

SCAA

November 2009

Vol. 37 No. 3

Seattle Claims Adjusters Association

Celebrating over 75 years of service to the claims community — Founded in 1930

“A professional organization dedicated to the ongoing education of the claims community.

Providing an arena for member interaction and the sharing of resources.”



Dean's Dish

— by **Dean West**, SCAA President

Thanks to everyone who attended the October Meeting and subsequent Bowling Tournament. Our joint meeting with TCAA was clearly a success. Special thanks to our guest speaker, **Daniel Thenell** of Smith, Freed & Eberhard, P.C. for his presentation on “The Art of Being Deposed”. The interaction was educational and informative, providing insight on what you might expect during a deposition.

Our two winners for the monthly drawings were **Dan Todd** and **Melody Worthen**. The

Blue Bucket went again without a winner so the prize increases to \$200 for the next drawing; **Scott Fankhauser** was not present to win when his name was called.



We'll have our next meeting close to the Thanksgiving Holiday with a return to the Swedish Cultural Center. We invite all members to bring someone along to encourage growth of our membership. This month's topic is titled “Medicare Mandatory Reporting Regulations”. Medicare issues affect claims and underwriting and it would be of great benefit for everyone to be aware of these issues. ❖

(See Dean's Dish... continued on page 3)

Next Meeting of the SCAA

November 20, 2009

The Swedish Club, 1920 Dexter Ave North, Seattle, WA

Program

Liz Seymour of **TECNORisk LLC** &
Marcin Grabowski of **Bauer Moynihan & Johnson LLP**
“Medicare Mandatory Reporting Regulations”

Cost

\$15 Members \$20 Non-Members

Time

11:30 a.m.

It is important for you to RSVP if you are going to attend our luncheon meetings. Do so through our website or contact Deborah Jette at deborah.jette@grange.com. Thank you!



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DON'T FORGET TO RSVP!

Please let us know you will be attending our next meeting by submitting an RSVP at our website:
www.seattleadjuster.org



ON THE DOCKET FOR 2009

Date	Speaker/Topic
Nov 20	SCAA Meeting "Medicare Mandatory Reporting Regulations" With Liz Seymour, TECNORisk LLC & Marcin Grabowski of Bauer Moynihan & Johnson LLP
Dec 4	SCAA Annual Holiday Party See our website calendar for more info and registration No regular meeting in December
Jan 15	SCAA Meeting

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Meeting Information

Please keep in mind that we'd like to start and end promptly during our monthly meetings. Here is the timeline for each meeting:

- 11:30 a.m. Registration
- 11:45 a.m. Buffet
- 12:00 p.m. Meeting Called to Order
- 1:00 p.m. End of Meeting

Please arrive on time and have your cash or check (payable to SCAA) ready. We appreciate your cooperation and assistance.



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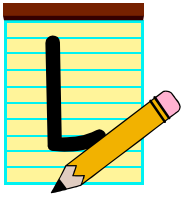


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Notes from the Secretary



“Death by Deposition”
— by Lynn Perry, SCAA Secretary

If you attended the October 16, 2009 joint SCAA/TCAA meeting and Bowling event at ACME Bowling in Tukwila, you know it was a wonderful success. If you missed it, then you missed a great event.

The meeting was MC'd by TCAA's own **Roger Howson** (President), who made the opening remarks and introduced us to one of our best presentations ever, “Death by Deposition” with **Dan Thenell** from the law offices of Smith, Freed & Eberhard. Dan played the role of plaintiff attorney, and our own (insurance claims personnel) **Larry Kagele**, took on the role of the deposed. It was a great training exercise with both Dan and Larry putting on exceptional performances.

After the mock depositions, anyone whose ever had, or who will ever be deposed, gained some great insight into how grueling a process sitting through a deposition can be.

Before moving on to the afternoon of bowling, our speaker provided us with a legal update and closing remarks were made by SCAA President **Dean West**.

Another joint meeting and bowling event is being planned for February 2010. You won't want to miss it! ❖

[See our website for all the photos!]



