

Practitioners have recently noticed an increase in the rejection and return of Agreements of Final Compromise and Settlements. The Commission has instituted a separate administrative taskforce to review all agreements before being forwarded onto a Commissioner for review. This taskforce verifies that the correct forms are being used, all information required is provided, and that the settlement generally is in "good form" before being given to a Commissioner for review. All rejections sent by this administrative taskforce bear the Chairman's signature.

Order NISIs

The medical department, under the supervision and guidance of Dr. Jerome Reichmister, administers the issuing of Order NISIs. The Commission has two individuals on staff with expertise in medical coding. Once a recommendation is made, it is reviewed by Dr. Reichmister before being issued. Controversions of an Order NISI can be heard before any Commissioner. It is strongly suggested that employer and insurers contact the medical department to discuss any concerns prior to a hearing. However, all controversions regarding payment of prescriptions are specifically set before the Chairman.

Medical Marijuana

Chairman Aumann was forthright in his assessment of the current medical marijuana conundrum. He noted that all requests for medical marijuana must meet the requirements laid out by the Maryland Medical Cannabis Commission (http://mmcc.maryland.gov). The current disconnect between state and federal law is something that the Commissioners will address on a case by case basis. Chairman Aumann stated that though there are no current plans to request an Attorney General Opinion on the validity of requiring payment for medical marijuana, it is not "out of the realm of possibility."

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Cannabis & Workers' Compensation Law

H. Scott Curtis

As medical marijuana slowly emerges from the mists — or haze — of promise and establishes itself alongside more traditional pharmaceutical treatments for illness or injury, it is useful to look at how it fares in the world of workers' compensation.

Intoxication

On December 12, 1914, Seymour Fitzhugh was killed when he was thrown — or fell — from the horse-drawn two–ton ice and coal wagon he was driving along North Avenue in Baltimore City for his employer, the American Ice Company. *American Ice Co. v. Fitzhugh*, 128 Md. 382 (1916). The evidence at trial showed that while the wagon was loaded with oyster shells, Mr. Fitzhugh was loaded with alcohol when he died.

Enacted the same year Mr. Fitzhugh died, what is now the Maryland Workers' Compensation Act (or "MWCA"), Maryland Code (2008 Repl.Vol., 2016 Supp.), §§ 9–101 through 9–1201 of the Labor and Employment Article ("LE") protects employees, employers, and the public through "a no-fault compensation system for employees and their families for work-related injuries where compensation for lost earning capacity is otherwise unavailable." *Polomski v. Mayor of Baltimore*, 344 Md. 70, 76-77 (1996). "[T]he Act provides employees suffering from work-related accidental injuries, regardless of fault, with a certain, efficient, and dignified form of compensation. In exchange, employees abandon common law remedies, thereby relieving employers from the vagaries of tort liability." *Polomski*, 344 Md. at 77 (citing *Belcher*, 329 Md. at 736, and 1 Arthur Larson, *The Law of Workmen's Compensation*, § 1.20 at 2 (1992)). This exchange is known as the "Grand Bargain" in workers' compensation.

As part of the Grand Bargain in Maryland, the legislature substituted a number of statutory defenses, including the intoxication defense, for other common law defenses, such as contributory negligence. As American Ice in *Fitzhugh* discovered, the substitution, however, was not straightforward for the "intoxication defense." Although the intoxication of an injured employee was relevant to compensation, the law presumed intoxication was not the sole cause of the injury unless the employer showed "by substantial evidence" that it was.

Today, the MWCA provides two levels of intoxication defense where the use of controlled dangerous substances is at issue. For instance, with a significant exception discussed below, LE § 9-506(b) provides that where the "sole cause" of an accidental personal injury, compensable hernia, or occupational disease is the effect of a depressant, hallucinogenic, hypnotic, narcotic, stimulant drug, or another drug that makes the employee incapable of satisfactory job performance, the employee would be entitled to neither compensation nor medical benefits. On the other hand, where the use or effects of drugs is not the "sole cause" but only the "primary cause" of the injury, the employee is entitled to medical benefits only, but not to compensation. LE § 9-506(d)(2); *see also* LE § 9-506(d)(1) ("Primary cause" means the cause that is first in importance.)

The exception to the intoxication or drug-effect bar to compensation or benefits applies where the drug (LE § 9-506(b)) was "administered or taken in accordance with the prescription of a physician" or the controlled dangerous substance (LE § 9-506(d)) "was administered, taken, or used in accordance with the prescription of a physician and the administering, taking, or use of the controlled dangerous substance was not excessive or abusive."

In workers' compensation practice, cases involving cannabis use — even legal "medical marijuana" use — present problems reminiscent of those encountered by Capt. Yossarian in Joseph Heller's classic, *Catch-22*. The Catch-22 arises in the context of the "prescription" exception to the intoxication or drug-effect bar to compensation or benefits for when the drug is administered, taken or used "in accordance with the *prescription* of a physician." Under both federal and State law, cannabis, marijuana (federal) and marijuana (State) are Schedule I controlled dangerous substances, which means that they have (1) a high potential for abuse; (2) no accepted medical use in the United States; and (3) a lack of accepted safety for use under medical supervision. 21 U.S.C. § 812(b)(1); Md. Code Ann., Crim. Law ("CL") § 5-402(g). Under both federal and State law, medical practitioners may "prescribe" controlled dangerous substances only for those substances listed in Schedules II — V. 21 U.S.C. § 829; CL §§ 5-501 — 505; *see also Gonzales v. Raich*, 545 U.S. 1, 27, 125 S. Ct. 2195, 2211, 162 L. Ed. 2d 1 (2005) ("The CSA designates marijuana as contraband *for any purpose*; in fact, by characterizing marijuana as a Schedule I drug, Congress expressly found that the drug has *no* acceptable medical uses.")(emphasis added.). In other words, a medical practitioner may not "prescribe" what has come to be known as "medical marijuana."

In Maryland, medical marijuana has been made possible through the creation of Natalie M. LaPrade Medical Cannabis Commission. Md. Code Ann., Health — General ("HG"), §§ 13-3301 — 3316 (2015 Repl. Vol., 2016 Supp.). In the simplest terms, the Medical Cannabis Commission regulates "certifying physicians" who recommend that "qualifying patients" obtain medical marijuana from a licensed "dispensary." HG § 13-3301. The observant practitioner will notice an anomaly arising out of the interplay between the regulation of medical marijuana and the intoxication or drug-effect bar to worker's compensation benefits: an employee who otherwise would have qualified for the "prescription exception" to the bar on benefits is prohibited from using it because a physician cannot "prescribe" medical marijuana. That is, because medical marijuana use is "certified" but not "prescribed," the employee cannot, by definition, take or use it "in accordance with the prescription of a physician."

Medical Benefits

Even where medical marijuana is not the part of the problem, but part of the solution, it takes an uneasy place alongside its "prescribed" peers. In every case where Commission approval is sought to pay fees and other charges for medical services or treatment, medical records form the basis for determining whether a particular service or treatment is medically necessary, and therefore, reimbursable. COMAR 14.09.08.07A. These medical records must include: history of the patient; results of a physical examination performed in conformity with the standard of practice of similar health care providers, with similar training, in the same or similar communities; progress, clinical, or office notes that reflect the subjective patient

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complaints, objective findings of the provider, assessment of the presenting problem, any plan or plans of care or recommendations for treatment, and updated assessments of patient's medical status and response to therapy. COMAR 14.09.09.07C. The medical records must also include copies of lab, x-ray, or other diagnostic tests, if any, that reflect the current progress of the patient and response to therapy; and hospital inpatient and outpatient records, if any, including operation reports, test results, consultation reports, discharge summaries, and other dictated reports. *Id.* Although it is early days for medical marijuana in Maryland, anecdotal reports indicate that certifying physicians are hewing closely to the requirements of COMAR 10.62.05.01; that is, they are issuing "written certifications" containing only the physician's name, Maryland Board of Physicians license number, and office telephone number; the qualifying patient's name, date of birth, address, and county of residence; the medical condition requiring medical cannabis; and the date of qualification as a qualifying patient. There is nothing — yet — to suggest that certifying physicians are prepared to provide the level of documentation the Commission is required to assess under its regulations.

