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2021 Workers Compensation Institute

Indiana Continuing Legal Education Forum (ICLEF)

2021 Worker's Compensation Institute
November 9, 2021
Index

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WORKER'S COMPENSATION INSTITUTE

November 9, 2021

www.ICLEF.org

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WORKER'S COMPENSATION INSTITUTE

Agenda

8:30 A.M. Registration and Coffee

8:55 A.M. **Welcome and Introductions**
***- Hon. Linda P. Hamilton and Nancy A. Norman,* Program Chairs**

9:00 A.M. Employer Liability Act vs. the Worker's Compensation Act
- Curtis P. Moutardier, E. Michael Ooley

9:45 A.M. Suspension of Benefits vs. the Termination of TTD / TPD
- Brandon G. Milster
- When is a suspension appropriate?
- When does a suspension become a termination?

10:30 A.M. **Break**

10:45 A.M. The Application of Indiana's Evidentiary / Discovery Rules Within the Practice of Indiana Worker's Compensation
- Michael A. Schoening

11:30 A.M. Can ADR be Useful in Workers Compensation and What Ethical Issues are Involved?
- Timothy O. Malloy and Wm. Douglas Lemon

12:15 P.M. **Lunch Break (On your own)**

12:45 P.M. Worker's Compensation Ethics Discussion
- Sharon Funcheon Murphy, Douglas W. Meagher, Kyle L. Samons

1:15 P.M. 2021 in Review
- Sally A. Voland
- Pay for Play (NCAA v. Alston)
- Workplace Safety (Physical Assaults on Airlines, Medical Personnel)
- Musculoskeletal Disorders in the Workforce
- COVID Mandates

2:00 P.M. The 5th Edition, Different Types of PPI Rating Disputes, Amputation, Negotiation of PPI Ratings, and Considerations for the Judge in a PPI Rating Dispute
- Heidi Kendall-Sage

2:45 P.M. **Break**

November 9, 2021

WORKER'S COMPENSATION INSTITUTE

Agenda Continued

3:00 P.M.	Post-COVID Syndrome: Beyond the Acute Illness - *Dr. Robert C. Gregori and Dr. Sean Dillon* - Pathophysiology of Post-COVID Syndrome - Symptoms and Objective Testing to Validate Subjective Complaints - Treatment Options
3:45 P.M.	Understanding Psychological Evidence in Worker's Compensation Cases - *Dr. Gregory T. Hale*
4:30 P.M.	**Adjournment**

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WORKER'S COMPENSATION INSTITUTE

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Hon. Linda P. Hamilton,
Chair, Indiana Worker's Compensation Board, Indianapolis

Linda Hamilton was appointed by Governor Mitch Daniels as the Chairman of the Indiana Worker's Compensation Board in August of 2005. She had served as a Single Hearing Member of the Board since 1995, following her original appointment by Governor Evan Bayh. Linda grew up in Porter County, Indiana and attended Indiana University in Bloomington, where she graduated Phi Beta Kappa and thereafter received her law degree in 1983. After graduation, Linda clerked for the Honorable Judge Robert W. Neal of the Court of Appeals of Indiana for two years before joining the Fort Wayne law firm of Helmke, Beams, Boyer and Wagner. In 1991, she resigned her partnership in the firm to resume full-time work in the public sector as the City of Fort Wayne's staff attorney and later Corporate Counsel to City Utilities. In August of 2002 Linda left her City legal career to concentrate her professional efforts on worker's compensation matters.

Nancy A. Norman is in Barnes & Thornburg's Indianapolis office, where she is a member of the firm's Labor and Employment Law Department.

Nancy's practice focuses on management interests for a broad client base throughout Indiana, with an emphasis on claims management of workers' compensation matters for mainly self-insured clients. She has defended numerous high dollar-value cases, including permanent total disability and death cases. As part of her practice, Nancy has represented clients in front of administrative forums and civil courts, including the Indiana Court of Appeals.

Prior to joining Barnes & Thornburg, Nancy practiced law at Nation Schoening Moll, P.C., Stewart & Irwin, and, Bingham Summers Welch & Spilman, now known as Dentons Bingham Greenebaum. Her prior law practice concentrated in the areas of general civil defense litigation, governmental affairs, workers' compensation defense and subrogation recovery. After graduating from law school, Nancy was a lobbyist at the Indiana General Assembly for the Insurance Institute of Indiana.