DON'T FORGET TO RSVP!

Please let us know you will be attending our next meeting by submitting an RSVP at our website: www.seattleadjuster.org

Membership in SCAA is open to all claims adjusters, and should be a priority on your list of things to do! Print the application from our website, or find it inside this newsletter.

JOIN TODAY!
www.seattleadjuster.org

Dean's Dish... (Continued from front page)

And now....the real Dish. With Thanksgiving, and yes, the next Holiday knocking on our door, a simple appetizer is always a nice warm-up for that big dinner. Deviled Eggs are quick and simple.

“D” Deviled Eggs

Ingredients:

- 12 Eggs
- ½ Regular Mayonnaise
- 3 teaspoons Regular Mustard
- ½ teaspoon of crushed garlic
- Salt to taste



Boil the eggs – (12 minutes after the water starts boiling – longer if you like) let cool. Peel the eggs then cut them in half. Place the yoke centers in a bowl. Mash the yokes with a fork until powdery. Mix the mayonnaise, mustard and garlic in with the yokes and stir until smooth. Spoon the yoke mixture into the egg halves. Sprinkle with Paprika or Cayenne (optional) Serve at room temperature or refrigerate until the guests arrive.

SCAA - TCAA Bowling
The best and worst of...

- 1st Place Team: Neil Biggerstaff-CASE, Jim Evans-CASE, Tracey Challman-CASE, Lynnne Ochoa-CASE, Lynn Perry-Grange, & Sheila Campbell-Grange
- Most Serious Player-Neil Biggerstaff-CASE
- Least Serious Player-Tanya Padur-SAFECO

~ **Employment Opportunities** ~

Mutual of Enumclaw has an opening for a Personal Lines Product Manager in their home office in Enumclaw, WA; and, a Sr. Claims Adjuster III (Casualty) position in their Tacoma office. Visit our website for more info.

Liberty Mutual has an opening for a Field Property Claims Specialist based out of Seattle, WA. This is a telecommuter position. Visit our website for more info.

Halo Construction has an opening for an Estimator. Visit our website for more info.



Case Study
SMITH FREED & EBERHARD P.C.
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Requiring a Certificate of Merit for Medical Malpractice Claims is Unconstitutional

— by Jeffrey D. Eberhard

Claims Pointer: Medical malpractice plaintiffs are no longer required to file a certificate of merit when they commence a lawsuit. The Washington statute requiring a certificate of merit has been found unconstitutional because it violates the doctrine of separation of powers by invading upon the judiciary's authority to create court rules.

The Washington Legislature enacted RCW 7.70.150 to reform medical malpractice tort claims. Under RCW 7.70.150, a medical malpractice lawsuit could be dismissed if a plaintiff did not file a written certificate of merit with the complaint. A certificate of merit is a statement by a medical expert asserting that the defendant's conduct did not follow the accepted standard of care. However, in a

recent Washington Supreme Court case, Putman v. Wenatchee Valley Medical Center, Case No. 80888-1, in the Supreme Court of the State of Washington (September 17, 2009), the court held that requiring a certificate of merit was unconstitutional because it violates the separation of powers.

Kimme Putman filed a lawsuit against Wenatchee Valley Medical center alleging medical malpractice for failing to timely diagnose her ovarian cancer. Putman argued that Wenatchee's 5 year delay in diagnosing her cancer caused her to miss early treatment options. Due to Wenatchee's actions, Putman alleged she only had a 40% likelihood of surviving the next 5 years. The trial court, in accordance with RCW 7.70.150, dismissed Putman's case because she failed to file a certificate of merit when she commenced her lawsuit. The trial court also held that requiring the certificate of merit was constitutional. Putman appealed.