Much progress, in terms of both refrigeration and the law, has been made in the century since Mr. Fitzhugh last drove his ice wagon on the streets of Baltimore. Whether medical cannabis can ever fully join in similar progress remains to be seen.

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Maryland's Highest Court Restricts Plaintiff's Choice of Venue

Univ. of Maryland Med. Sys. Corp. v. Kerrigan, 456 Md. 393, 174 A.3d 351 (2017)

Benjamin A. Beasley

In a 4 – 3 decision, the Maryland Court of Appeals issued an opinion in *Univ. of Maryland Med. Sys. Corp. v. Kerrigan* that has important implications on a plaintiff's choice of venue. The suit arose when Brandon Kerrigan, a minor through his parents, filed a medical malpractice action in the Circuit Court for Baltimore City. Seven of the ten named parties (including the plaintiffs) resided in Talbot County. The remaining three parties resided or were incorporated in Baltimore City.

The defendants filed a joint motion to transfer the case to the Circuit Court of Talbot County on *forum non conveniens* grounds, arguing that transfer was for the convenience of the parties and witnesses and served the interests of justice. The trial court agreed.

The plaintiffs appealed to the Maryland Court of Special Appeals, arguing that the balance of the factors required for forum non conveniens did not weigh strongly in favor of transfer, but rather the evidence in support of and against transfer weighed about evenly, or near "equipoise." The Maryland Court of Special Appeals agreed and reversed the trial court decision. This prompted the defendants to file an appeal with Maryland's highest court, the Court of Appeals, who reversed the decision of the Maryland Court of Special Appeals and affirmed the trial court.

Generally, plaintiffs receive the privilege of deference to their choice of venue, which is presumed convenient. Deference to the plaintiff's choice of venue, however, is not absolute.

In reaching their decision in *Kerrigan*, the Court of Appeals pointed to prior cases standing for the proposition that a plaintiff's choice of venue has minimal value where the plaintiff does not reside in the judicial district in which the suit was filed. The court also looked at prior decisions applying the "meaningful ties" factor to determine whether a plaintiff's choice of venue (in which the plaintiff is not a resident) has meaningful ties to the controversy connected to the lawsuit. If a court weighing the factors finds the evidence to be in equipoise, then the plaintiff's choice of venue prevails.

In *Kerrigan*, the Maryland Court of Appeals was particularly persuaded by the fact that the plaintiffs and four of the defendants resided in Talbot County, and that the plaintiffs would necessarily drive by the Circuit Court for Talbot County on their way to court in Baltimore City. The Court of Appeals criticized the Court of Special Appeals for failing to consider the plaintiffs' residence as part of the factual determination for whether transfer was convenient for the parties.

In conclusion, the Court of Appeals expressly recognized that less weight is given to the plaintiff's choice of venue when the plaintiff does not reside in the chosen venue. The court further recognized that a plaintiff's decision to file suit in a venue in which the plaintiff does not reside is given minimal weight when the venue has no meaningful ties to the controversy and no particular interest in the parties or subject matter.

Three of the seven judges on the Court of Appeals dissented, writing that the facts in this case did not strongly warrant transfer. The dissenters further criticized the majority's adoption of the less deferential standard applied to plaintiffs filing suit in a foreign venue, arguing that the majority's analysis should have been reserved for whether the convenience of the parties and witnesses or the interests of justice strongly favored transfer. Under that standard, the dissent argued that transfer was not warranted.

This decision sets new precedent to Maryland Civil Procedure as it places new constraints on where plaintiffs may file suit in Maryland. This decision also opens the doors to new challenges to venue in similar circumstances presented in the *Kerrigan* case. As such, Maryland defense counsel should carefully scrutinize propriety of venue in light of the *Kerrigan* decision, and consider filing motions to transfer for *forum non conveniens* in circumstances where a plaintiff files suit in a venue in which they do not reside, and in one where there are no or little apparent connection to the subject matter of the lawsuit.

Ben Beasley joined Rollins, Smalkin, Richards & Mackie, LLC as an associate in April 2016. His practice focuses on insurance defense litigation. Mr. Beasley is an adjunct faculty member of the University of Baltimore School of Law as well as a member of the Baltimore County Bar Association.

Workers' Comp Appeals — Choose Your Own Adventure!

Amy Foster

Much like in the Choose Your Own Adventure stories of the 1980s and '90s, you can control the manner of your workers' compensation appeal. Believe it or not, workers' compensation appeals do not have to be jury trials! Some cases are better resolved with an "on the record" review rather than a *de novo* review. How do you know which type of appeal is best for your case? Fear not! Below are the ins and outs of "on the record" appeals versus *de novo* appeals and some examples to help you decide which format is best for your case and your client.

No matter the type of appeal, there are some basic rules when filing a Petition for Judicial Review ("PJR"). First, you must request judicial review and identify the order of the Commission to be reviewed. You must also state that you were a party to the agency proceeding (which confers standing) and you must serve a copy of the PJR to the other parties to the proceedings and to the Workers' Compensation Commission itself. In a *de novo* proceeding, you must attach to your PJR all of the Commission orders in the history of the case and the employee claim form. These attachments are not required in an "on the record" review. However, it is a good idea to attach them in an "on the record" appeal in the event the "on the record" is converted to a *de novo* review. As such, these attachments should be affixed to your PJR regardless of which avenue of appeal is pursued. Since you are filing a petition for judicial review and not an appeal, the parties to a workers' compensation appeal are "**petitioners**" and "**respondents**" rather than appellants and appellees.

Similarly, time limits on filing a petition for judicial review are the same for both types of appeals. If no Request for Rehearing has been filed with the Commission within 15 days of the order, there is a 30 day deadline for filing an appeal, counted from the date that the Commission issued the order being reviewed. *See* Md. Code Ann. Lab. & Empl. § 9-726; *see also* Md. Rule 7-203. If a Request for Rehearing has been filed, you have two choices. You do not need to wait to file your PJR until receiving a decision; however, if you do wait, the deadline is extended to 30 days from the date of the decision on the Rehearing. In response to your PJR, any other party to the Commission proceeding may file a Petition within 10 days of the filing of the Commission notice or 30 days from the original order. Md. Rule 7-203. If you are not the filing party, you have 30 days to file a Response to the Petition for Judicial Review from the date of the Agency Notice of Appeal as opposed from the date of service from the appealing party. Md. Rule 7-204.

Beyond these initial procedural requirements, the two types of appeals diverge. There is only one circumstance in which an "on the record" appeal should not be filed — where the appeal reviews a question of fact. In those cases, you *must* file a *de novo* appeal. An "on the record" review will result in automatic loss (See Standard of Review below). Otherwise, consider your options based on the requirements and examples below.

Issue to be Reviewed

In an "on the record" appeal, Md. Rule 7-202(1)(D) requires that the specific issue to be reviewed be identified. There is no such requirement in a *de novo* appeal.

Transmitting the Record

Maryland Rule 7-206.1 requires the record to be forwarded to the Circuit Court in "on the record" appeals. The Commission must transmit the record to the Circuit Court within 60 days of the Notice of Appeal. You may file a motion to receive an extension of an additional 120 days and best practices is to file the motion with the PJR. It is important to file the extension because if the record does not get transmitted timely by the agency, then the matter cannot be dismissed by the Circuit Court for failure to provide the record. The case of *Montgomery Cty. v. Post*, 166 Md. App. 381 (2005), clearly states that the Circuit Court cannot summarily dismiss a case for failure to provide the record if the petitioner has substantially complied with the rule and no other party is prejudiced. Though the record must be ordered for a *de novo* appeal, there is no requirement that it be provided to the court. In lieu of providing the entire record, the Employee Claim Form and ALL Commission orders in the case must be filed with the PJR in *de novo* appeals. Md. Rule 7-202(c)(2).