Professional and Community Involvement

Member, Indiana State Bar Association

Member, Indiana Worker's Compensation Institute

Judge for the Order of the Barristers Staton Moot Court Competition

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EDUCATION

Indiana University School of Law-Indianapolis, J.D., member of civil practice clinical program; tutored paralegal students; member of client counseling program, graduated Spring 1989

University of Dayton, B.A., magna cum laude, recipient of Dr. E.O. O'Leary Memorial Award of Excellence in Economics and Academic Upperclassman Scholarship in economics, tutored economics students, graduated Spring 1986

BAR ADMISSIONS

Indiana, since October 1989

PRACTICES

Labor and Employment

Indiana Workers' Compensation

LANGUAGES

English

Dr. Sean Dillon, M.D.
Objective Medical, LLC, Indianapolis

Dr. Sean Dillon was born in West Virginia, but grew up right here in central Indiana, and has always considered Indiana his home.

He attended Ball State University for his undergraduate education where he majored in Spanish and Medicine. He then taught high school Spanish before attending Ross University School of Medicine and obtaining his Doctorate of Medicine.

Dr. Dillon then completed his training in Northern Kentucky at the St. Elizabeth Family Medicine Residency training program. He stayed on with St. Elizabeth and practiced there for several years doing primary care, hospital medicine, and urgent care, before moving back to Indiana.

Dr. Robert C. Gregori, M.D.
Objective Medical, LLC, Indianapolis

Dr. Gregori is the President and Founder of The Objective Group of Companies. He graduated Magna Cum Laude from Loyola University of Chicago in 1980. He received his medical degree from the University of Illinois Medical School in 1984. Dr. Gregori completed his residency in Physical Medicine and Rehabilitation at the University of Michigan in 1987, where he served as Chief Resident. Dr. Gregori served as Director of Physiatry with OrthoIndy thru 2006.

In 2009, Dr. Gregori started his forensic medical company, Objective Medical, and now dedicates the majority of his practice to medical legal consulting. With the success of Objective Medical, Dr. Gregori started Objective Diagnostics in 2011 (a cost containment diagnostic scheduling company); and Objective Surgical launched in 2013 with innovative outpatient surgical services offering global pricing for all aspects of surgery and post-operative care. Objective Wellness, a self-pay wellness and primary care clinic, will be open for business in 2018.

Dr. Gregori is licensed to practice medicine in Indiana. He is considered an expert in musculoskeletal and neurologic conditions to include traumatic brain injury, concussion and chronic regional pain syndrome. In his spare time, Dr. Gregori enjoys spending time outdoors with his family. His favorite past times include fishing, bird watching and visiting his lake house in Northern Michigan.

Dr. Gregory T. Hale, Ph.D.
Psychologist, Indianapolis

Dr. Gregory T. Hale is a Psychologist practicing in Indianapolis. He studied at Ball State University, obtaining his Doctor of Philosophy - PhD.

Heidi Kendall-Sage
Alcorn Sage Schwartz & Magrath LLP, Madison

Heidi Kendall-Sage is a partner with the firm of Alcorn Sage Schwartz & Magrath and concentrates her practice in family law, workers' compensation claims, social security disability, and personal injury claims and civil litigation. She is a graduate of Hanover College, Hanover, Indiana, with a B.A. in English and Sociology (1991) and a 1994 graduate of Indiana University School of Law with honors, where she won the American Jurisprudence Award for trial practice and was a member of the Indiana School of Law National Trial Team. She is a member of the American Trial Lawyers Association. Ms. Kendall-Sage is attorney for the Town of Dupont, Indiana and has recently attended & graduated from the National Institute of Trial Advocacy litigation training school.

Ms. Kendall-Sage is married and has 2 children. She attends North Madison United Methodist Church.