The doctrine of separation of powers divides governmental power into three co-equal branches: the executive, the legislature and the judiciary. When one governmental branch oversteps its authority and invades the independence of another govern-

Membership Application for 2009-2010



SCAA Annual Membership Application

Membership Dues for the year September 1, 2009 to August 31, 2010

DUES ARE NOT PRO-RATED

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mental branch, that act violates the doctrine of separation of powers and is unconstitutional. The legislature, which has the authority to enact rules and laws, can invade the judiciary branch's authority by enacting court procedural rules (i.e., rules about how to file a lawsuit) that irreconcilably conflict with procedural rules created by the judiciary branch—which has the inherent power to create court rules of procedure. Whenever there is an irreconcilable conflict between two rules, the judicially created procedural rule will take precedence over the legislative court procedural rule.

On appeal, Putman argued that requiring plaintiffs to file certificate of merit when they commence a suit irreconcilably conflicts with notice pleading under Court Rule (“CR”) 8—which only requires plaintiffs to file “a short and plain statement of the claim” and demand for relief. The Washington Supreme Court agreed with Putman and held that CR 8 and the certificate of merit irreconcilably conflicted. The court explained that CR 8 only requires a short statement of the claim and allows plaintiffs to acquire evidence through later discovery; whereas the certificate of merit requires plaintiffs to

provide enough evidence to support their claim before any discovery process. Since the certificate of merit addressed how to file a claim, the court determined it was a procedural rule and CR 8 took precedence over RCW 7.70.150. Because the certificate of merit threatens the court's ability to set court procedural rules, the court held RCW 7.70.150 violated the doctrine of separation of powers and was unconstitutional. ❖

— Full Case Available at: <http://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=808881MAJ>

— If you would like to be notified of these new cases, please send an email to caseupdate@smithfreed.com.

Smith Freed & Eberhard is a mid-sized Portland law firm that has a primary focus on insurance defense litigation. The firm provides quality legal services in all areas of insurance, including personal injury, product liability, construction defect, business torts, first-party claims and subrogation. Our firm handles cases throughout the state of Oregon and Southwest Washington.

This article is intended to inform our clients and others about legal matters of current interest. It is not intended as legal advice. Readers should not act upon the information contained in this article without seeking professional counsel.

Benefits of Membership in SCAA — Join or Renew Today!

We can't say enough about the advantages of membership in the Seattle Claims Adjusters Association. The benefits are numerous, for example:

- **Newsletter** — Receive a copy of the SCAA newsletter September through June, packed full of educational articles and other information of interest to adjusters. It is also a resource guide to goods and services provided by our industry vendors — who also support our Association.
- **Monthly Meetings** — Attend these meetings to hear local presenters on topics that are pertinent to today's adjuster — always educational and sometimes entertaining!
- **Spring Seminar & Vendor Fair** — An entire year's worth of work goes into planning and hosting this annual educational event held in the spring — touching on all the hot topics and providing you an opportunity to meet with industry vendors face-to-face outside of your office.
- **Golf** — Not much educational about golf, but what adjuster today doesn't need a little relaxation and fun — held in the summer each year.
- **Website** — Stay in touch with local happenings and other claims associations in the Pacific Northwest. Open a web version of our newsletter. Find contact information for SCAA board and committee members. Or find a new job from the employment listings. And there's more.....

Membership in SCAA is open to all claims adjusters, and should be a priority on your list of things to do!
Print the application from our website, or use the one on the previous page.

JOIN or RENEW TODAY!

www.seattleadjuster.org

 Smith & Co. Newsletter

California Law Firm Loses Its Own Bad Faith Appeal

— by C. Donald Smith, Smith & Co. LLC
 Reprinted from Smith & Co., LLC October 2009 Newsletter

Lost Profit Testimony Falls Short of the Necessary Financial Expert Evidence

Neiman v. Bunnel Hill Development, Co., 2008 WL 4694998 (Ohio App.)(Oct. 27, 2008)

This decision illustrates what happens when a plaintiff fails to retain a qualified expert to testify to lost profits damages, and the defendant offers a credible expert to rebut those same claims. The plaintiff operated a pizzeria in mall space that he leased from the defendant/landlord. The parties' lease included the right of first refusal for adjoining space. However, when the tenant wanted to expand into this space, he discovered that the landlord had rented it to another restaurant. The tenant sued for breach of contract and damages, including the profits he lost from the time of the breach until he could reopen the pizzeria at a new location, plus associated costs.