Submitting a Memorandum to the Court

Most workers' compensation practitioners have likely never submitted a memorandum of law to the court. However, pursuant to Md. Rule 7-207, "on the record" appeals (only) require a memorandum outlining the questions to be reviewed, a statement of facts, and legal arguments to be submitted to the court. No new evidence can be submitted. The argument is based on the Commission record alone. The memorandum forms the foundation for the hearing that will ultimately decide the appeal. Responsive memoranda are permitted from the non-filing party within thirty days of service of the initial memorandum. Then, the petitioner can file a Reply to the Response within fifteen days of the Respondent's filing his or her opposition memorandum. No other filings are permitted by the Maryland Rules.

What is Reviewed?

An "on the record" appeal is just that, a review of the record. You may not present any new evidence not presented to the Commission. The Court will review the Commission Order, exhibits submitted to the Commission, the transcript of the proceedings, and the memorandum. That is it! In contrast, a *de novo* appeal allows for the consideration of more, less, or the same evidence and provides for discovery, live witnesses, and expert testimony.

Standard of Review

In an "on the record" appeal, the court will review whether the Commission's decision was supported by a legally sufficient record to support the order issued or whether the Commission made some other error of law. There is no presumption of correctness in an "on the record" appeal. The court reviews whether the Commission committed an error of law. In an "on the record" appeal, the court must defer to the Commission on issues of fact. *De novo* appeals allow the court to review issues of fact and law. However, in a *de novo* review, there is a presumption that the Commission's decision is correct on issues of fact. Md. Code Ann. Lab. & Empl. § 9-745(b). The challenging party bears the burden of proof by a preponderance of the evidence to establish that the Commission

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was wrong in its interpretation of the facts or inferences of fact. In both proceedings, however, there is no presumption of correctness or burden on the party attacking the Commission decision when the review is one of law alone.

The Proceedings

An oral hearing will be held before a Judge for "on the record" appeals. The Memorandum and any responses will form the basis for the hearing. A *de novo* appeal will proceed to either a jury or a bench trial, usually at the selection of the Petitioner though either party can request that an issue of fact be heard by a jury. Id. § 9-745(d).

Think you have it? Try some examples!

Case No. 1: John Jones injures his knee at work in February 2015. He has arthroscopic surgery in June. The following month he receives a PPD Award of 20% to the knee. In March 2017, he returns to the doctor due to increased pain and additional surgery is recommended as causally related to the February 2015 injury. The defense IME says that the surgery is not causally related to the injury, but instead, to his hobby of participating in ultra-marathons. The Commission finds the surgery related to the injury and the defense decides to appeal. What type of appeal should the defense note?

Answer: The appeal should be filed *de novo*. The question to be resolved is one of fact — whether the surgery is causally related to the work injury. Remember, questions of fact mean an automatic loss in an "on the record" appeal.

Case No. 2: Jane Smith injures her back in November 2010. She has had two surgeries and three permanency awards. The last permanency award, in 2015, found a 1% worsening for a total of 25% to the back. She has not sought medical treatment since January 2015 when she filed issues for physical therapy and injections in March 2017. The treating physician does not specify that the treatment is for the worsening of her condition from November 2010. The defense does not obtain an IME. The Claimant testifies that she has not had any new injuries to her back and the Commission finds the treatment causally related to the November 2010 injury. What type of appeal should the defense file?

Answer: An "on the record" appeal should be filed. In this case, given the length of time since the last treatment and lack of clear causal relationship from the treating physician, the court should review whether the Commission's decision was supported by a legally sufficient record.

Case No. 3: Jim James works as a bus driver. He sustains an injury while in route to work. His boss asked him to be at work a half hour early because there was a special presentation that had to be given that morning. He is in his private vehicle and is not reimbursed for mileage. The defense argues that the injury should not be covered pursuant to the Going and Coming Rule. The Claimant argues that the journey falls under the special errand exception. The Commission finds the injury compensable. What type of appeal should the defense file?

Answer: The appeal should be "on the record." This is a legal question regarding the Going and Coming Rule.

If you passed the test, then you are on the road to knowing how to Choose your Own Adventure successfully. If you are still a little shaky on the type of appeal that should be filed and how to do it, review the Md. Rules 7-200 et seq. and Md. Code Ann. Lab. & Empl. § 9-745. *Board of Education v. Spradilin*, 161 Md. App. 155 (2005) is also an extremely instructive case on these issues. Also, feel free to reach out to other members of the Maryland Defense Counsel for assistance.

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Phlonda Peay v. Reginald Barnett, Lack of Personal Jurisdiction May Allow Six Year Old Default Judgment to be Vacated

Christine R. Hogan

In 2009, former corrections officer Phlonda Peay had a default judgment entered against her by Reginald Barnett, an inmate at the Maryland Correctional Adjustment Center ("Super Max"). Barnett claimed he suffered serious injuries in 2006 after officers entered his cell and shackled him. At the time of the incident, Peay was a captain and was accused of having supervised the officers' conduct.

On February 19, 2008, Barnett filed a complaint in the Circuit Court for Baltimore City against several officers, including Peay. When a private process server went to Peay's Owings Mills apartment on December 25, 2008 to serve Peay with the complaint and summons, Peay's sister answered the door. The process server filed an affidavit stating that Peay's sister and co-resident had been served with the papers. Peay did not file an answer to the complaint, and on July 1, 2009, the Circuit Court entered a default order against each of the defendants. Notice of the default order was mailed to Peay's Owings Mills address. On August 7, 2009, the Circuit Court directed the Clerk of the Court to entered judgment in favor of Barnett, and against the five remaining defendants (including Peay) for $250,000 in compensatory non-economic damages and $250,000 in punitive damages. All five defendants were held jointly and severally liable for a total of $500,000. Copies of the final judgment were mailed on the same day. Peay did not take any action in the case until March 28, 2016, when she filed a motion to set aside the judgment of default and requesting a hearing. The basis of her motion to set aside the judgment was that she was not properly served with notice of the proceedings. She claimed that her sister was not a resident of her apartment at the time she received the summons and complaint from the process server and that she did not give the documents to Peay.

On May 25, 2016, the Circuit Court held a hearing on Peay's motion and found that service on Peay's sister was invalid and constituted a "mistake" under Md. Rule 2-535(b). The Circuit Court denied Peay's motion, however, because Peay had not diligently sought to set aside the judgment. Peay appealed.

The Court of Special Appeals noted that the equitable considerations of "diligence and good faith" are not applicable to the jurisdictional mistakes under Md. Rule 2-535(b) that would render a default judgment void. Once the Circuit Court determines that the issuing court exceeded either its *in personam* jurisdiction or its subject matter jurisdiction, the court must find the prior judgment invalid. Even where such judgment is invalid, however, the court should consider whether or not the defendant waived his or her right to challenge the default judgment. In the instant case, the appellate court found that the Circuit Court erred in failing to determine whether Peay waived her right to challenge the Circuit Court's *in personam* jurisdiction. The waiver analysis should include consideration of: (1) whether the plaintiff made a good faith effort to serve the defendant and whether the plaintiff reasonably should have known that service would be challenged; (2) whether the defaulting defendant had actual, sufficient notice of the proceedings and the opportunity to defend prior to the court's final judgment; and (3) whether the defaulting defendant's inaction after gaining such knowledge rendered the plaintiff unable to prosecute his case.

In the instant case, the appellate court noted that Barnett sent several notices of motions hearings to Peay and the other officer-defendants without a response and that a private process server went to Peay's residence on Christmas Day in 2008 to serve her with the summons and complaint and served Peay's "sister and co-resident" with the papers.

Judge Robert A. Zarnoch, who authored the unanimous, three-judge appellate panel's unreported opinion, stated that on remand, the trial court must determine whether Peay waived the right to object to personal jurisdiction: "The court found that service of process was defective, but despite some facts that might have suggested waiver, made no finding that Peay had either waived or did not waive the right to object to the court's lack of personal jurisdiction. On that basis the Circuit Court erred."

Christine Hogan joined Wilson Elser Moskowitz Edelman & Dicker LLP in November 2017. Her practice focuses on civil litigation and pharmaceutical/medical device law. She is a member of the Executive Counsel of the Young Lawyers' Division of the Bar Association for Baltimore City and co-chair of the YLD Mentoring Committee.

The Effect of Reger: When Does the LE §9-610 Offset Apply?

Theresa M. Colwell

In the last 18 months, there has been quite a bit of litigation on the issue of whether workers' compensation benefits are subject to a statutory offset against benefits awarded by the Maryland State Retirement & Pension System. The latest cases litigating the Labor and Employment Article, Section 9-610 ("LE § 9-610") offset issue have focused on the meaning of the term "similar benefit" as set forth in § 9-610. The positions on this issue have run the gambit. One position advocates a total offset on ANY overlapping period where the injured worker receives both workers' compensation and disability retirement benefits regardless as to the basis of the disability retirement award (i.e. the body parts or conditions involved). This argument is based on the legislative intent to provide only a single recovery for injured workers covered by both government pension plans and workers' compensation benefits and this intent has been discussed at great length in many of the prior cases examining the applicability of the LE § 9-610 offset. Such intent has been interpreted to preclude a duplicate recovery by such injured workers. The contrary position is that the LE § 9-610 offset can only apply when both the workers' compensation award and the disability retirement award arise out of the same underlying injury (i.e. involve the same body parts or condition).

In *Zakwieia v. Baltimore Co. Bd. of Educ.*, the Court of Special Appeals addressed the offset when the injured worker received workers' compensation benefits (permanent partial disability) for injuries to the back and shoulder, as well as ordinary disability retirement benefits for degenerative arthritis of the lumbar spine. The Court of Special Appeals agreed with the Employer's position that the term "similar benefit" refers to the nature of the benefit awarded to the injured worker, and not to the nature of the underlying injury. 231 Md. App. 644 (2017). In so holding, the court determined that allowing an injured worker to receive duplicate benefits for the same underlying basis, "i.e. Claimant's physical incapacity" would be contrary to the legislative intent underlying LE § 9-610, which was to prevent duplicate recovery by an injured worker and to prevent duplicate payment by the employer. Accordingly, the court held that the term, "similar benefit" referred to whether the benefits provided a similar wage loss benefit to that of a workers' compensation award, and not whether the benefits accrued from the same or similar type of injury.

The applicability of the LE § 9-610 offset was subsequently examined by the Maryland Court of Appeals in *Reger v. Washington Co. Bd of Educ.*, 455 Md. 68 (2017). In *Reger*, the injured worker received workers' compensation benefits (temporary total disability) for injuries involving the neck and back, as well as other body parts. The injured worker applied for accidental disability retirement based on his work-related injury; his application for accidental disability retirement was denied and he was awarded and accepted ordinary disability retirement benefits for cervical and lumbar spondylosis. The employer requested that the injured worker's temporary total disability benefits be offset by his ordinary disability retirement benefits. The offset was allowed by the Workers' Compensation Commission and affirmed on appeal to the Circuit Court and ultimately to the Court of Special Appeals. When the case ultimately went before the Court of Appeals, Claimant argued that his workers' compensation (TTD) benefits and his ordinary disability retirement benefits were based on two separate injuries (i.e. a work-related injury and his separate pre-existing degenerative conditions) and were therefore not "similar benefits" under the meaning of LE § 9-610. The Court of Appeals found the LE § 9-610 offset applied because the **same underlying injury** served as the basis for both awards. Although the court's holding casts doubt on the Court of Special Appeal's decision reached in *Zakwieia*, it does not expressly overturn it.

The Court of Appeals reached its conclusion rather quickly, but continued to explore the notion of wage loss and loss of earnings capacity in a rather lengthy opinion. Here is where the readers of *Reger* diverge: some interpret the remaining discussions in *Reger* as *dicta* and merely persuasive authority, while others interpret this as controlling legal precedent. Those who interpret the conclusions of *Reger* to serve merely as dicta, and not controlling precedent, argue that because the awards discussed in *Reger* involved the same underlying injury (i.e. a work related injury and pre-existing conditions of the neck and back), that the court never had to examine whether different injuries and/or different underlying incapacities could also be similar for the purpose of applying the LE § 9-610 offset.

The Court of Special Appeals had an opportunity to re-examine the § 9-610 offset in a subsequent unreported[1] decision, *Kinna v. Bd. of Educ., Baltimore Co.*, which involved an injured worker receiving workers' compensation benefits for a psychological condition and ordinary disability retirement benefits due to fibromyalgia. No. 0337, Sept. Term 2017; 2017 WL 4117872. In this decision, the Court of Special Appeals referenced *Reger* and ultimately found the 9-610 offset did not apply because the disability retirement benefits for fibromyalgia and the workers' compensation benefits were for two distinctly different injuries and therefore were not a "similar benefit" under LE § 9-610. Although this case is not persuasive authority, it provides some insight into how the Court of Special Appeals is likely to address future offset cases.

The Court of Special Appeals will have another opportunity to address the LE § 9-610 offset in *Norman-Bradford v. Baltimore Co. Public Schools*, September Term 2016, 02536. During those recent oral arguments before the Court of Special Appeals in the wake of *Reger*, it became evident that the Court of Special Appeals appears to be rejecting the dicta argument and interpreting *Reger* as overturning their prior decision in *Zakwieia*. However, until such a decision is rendered, there continues to be an opening for this argument. At the time the *Reger* decision was entered, a petition for *certiorari* was pending before the Court of Appeals in *Zakwieia* and the Court of Appeals stated in a footnote that it had not yet decided whether to deny or grant that petition. The fact that the court subsequently denied the petition to review *Zakwieia* illustrates that the court had an opportunity to overturn *Zakwieia* and expressly opted not to do so. Therefore, at present the decisions in both *Reger* and *Zakwieia* remain applicable.

Until a subsequent decision has clarified the interplay between *Reger* and *Zakwieia*, there remains an argument that the LE

[1] An unreported opinion may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

(REGER) *Continued from page 24*

§ 9-610 offset applies against any disability benefit, irrespective of the underlying injury. However, in the wake of *Reger*, the Commission and the appellate courts are likely to be examining the nature of the underlying injury/condition serving as the basis for the workers' compensation benefits and the ordinary disability retirement benefits, and if there is no overlapping body part/condition, rejecting the offset claim. This opens the door for governmental injured workers to receive duplicate benefits. It also creates somewhat of a conundrum for practitioners seeking to apply the offset at the Commission level. Under this "similar injury" notion, the only way to determine if the LE § 9-610 offset applies is to determine the basis of the ordinary disability retirement award, and the Commission will need to consider relevant evidence to make such a determination. This requires a subpoena to the Maryland State Retirement and Pension System to obtain a copy of the injured workers' application for disability retirement, as well as the documentation explaining the benefits awarded. The parties should keep in mind, however, that there is no requirement that the State Retirement & Pension System identify a specific condition/injury in the award for ordinary disability retirement benefits. Should that occur, it is even more imperative that the parties look to the application submitted by the injured worker and the supporting medical reports included and reviewed in conjunction with that application. Therefore, employers and insurers should take appropriate action to obtain the necessary documentation to establish the applicability of a LE § 9-610 prior to any workers' compensation proceedings.

Theresa M. Colwell is a Partner with Humphreys, McLaughlin & McAleer, LLC. Ms. Colwell has been defending and representing the interests of employers and insurance carriers for 10 years. Prior to joining Humphreys, McLaughlin & McAleer, LLC,, Ms. Colwell was an Associate at Morgan & Akins, PLLC, where she handled and defended workers' compensation and general liability claims all across the State of Tennessee.

Duffy v. CBS Corporation: Maryland's Highest Court Rules that the Statute of Repose does not retroactively apply to injuries arising before it was enacted and the cause of action for asbestos is the date of exposure, not discovery.

Renita L. Collins

In a March 28, 2018 unanimous decision, the Court of Appeals employed the "exposure approach" and ruled that any injury related to asbestos exposure that underlies a cause of action for personal injury or wrongful death arises at the time of exposure. Further, it ruled that the statute of repose does not apply if the "last exposure undisputedly was before" the effective date of the 20-year Statute of Repose.