At trial, the plaintiff failed to present any expert testimony on lost profits damages, including any market surveys or industry analyses. Neither did he ask the jury to consider the profits that his pizzeria made at its former location and then use these to project the profits that he could have anticipated from expanding that space. In fact, he admitted that he was not qualified to make these calculations.

Instead, he submitted two years of tax returns: one showing profits at the old location and another illustrating profit at the new location, three years later. The jury was asked to find that the latter (some \$203,000) was evidence of the profits he would have made, had the landlord permitted him to expand into the former space. He also requested about \$60,000 in the moving and build-out costs incurred at the new location.

The defendant presented an expert witness. At trial, the defendant retained a forensic-certified CPA to demonstrate that the plaintiff's lost profits calculations were inconsistent with generally accepted accounting principles. It was inappropriate to compare tax returns from the old and new businesses, he maintained, because there were substantial differences between the two, including their locations, rents, equipment, and parking availability. In addition, a competing pizza restaurant was moving within one mile of the old location, which plaintiff failed to account for in his calculations. The plaintiff also failed to present evidence of the costs he would have incurred in expanding the old location; instead, he only submitted his build-out costs at the new location. Nevertheless, the jury awarded him unspecified damages for \$162,500. The defendant appealed, claiming that the pizza owner's methodology failed to prove lost profits to a reasonable certainty.

The court of appeals agreed that the plaintiff's lost profits calculations fell short of the requisite standard. To establish these amounts with reasonable certainty, the plaintiff needed to show what his profits would have been in the expanded space, "and then subtract from that figure the costs he would have incurred in expanding his pizzeria there, as he planned to do before [the defendant] breached the right of first refusal clause in the parties' lease," the court said. Without this evidence, "it was impossible for the jury to determine with reasonable certainty what [the plaintiff's] net lost profits would have been," but for the breach.

Further, it was not clear from the jury's award what portion accounted for the plaintiff's moving and build-out costs, and what portion accounted for lost profits. Accordingly, the court reversed the award and remanded the case for a new trial and proper accounting of lost profits. ❖



"What has two legs and can be seen running fast every third Friday of the month? An adjuster on their way to an SCAA meeting!"

November 20 — Be there!

Medical Notes



Traumatic Brain Injury

Article provided by Health Cost Management

— by **William DeBolt, MD, Neurologist**

Traumatic brain injury is a deep topic, encompassing both penetrating and non-penetrating injuries. Mild traumatic brain injuries (concussions) are defined as clinical states which occur following a blow to the head. They include such traumas as epidural, subdural, intraparenchymal and sub-arachnoid hemorrhage, skull fracture, brain and hemorrhagic contusion, focal brain swelling and traumatic encephalopathy. The symptoms from these conditions are usually clear in contrast studies or neurological examinations. There is immediate failure to register memory. There may also be loss of consciousness and postural reflexes, changes in blood pressure and heart rate, pupillary dilation, and limited response to pain or verbal stimulus. If a concussion goes untreated, usually the patient recovers consciousness and postural control, but has memory loss for past and present events. Prolonged unconsciousness is uncommon. It is not normal to see stars, go to ones knees, or get dinged (momentarily dazed). More accurately, following a concussion an individual may wander about and seem confused, having no memory of the incident later on. It is assumed that a victim of concussion always experiences unconsciousness, even if only very briefly.