The Court overturned a Court of Special Appeals ruling wherein the lower court ruled that the diagnosis of the Plaintiff's mesothelioma was his "injury" rather than this exposure. The Honorable Clayton Greene, Jr., who wrote the unanimous opinion, reasoned that the lower court's ruling was misguided because in certain circumstances the "happening of the wrong, the knowledge of the wrong and the maturation of the harm" are not simultaneous; therefore, the accrual of the cause of action is complex." Asbestos exposure is one of those instances because asbestos fibers can lay dormant in the body for a long period of time and only be discovered years after exposure. Further, Judge Greene found that the lower court conflated the terms "arise" and "accrue" in the Statute of Repose. According to the statutory language used by the General Assembly when the statute was originally enacted in 1970, Chapter 666 of the Acts of 1970, the Statute of Repose did not apply to any cause of action "arising" on or before June 30, 1970. Therefore, the statute does not apply to injuries wherein the plaintiff was exposed to asbestos before that time.

The estate of the decedent sued the owner of a turbine generator who worked near the owner's employees who performed the installation from May 3 – June 28, 1970. The decedent was not diagnosed with mesothelioma until December 26, 2013. His March 2014 lawsuit was dismissed as barred by the Statute of Repose.

Renita L. Collins is a trial attorney with Thomas, Thomas & Hafer, LLP in Baltimore, Maryland. She has extensive experience handling business, banking, insurance defense, and other civil litigation matters.

Subsequent Accidents In Light of Labonte

Julie D. Murray and Christopher M. Balaban

In *Elec. Gen. Corp v. Labonte*, 454 Md. 113 (2017), the Court of Appeals held, in a case of first impression, that a subsequent intervening event occurring outside of a Claimant's employment does not, *per se*, preclude the liability of the Employer for worsening of the prior workplace injury. The Court of Appeals also held that the doctrines of the law of the case and collateral estoppel do not apply to decisions of the Workers' Compensation Commission as Md. Code Ann., Lab. & Empl. § 9-736 gives the Commission the power to revisit and revise any prior order within five (5) years of an Order.

In *Labonte*, the Claimant suffered a compensable workplace injury to his back on September 2, 2004. For this injury, Claimant received medical treatment and out of work benefits. On December 31, 2006, the Claimant re-injured his back during an altercation with a police officer. As a result the Claimant sought additional temporary total disability benefits alleging that this temporary total disability was causally related to the September 2, 2004, accident. The Workers' Compensation Commission denied Claimant's requested additional temporary total disability benefits on the grounds that Claimant suffered a subsequent intervening event that had broken the chain of causation. No appeal was filed from this decision.

The Claimant then filed issues seeking permanent partial disability benefits. A hearing was held, and the Workers' Compensation Commission found that the Claimant had sustained a 20% permanent partial disability as a result of the September 2, 2004, accident and a further 10% permanent partial disability as a result of pre-existing and subsequent conditions. The Claimant had also sought payment of medical bills which were denied due to the subsequent intervening accident.

Five years later the Claimant filed a Petition to Reopen his claim on the grounds that his back condition had worsened. The Commission granted Claimant's Petition to Reopen, but denied his claim of worsening, ruling that the Commission's prior finding that Claimant suffered a subsequent intervening injury to his back had severed the causal nexus between Claimant's compensable workplace injury and his current back condition.

The Claimant appealed this decision to the Circuit Court for Anne Arundel County. After the Employer and Insurer's Motion for Summary Judgment was denied, the case was submitted to the jury and the jury found that "100%" of the Claimant's worsening of his back condition was causally related to his September 2, 2004, accidental injury.

On appeal to the Court of Special Appeals and the Court of Appeals, the Employer and Insurer argued that since no appeal was filed in response to the Commission's denial of temporary total disability benefits based on Claimant's subsequent intervening event, that the doctrines of the law of the case and collateral estoppel precluded a finding that Claimant's worsening of permanent partial disability was causally related to his workplace injury. The Court of Appeals disagreed and held that neither doctrine was applicable to orders of the Workers' Compensation Commission on the grounds that Md. Code Ann., Lab. & Empl. § 9-736 gives the Commission the power to revisit and revise any prior Order within five (5) years of the Order.

The Employer and Insurer also argued that a subsequent intervening injury breaks the chain of causation between a compensable work injury and the Claimant's current condition as a matter of law. The Court, however, held that while temporary total disability benefits are awarded based on the most recent injury and apportionment does not apply, permanency awards are subject to apportionment for both pre-existing and subsequent injuries. The Court further held that there was sufficient evidence on the record to support a jury finding that Claimant's worsening of condition was solely caused by his workplace injury.

As a result of *Labonte*, Maryland workers' compensation defense practitioners need to be aware that a subsequent injury to the same or similar body part to one that is part of a claim will not *in and of itself* break the chain of causation from the prior workplace injury. Accordingly, attorneys should be prepared to not only argue that the subsequent injury was sufficient to break the chain of causation, but also be prepared to argue for apportionment as well. Practitioners should further be aware that the doctrines of collateral estoppel and law of the case are not applicable to decisions of the Workers' Compensation Commission within the five-year reopening period. However, at the same time, this decision also permits Employers and Insurers to argue for reconsideration and/or increase of apportionment findings when a Claimant reopens a case and seeks additional permanency benefits.

Julie D. Murray is a Partner in the Workers' Compensation and Employers' Liability practice group at Semmes, Bowen & Semmes. She represents Employers and Insurers in the defense of workers' compensation claims in both Maryland and the District of Columbia. Her clients include Self-Insured Employers as well as insurance companies providing coverage for large and small Employers. She represents clients at all stages of litigation, including in the appellate courts, and also provides education and training to risk management and insurance professionals to help them successfully manage their claims.

Christopher Balaban is an Associate in the Baltimore office of Semmes, Bowen & Semmes. His practice is focused on Workers' Compensation and Employer Liability Defense.

The MDC Expert List

The MDC expert list is designed to be used as a contact list for informational purposes only. It provides names of experts sorted by area of expertise with corresponding contact names and email addresses of MDC members who have information about each expert as a result of experience with the expert either as a proponent or as an opponent of the expert in litigation. A member seeking information about an expert will be required to contact the listed MDC member(s) for details. The fact that an expert's name appears on the list is not an endorsement or an indictment of that expert by MDC; it simply means that the listed MDC members may have useful information about that expert. MDC takes no position with regard to the licensure, qualifications, or suitability of any expert on the list.

MDC's Inaugural Awards Ceremony and Spring Dinner

James K. O'Connor

On March 19, MDC celebrated its inaugural Awards Ceremony and Spring Dinner. There was a great turnout for the event with the room filled to capacity. Judges C. Carey Deeley, Jr. and Joseph G. Murphy, Jr. were presented with **2018 Honorable Herbert F. Murray Lifetime Achievement Award**. The Murray Award recognizes these jurists' demonstrated intelligence, character, impartiality, judicial sensitivity and temperament. Robert E. Scott, Jr., F. Ford Loker, Bruce R. Parker and Susan T. Preston received the **2018 John H. Mudd Lifetime Achievement Award**. The Mudd Award honors the recipients' dedication to professionalism and civility in the practice of law throughout their careers. We are looking forward to next year's event already and hope to see you there!

The Honorable Judge C. Carey Deeley, Jr.

Robert E. Scott, Jr., Esquire

Bruce R. Parker, Esquire

The Honorable Judge Joseph F. Murphy, Jr.

F. Ford Loker, Esquire

Susan T. Preston, Esquire

Businesses Take Note: Updates to Maryland's Data Breach Notification Law Took Effect

James R. Benjamin Jr.

What are businesses required to do when personal information they have collected is breached? Most states have breach notification laws with varying degrees of security and notice requirements. With high profile data breaches continuing to top headlines, legislators are beginning to make these laws more strict.

Maryland's Legislature is no exception. On January 1, 2018, several amendments to the Maryland Personal Information Protection Act, ("MPIPA") Md Code Ann., Com. Law § 14-3501 *et seq.* went into effect. Businesses collecting personal information should take note and be prepared.

Under the law as amended, the definition of "personal information" under § 14-3501 has been greatly expanded. The current definition includes information such as first and last name, social security number, driver's license number, and bank account numbers and/or passwords. However, in light of amendments to the law, the definition of "personal information" is more expansive and now includes the following:

- passport numbers
- health insurance policy numbers
- fingerprints/retina scans or other biometric data, any mental or physical health information (generally anything covered by HIPAA) usernames/passwords that give access to a person's e-mail address

In addition, changes have been made to allow notification of a data breach to be made within a set period of time. Section 14-3504(b) of MPIPA currently requires that a business conduct in good faith a reasonable and prompt investigation to determine the likelihood that personal information of the party has been or will be misused as a result of that breach. Should the business determine it is reasonably likely the information has been or will be misused, the law used to require the business to notify the party "as soon as reasonably practicable." The law as amended requires a business to notify the party owning the data no later than forty-five (45) days after the conclusion of any investigation conducted by the business in which it determined the breach has created a likelihood that the personal information has been or will be misused. Although not required in MPIPA, businesses should also be sure to provide prompt notice of any data breach to their insurance carrier.

Also, in light of the addition of usernames and/or passwords giving access to a person's e-mail address to what is considered personal information under MPIPA, changes have been made under MPIPA to allow businesses to provide alternative notice in certain circumstances. Under prior law, § 14-3504(e) generally required notice of a data breach be given by written notice sent to the most recent address on record, by telephone, or by e-mail if the business has expressly consented or primarily conducts business through the internet. However, under § 14-3504(i) as amended, in the event of a data breach involving only personal information regarding a person's e-mail address and/or password, a business may comply with MPIPA by providing notification in electronic or other form that directs the party whose personal information has been breached promptly to change their usernames, passwords, or security questions or take other appropriate steps to protect the e-mail account. It should be noted that generally, such notification cannot be given to the party by sending notification by e-mail to the e-mail account affected by the breach. That said, however, such notification "may be given by a clear and conspicuous notice delivered to the party online while the party is connected to the affected e-mail account from an internet protocol address or online location from which the business knows the individual customarily accesses the account." *Id.*

Lastly, changes occurred to § 14-3502 of MPIPA. This section currently governs the destruction of records and currently requires that when a business destroys a customer's records that contain covered personal information, it must take reasonable steps to protect against unauthorized access or use of that information by others. The entity must take into account: (1) the sensitivity of the records, (2) the nature and size of the business and operations, (3) the costs and benefits of different destruction methods, and (4) available technology. Under the law as amended, businesses will be required to also take reasonable care to protect an employee's or former employee's personal information. Importantly, this amendment expands the scope of this section outside the realm of consumer protection alone to include protection of employees.

Data breach security and notification laws in Maryland and throughout the country are evolving and will continue to do so. It should be noted that the National Association of Insurance Commissioners' ("NAIC") recent passage of the Insurance Data Security Model Law will provide many states with guidance on specific security measure requirements. Accordingly, it is of paramount importance that businesses keep abreast of compliance and notification requirements in this area.

Mr. Benjamin is a Member in PK Law's General Litigation Group. He also focuses his practice areas in Lead Paint Defense, MBE/WBE/DBE and Medical Malpractice Defense. Mr. Benjamin has substantial bench and jury trial experience representing insurers and business entities in personal injury and premises liability matters. He represents property owners in Baltimore City in complex lead paint and toxic tort litigation at both the trial and appellate levels. He successfully argued a lead paint case before Maryland's Court of Special Appeals on legal issues concerning definitions of an owner and operator under the Baltimore City Housing Code. He has successfully defended cases brought against property owners in lead paint cases involving claims brought under Maryland's Consumer Protection Act. Mr. Benjamin has significant experience representing and advising minority-owned and women-owned businesses (MBEs and WBEs) on certification and procurement matters as well as structuring and creating joint ventures and teaming arrangements.

Expert Information Inquiries

The next time you receive an e-mail from our Executive Director containing an inquiry from one of our members about an expert, please respond both to the person sending the inquiry and Mary Malloy Dimaio (mmd@cls-law.com). She is compiling a list of experts discussed by MDC members which will be indexed by name and area of expertise and will be posted on our website. Thanks for your cooperation.

Average Weekly Wage Calculation Following the *Wagstaff* Decision

James A. Turner

In *Richard Beavers Construction, Inc., et al. v. Wagstaff*, the Court of Special Appeals determined that the Workers' Compensation Commission was not required to use actual wages earned during the period worked prior to the date of accident to calculate average weekly wage. Particularly, the Court of Special Appeals determined that by considering prospective wages based on anticipated full time employment, the Commission did not commit an error of law.

On April 1, 2013, the Claimant in this case, Dexter Wagstaff, sustained injuries when he fell through the roof at the Employer's worksite. Prior to this incident, the Claimant began working for the Employer on February 15, 2013. He was hired to work 40 hours per week at the rate of $18.95 per hour but was only paid for hours that he in fact worked. The Claimant was instructed not to report for work when the Employer's job site was closed due to inclement weather. During the weeks between February 15, 2013 and April 1, 2013, the job site was frequently closed and the Claimant worked an average of only 16.75 hours per week.

Following the April 1, 2013 fall, the Claimant received significant medical treatment and sought temporary total disability benefits as a result of the accidental injury. The parties came before the Workers' Compensation Commission for a hearing on April 16, 2014 to address a number of issues, including average weekly wage. The Commission found that the Claimant's average weekly wage was $758.00 per week, based upon 40 hours per week at $18.95 per hour. The Employer and Insurer appealed the Commission's decision to the Circuit Court for Talbot County. The Circuit Court for Talbot County affirmed the decision and the Employer and Insurer appealed to the Court of Special Appeals.

On appeal to the Court of Special Appeals, the Employer and Insurer argued that the Commission was required to calculate the Claimant's average weekly wage based upon the actual wages earned prior to the accidental injury. Specifically, the Employer and Insurer's position was that the Commission was not permitted to rely upon hypothetical and speculative future earning potential. Instead, the Commission should be limited to actual earnings. The Claimant argued that the Commission's Order should be affirmed and the average weekly wage should be calculated based upon the 40-hour work week. Particularly, the Claimant argued that the Workers' Compensation Act permits the Commission to consider an expected increase in wages under normal circumstances. The Court of Special Appeals effectively rejected both of these positions.

Instead, the Court of Special Appeals determined that the average weekly wage calculation should reflect what an employee would earn from the employer under the contract in place at the time of the injury. To achieve this goal, the Court held that the Commission was permitted to consider evidence beyond the 14-week wage statement and the wages earned prior to the accidental injury. In this case, the Court found that the Commission could reasonably conclude that $758.00 per week was a better approximation of the wages the Claimant would have earned if not for the injury. Therefore, it was not an error of law for the Commission to rely upon the Claimant's future potential earnings in determining the average weekly wage. More specifically, the Court held that the Commission was not required to calculate the Claimant's average weekly wage based upon the actual earnings during the period prior to the accidental injury.

The general consensus is that the *Wagstaff* decision is consistent with the approach the Commission takes to calculating average weekly wage. Typically, the Commission relies upon a 14-week wage statement unless one of the parties convinces the Commission that the wage statement does not accurately reflect the Claimant's preinjury earnings. In light of *Wagstaff*, the claimants' bar will likely attempt to deviate from the 14-week wage statement more often when it works to their client's advantage. Maryland workers' compensation defense attorneys need to be prepared to present clear wage and hour records if the claimant's attorney seeks an average weekly wage beyond that established within the 14-week wage statement.

James A. Turner is a partner at Godwin, Erlandson & Daney, LLC. He focuses his practice on the defense of employers, insurance companies, and self-insured employers in workers' compensation and general liability matters.