What happens to the brain during a concussion? The answer remains unclear. Examinations, imaging, and studies of patients are generally negative upon regaining consciousness. Older theories suggest an “electrical paralysis of functioning akin to seeing stars.” Autopsy studies of closed head injury and persisting coma show white matter discontinuity or axonal shearing. It is tempting to reason that this causes the concussion symptoms. Various biochemical events in the brain have been studied in experimental models, with the use of technologies such as SPECT scanning, magnetoencephalography, and Diffusion Tensor Imaging. Microvascular events associated with the blood-brain barrier have been suggested, but there are inconsistent results. Also, the studies show that there are differences in the brain between blast injury victims and common concussion victims. In Dementia Pugilistica syn-

drome (a punch drunk state following multiple concussions), neuronal and cortical loss is primarily in the sub-frontal cortex. Overall, the actual pathophysiological cause of concussion symptoms is not clear. The timeline following a concussion includes loss of consciousness for less than 20 minutes immediately following trauma, retrograde amnesia for less than 24 hours, and a Glasgow Coma Scale rating between 13 and 15 (very responsive). Neurological examinations and various imaging tests usually show up as normal and healthy, although microscopic blood can be seen in the cerebrospinal fluid examination. The majority of suspected concussion patients in the ER undergo a CAT scan to exclude skull fracture or intracranial bleeding. This is the normal choice in concussion evaluation, and only a small percentage of simple concussion patients show evidence of intracranial injury. In this case, they proceed with further evaluation or surgical attention.

Following return of awareness, the concussed person complains of headache, mental foginess, gait instability, tinnitus, nausea and weakness. These typically clear up within a few days, but about 5-15% of patients morph into post-concussion syndrome (PCS). There is an association between frequency of lawsuits in a country and the diagnosis of PCS. Poor physical conditioning, substance abuse history, impaired health and psychological instability appear to increase the diagnosed symptom duration. Classic studies report that the duration and severity of symptoms are inversely proportional to the level of education. In fact, PCS diagnosis is rare in children and those with established dementia. It is also uncommon in patients with severe anatomical brain injuries. The main symptoms of PCS are relatively uniform and include headache, migraine, sharp pain, dizziness, fatigue, irritability, worry and apprehension, impairment of memory and concentration, insomnia and noise intolerance. Alcohol intolerance is normal. Although debatable, the onset of any PCS symptoms is within one week of the injury, and the majority of sufferers return to normal within three months. However, some studies report the syndrome continuing for a year. Late development of PCS symptoms is the basis of concussions caused by whiplash injuries. In severe whiplash injuries sustained in auto collisions, loss of consciousness may be witnessed without evidence

(See **Medical Notes...** continued on page 8)

Medical Notes... *(Continued from page 7)*

of head injury. Cervical spine symptoms, cervicogenic headache and dizziness are often the major complaints, rather than PCS symptoms.

Literature has recently emphasized the issue of repeat concussions in sports. There appears to be statistical confirmation on the glass jaw cumulative effect and increased severity of PCS with subsequent concussions. Programs such as ImPACT have been developed and utilized in most athletic activities where head impact is probable. Studies of blast injury diagnosis, prognosis and pathophysiology hopefully will shed further light on concussion and PCS. The question of the effect of concussions in development of permanent brain disease has been investigated since the public awareness of Mohamed Ali and Parkinson's' disease. Some studies suggest that a single concussion can precipitate or increase the rate of progression of Alzheimer's disease. It is understandable that when symptoms of PCS are severe and persistent, psychological problems may complicate recovery. Adjustment disorder, anxiety disorder, malingering, depression, and

PTSD should be considered. PTSD includes intensive nightmares, hypervigilance, phobias, startled reactions, and anxiety associated with recollection of a traumatic incident. These conditions may respond to psychiatric therapy. Antidepressants are the most frequent drugs prescribed to treat PTSD in PCS.

Neuropsychological testing is usually done when memory and concentration complaints persist. Complicating psychological issues may be differentiated from the cognitive impairment that is multifactorial in memory problem causation. The role of the neurologist in patient evaluation is to be certain that the diagnosis from the ER is correct. A complete neurological examination should document all impairments. A mini-mental status examination is usually much more intact than the patient's own perception of their mental functioning. The neurologist can assess the possibility of a post-traumatic seizure disorder, arrange psychological assessment to document memory impairment, provide palliative symptomatic medication, and provide counseling and reassurance regarding anticipated recovery.

❖