The Intersection Between the Workers' Compensation Law & Child Support

RK Grounds Care, et al. v. Wilson

Lance G. Montour

When Chesapeake Employer's Insurance Company and Kevin Wilson decided to settle his workers' compensation claim, neither expected another two and a half years of litigation would ensue over how that settlement would be paid. Unfortunately for both parties, an outstanding child support obligation intervened and delayed the final resolution of that settlement until the Court of Special Appeals issued its opinion in *RK Ground Care, et al. v. Wilson*, 235 Md. App. 20 (2017). In that recent decision, the Court of Special Appeals determined that the Maryland Workers' Compensation Commission ("the Commission") does not have jurisdiction to determine the enforceability of or the exemptions from a writ of garnishment pertaining to an Order of Child Support.

In *RK Grounds Care*, Kevin Wilson (Claimant) negotiated a settlement of his workers' compensation claim with Chesapeake Employer's Insurance Company (Insurer), the Employer's Insurer. The settlement was approved by the Commission and an order issued providing for payments to be made to the Claimant, the Claimant 's attorney, and the Claimant's doctor within fifteen (15) days of the order. The net recovery to the Claimant was approximately $2,300.00. Prior to the expiration of the 15-day period, the Bureau of Child Support Enforcement put the Insurer on notice of liens arising out of three (3) orders for payment of child support arrearages. These three liens were in excess of Claimant's total net recovery. The Insurer determined that under Labor & Employment Article § 9-732 ("LE § 9-732") they were required to comply with the instructions of the Bureau of Child Support Enforcement. Accordingly, the money was held until appropriate writs of garnishment were provided, which directed payment of the net recovery from the Claimant's settlement proceeds to the Bureau of Child Support Enforcement. The Insurer complied by issuing payment directly to the Bureau, leaving no funds left to be paid to the Claimant.

Claimant filed issues with the Commission asserting that the diversion of payments was improper and that the Insurer should comply with the Commission's settlement approval Order by making further payments to the Claimant. Pertinent to the Claimant's argument was that Courts and Judicial Proceedings Article § 11-504 (b) ("CJP § 11-504") provided a limit of 25% that could be taken from any personal injury settlement or judgment for the purpose of satisfying a child support order. The matter proceeded to a hearing and the Commission determined that because there were three separate Orders for child support arrearages, the Bureau of Child Enforcement was entitled to a total of 75% of the net settlement recovery, which represented a 25% recovery for each of the three child support arrearage orders, and the remaining 25% was payable to Claimant.

The Insurer appealed this decision to the Circuit Court and after a bench trial, the court determined that only 25% of the total net recovery could be diverted to the Bureau of Child Support Enforcement and the Claimant would receive 75% of the net recovery from the settlement. Aggrieved by this decision, the Insurer filed an appeal to the Court of Special Appeals. At this point, the question went beyond the scope of just workers' compensation law, but included issues pertaining to the Family Law article, and the Court's and Judicial Proceedings Article (CJP), specifically §11-504 (b). Claimant contended that under CJP § 11-504, the maximum amount of money payable to child support (for all of the arrearages) out of his workers' compensation settlement would be limited to 25% of his net recovery. The Insurer contended that the Circuit Court had erred in applying Courts and Judicial Proceedings Article §11-504(b) to a workers' compensation claim. The Insurer argued that because LE § 9-732 specifically required compliance with Title 10 of the Family Law Article (the section that applies to child support enforcement), the CJP did not apply, and therefore the Insurer was obligated to adhere to the child support liens and garnishments. Part of the legal analysis provided by the Insurer had to do with the statutory construction, the fact that the purpose of LE § 9-732 was initially to prevent any type of attachment or execution, and that the legislature subsequently added in the requirement for compliance with child support orders. Claimant simply argued that because CJP § 11-504(b) refers to settlements or judgments for personal injuries, sickness, or disability, that it applied to workers' compensation because of a similarity of terminology. Both parties had ancillary arguments having to do with the history of the various statutory sections, but neither the primary nor secondary arguments were persuasive to the Court of Special Appeals.

Throughout the proceedings at the Commission, in the Circuit Court and even through briefing before the Court of Special Appeals, the parties identified the issue as being one of whether CJP § 11-504(b) applied to limit the recovery that the Bureau of Child Support could receive from a workers' compensation settlement. The basic premise of this argument was whether a workers' compensation claim was an action for recovery based on personal injury or disability or sickness in accordance with CJP § 11-504(b) or, in the alternative, whether the legislative history and dictates of statutory construction mandated that the coordination between workers' compensation and the Family Law Article render the Courts and Judicial Proceedings Article inapplicable.

The ultimate holding in *RK Grounds Care, et al. v. Wilson* was one determined by jurisdiction and the nature of the Maryland Workers' Compensation Commission. Specifically, the Court of Special Appeals pointed out that the Commission is "not a Court at all." Going further, the court stated that "the Commission's limited powers do not include the power to enforce an Award it has granted." Only a court of general jurisdiction could determine the applicability of the various statutes and exemptions with regard to the child support Orders and the applicability to a Workers' Compensation Settlement Award. In that regard, the Court

Continued on page 31

Spotlights

Rosenthal v. Mumtaz, et al.

MDC Members, Neal Brown and Michelle Dian obtained a defense verdict on behalf of an ENT and an intensivist for allegedly failing to stop a nosebleed in an elderly coagulopathic patient, resulting in his death. The Plaintiffs claimed the physicians failed to pack properly the patient's nose and to timely reverse the coagulopathic state of the patient. The defense maintained that the physicians were doing all they could to assist; however, due to the patient's advanced age and co-morbidities (weak heart), these interventions were unable to reverse his anticoagulation status in time to stop the bleeding and prevent his death. This matter was tried before the Honorable Mickey Norman in the Circuit Court for Baltimore County. Neal and Michelle also obtained summary judgment on behalf of another ENT who was not on-call for this matter.

MDC Members, **Tina Billie**t and **John Sl**y obtained an unconventional trial defense victory on behalf of a Baltimore City Hospital and its orthopedic trauma surgeon. Plaintiff claimed Defendant failed to appropriately diagnose and treat a MRSA infection associated with an intramedullary rod, resulting in a severe MRSA re-infection several years after his initial trauma surgery. The case was tried before a jury and the Honorable Pamela J. White in the Circuit Court for Baltimore City in November 2017. Tina and John were successful in having the Plaintiff's sole orthopedic surgery expert barred from testifying following *voir dire* (he was found to be unqualified). They then argued that the remainder of the case was time barred and should be dismissed; Judge White agreed and dismissed the case in its entirety.

Tracy Steedman was recently elected to Litigation Chair of Adelberg Rudow and selected as a Fellow of the Construction Lawyer Society of America.

Sara Cawrse, et al. v. Nathan Berger, M.D., et al.
Case No. 24-C-16-004319

Tony Breschi, **Saamia Dasti** and **April Hitzelberger** of Waranch & Brown, LLC, obtained a medical malpractice victory in the Circuit Court for Baltimore City in January 2018. The case concerned a patient who suffered a stroke as a result of treatment with fertility medications. The Plaintiffs had sued the Defendant reproductive endocrinologist, as well as a hospital whose emergency room physician evaluated the patient the day prior to her stroke and diagnosed her with dehydration.

The hospital settled the case before trial. Waranch & Brown's client asserted that the Co-Defendant's negligence was an intervening and superseding cause of the Plaintiff's claimed injury and presented the testimony of the Plaintiff's own neurology expert who testified that the ER physician was negligent and that appropriate care in the ER would have prevented the stroke.

The jury found that the negligence of the settled Defendant was the proximate cause of injury. Although the female Plaintiff suffered a stroke, she fully recovered and was suing for her past pain and suffering, lost wages and medical expenses.

Tony Breschi and **John T. Sly** successfully defended an OB/GYN in the Circuit Court for the City of Baltimore. The case was tried before Judge Barry Williams. The allegation was that the defendant surgeon damaged a ureter during a laparoscopic hysterectomy resulting in multiple procedures and substantial future care needs. The jury returned a defense verdict on April 27, 2018.

(WORKERS' COMP & CHILD SUPPORT) *From page 30*

determined that the Circuit Court's decision was to be reversed and the matter remanded to the Commission to vacate the Order addressing the question of whether CJP § 11-504(b) applied to restrict the garnishment of the settlement proceeds.

Based on the decision in this case, the ultimate question as to whether there is a limit on what a child support enforcement office can recover from a workers' compensation settlement has been postponed until another day in another forum. The ruling in this case begs another question — what happens when the Commission approves a settlement and there is a need for enforcement? Noting that the Commission was not a court, the Court of Special Appeals implied that the Commission did not have the power to enforce its own Award. Speculation abounds as to what further complications and litigation obstacles that stance will lead.

Lance G. Montour is a principal at Humphreys, McLaughlin & McAleer, LLC. Mr. Montour concentrates his practice in the areas of workers' compensation defense, personal injury liability defense, insurance defense, administrative law and general civil litigation.

See photos
from past events at
mddefensecounsel.org/
gallery

MDC 2017–2018 Programs

June 15, 2017, 12 pm — Lunch and Learn 1

"Don't Forget Causation"
Speakers: John T. Sly & Hon. Julie R. Rubin
Sponsors: Planet Depos, Social Detection, SEA Limited

July 20, 2017, 12 pm — Lunch and Learn 2

Social Media & Litigation
Speakers: Marisa Trasatti & Scott Catron
Sponsors: Social Detection, Gore/Veritext

August 24, 2017, 12 pm — Lunch and Learn 3

Data Security & Breach Response for Law Firms
Speakers: Veronica Jackson, Esq. & Mutungi Tumusiime
Sponosrs: Gore/Veritext, National Forensic Consultants

Sept. 12, 2017, 12 pm — Lunch and Learn 4

The Future of Autonomous Vehicles & the Impact on Litigation
Speakers: Erin Cancienne, Esq. & Tracie C. Eckstein
Sponsors: Gore/Veritext, Rimkus Consulting Group

Sept. 26, 2017, 5:30 pm — Past Presidents Reception

Miles & Stockbridge P.C.

Oct. 19, 2017, 12 pm — Lunch and Learn 5

New Concepts in Workers' Compensation
Speakers: Wendy Karpel, Esq. & Mike Dailey, Esq.
Sponsor: Exam Partners

Nov. 16, 2017, 12 pm — Lunch and Learn 6

The Importance of Forensic Engineering and Expert Witness Testimony in Admiralty and Maritime Law
Speakers: Walter Laird, PE, CMI, CFI & Steven E. Leder, Esq.
Sponsor: Forcon International

Dec. 14, 2017, 12 pm — Lunch and Learn 7

Errors in the Operating Room — human factors in medical litigation
Speaker: Lindsay O'Hara Long, Ph.D.
Sponsor: Exponent

Jan. 12, 2018 — THE FALL DEFENSE LINE

Jan. 25, 2018, 12 pm — Lunch and Learn 8

"It's Not the Knot... it's a function of the fundamental principles involved"
Speaker: Timothy W. Ott
Sponsors: Nelson Forensics, Irwin Reporting

Jan. 29, 2018, 8 am — Deposition Boot Camp

8 am – 6 pm
Location: Semmes Bowen & Semmes
Sponsors: Planet Depos, Rimkus Consulting

Feb. 22, 2018, 12 pm — Lunch and Learn 9

Hacking and Wire Fraud: 99.9% of all new information is stored digitally and information is the new currency.
Location: Pessin Katz
Speaker: Stephan Y. Brennan
**Minnesota Lawyers Mutual has arranged for 1.0 hour of CLE credit in VA and PA*
Sponsor: Minnesota Lawyers Mutual

March 19, 2018, 5:30 pm — Awards Dinner

5:30 pm – 7:30 pm
Location: Semmes Bowen & Semmes
Keynote Speaker: Bruce Elliott, WCBM Radio Personality
The Honorable Herbert F. Murray Lifetime Achievement Award and
The John H. Mudd Lifetime Achievement Award
Sponsor: rti

March 29, 2018, 12 pm — Lunch and Learn 10

In the Courtroom: Nuts & Bolts
Location: Semmes Bowen & Semmes
Speaker: Judge Matricciani (Ret.) — WTP
Sponsor: ADR of MD (Sustaining Member Benefit)

March 30, 2018 — THE WINTER DEFENSE LINE

April 2018 — Happy Hour

Organizer: Dwight Stone
Location: TBD

April 5, 2018, 12 pm — Lunch and Learn 11

Advocacy in Mediation
Location: Semmes Bowen & Semmes
Speakers: The Honorable Martin P. Welch (Ret.), The Honorable Gale E. Rasin (Ret.) and The Honorable Daniel M. Long (Ret.)
Sponsor: The McCammon Group

April 30, 2018, 8:00 am — Trial Academy

8:00 am – 6:00 pm
Location: Semmes Bowen & Semmes

April 30, 2018 — THE SPRING DEFENSE LINE

May 16, 2018, 9:00 am — Strategic Planning Session

9:00 am – 12:00 pm
Location: Ellin & Tucker
Facilitators: Steve Manekin (Ellin & Tucker) & Joseph Jagielski (MDC Historian)

May 17, 2018, 12 pm — Lunch and Learn 12

"Use of Computer Simulation in Litigation – with emphasis on Vehicles, Humans, and Structures"
Location: Semmes Bowen & Semmes
Speakers: John Zolock, PhD, PE and Sri Danthurthi
Sponsor: Exponent

June 1, 2018 — THE SUMMER DEFENSE LINE

June 6, 2018, 5:30 pm — Annual Meeting & Crab Feast

Location: Nick's Fish House

June 20, 2018, 12 pm — Lunch and Learn 13

Accident Reconstruction
Location: Semmes Bowen & Semmes
Speaker: Tracie Eckstein
Sponsor: Rimkus
(Beginning of John Sly's administration)

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Maryland Defense Counsel, Inc. Presents

Trial Academy

April 30, 2018 ✯ 8:00 a.m. – 6:00 p.m.

Miles & Stockbridge • Baltimore, Maryland 21201

7:30 am – 8:00 am — **Registration and Continental Breakfast**

8:00 am – 9:05 am — **Bruce R. Parker and John R. Penhallegon**
Lecture: Opening statement

9:05 am – 9:40 am — **Susan T. Preston**
Lecture: Cross-examination of Plaintiff

9:40 am – 10:15 am — **Christopher R. Dunn**
Lecture: Direct Examination of Defendant

10:15 am – 10:30 am — **Break**

10:30 am – 11:15 am — **F. Ford Loker**
Lecture: Closing Argument

11:15 am – 12:00 pm — **Jeanie S. Ismay with Dr. Rachel York Colangelo**
(National Managing Director of Jury Consulting) from Magna Legal Services
Lecture: Jury Selection and Voir Dire

12:00 pm – 1:30 pm — **Lunch and Judicial Panel of Keynote Speakers including three jurists who have served on three levels of the Maryland Court System**
(moderators: Richard M. Karceski and Robert E. Scott, Jr.)

1:30 pm – 3:30 pm — **Thomas P. Bernier, Geoffrey H. Genth, Mary M. Dimaio, Chad I. Joseph**
Practice Closing Arguments

1:30 pm – 3:30 pm — **Theodore F. Roberts, Virginia W. Barnhart, Shadonna E. Hale, Wendy B. Karpel**
Practice Cross Exam of Plaintiff

3:30 pm – 3:45 pm — **Break**

3:45 pm – 5:45 pm — **Thomas P. Bernier, Geoffrey H. Genth, Mary M. Dimaio, Chad I. Joseph**
Practice Closing Arguments

3:45 pm – 5:45 pm — **Theodore F. Roberts, Virginia W. Barnhart, Shadonna E. Hale, Wendy B. Karpel**
Practice Cross Exam of Plaintiff

6:00 pm – 6:15 pm— **Closing Remarks**

6:15 pm – 7:00 pm— **Reception**

Registration:
mddefensecounsel.org/events.html

SPACE IS LIMITED,
REGISTER NOW

Maryland Defense Counsel, Inc. Presents

Annual Meeting and Crab Feast

June 6, 2018
5:30 p.m. – 7:30 p.m.

Nick's Fish House
2600 Insulator Drive
Baltimore MD 21230

For More Information:

ED@mddefensecounsel.org

Learn more at www.mddefensecounsel.org