Areas of Practice:

- Family
- Civil Litigation
- Personal Injury Claims and Litigation
- Social Security Disability
- Worker’s Compensation

W. Douglas Lemon
Lemon, Keirn & Rovenstine, LLP, Warsaw

W. Douglas Lemon was admitted before the Indiana State Bar in 1995, as well as the U.S. Northern and Southern District Courts. Memberships include the Indiana State Bar Association and the Kosciusko County Bar Association. Mr. Lemon graduated from Hanover College (BA) in 1992 and received his JD from the Indiana University School of Law (Bloomington) in 1995. In a career spanning more than 20 years, Mr. Lemon has built a wide-ranging and diverse practice including: insurance defense, plaintiff's litigation, criminal defense, estate planning and probate, real estate transactions, guardianships and adoptions, family law, business development, and juvenile law. Since completing the Civil Mediation Training course in 2008, Mr. Lemon's practice has increasingly concentrated on both civil and domestic mediation, and he has served as a frequent Assistant Trainer in subsequent courses.

In addition to pursuing his law practice, Mr. Lemon attended Grace Seminary in Winona Lake, Indiana from 2003-2005 and has been serving as the Senior Pastor of Oak Grove Community Church (Warsaw) since 2005.

Timothy O. Malloy,
The Law Offices of Timothy O. Malloy, LLC, Highland

Timothy O. Malloy, was born in Joliet, Illinois, September 2, 1953; admitted to the Bar in 1981. He currently practices primarily in the area of Workers' Compensation and Personal Injury.

EDUCATION
Marquette University 1975; Northern Illinois University School of Law, Juris Doctorate 1980.

ASSOCIATIONS
Indiana State Bar, American Bar, Lake County Bar, and the Indiana Defense Lawyers Association. Mr. Malloy was appointed to the Judges and Lawyers Assistance Program by the Indiana Supreme Court in 2003. He is also a member of the Lake County Bar Association's Board of Managers. He is also an active member of the Knights of Columbus, third degree and is the President of the St. John Evangelists Mens Club, second term. Mr. Malloy is active in the Lake County, Indiana and State Bar Association where he has served as a member of several special committees.

COURTS ADMITTED INTO
All Courts in the State of Indiana, United States District Courts in Indiana, and the Seventh Circuit Court of Appeals.

CONTINUING LEGAL EDUCATION
Faculty member participating in numerous seminars.

Brandon G. Milster,
Klezmer Maudlin, P.C., Indianapolis

Brandon Milster has been selected as a 2021 Super Lawyer's Rising Star for worker's compensation attorneys in Indiana, making this his 7th straight year on this prestigious list! After spending over a decade dedicating his legal practice to helping Hoosier workers, Brandon joined Klezmer Maudlin in 2019. Born and raised in Lafayette, Brandon is a native Hoosier who began his legal career representing employers and insurance carriers before switching his focus to representing Indiana's injured workers. It is this unique background that allows Brandon to be well-versed from both sides on most any issue that presents itself in a claim for benefits. Brandon possesses a true passion for helping guide Hoosier workers through Indiana's complicated worker's compensation system.

Brandon is also active in the worker's compensation community in Indiana. He has volunteered his time with Kids' Chance at their annual outing the last two years. He has also presented to his peers at worker's compensation seminars in the areas of client relations and mediation. Both of these topics are key in helping resolve highly contested claims.

Brandon completed his undergraduate course work in Bloomington, Indiana at Indiana University and graduated from the Kelley School of Business. He proceeded to attend law school and graduated *cum laude* from the McKinney School of Law in 2008. While in law school Brandon was a member of Moot Court and competed in the ABA National Appellate Advocacy Competition in New York City.

When Brandon is not working in the office, he enjoys his personal time with his loving family and two stubborn dogs.

Curtis P. Moutardier
Boehl Stopher & Graves, LLP, New Albany

Curt Moutardier is a lawyer, mediator, and singer. As a lawyer, Curt is a partner with Boehl Stopher & Graves in New Albany, Indiana, with a practice focusing on civil litigation and workers' compensation. As a mediator, Curt is a member of the Freedom Mediation Group, where he and fellow founding members, Mike Ooley and Alex Ooley, serve as registered mediators for both civil and domestic matters. As a singer, Curt is the front man for the rock and roll band Stone Carnival, with a focus on classic rock covers, including all of your favorite songs.

Curt graduated from Indiana University Bloomington School of Law in 2002 magna cum laude. He then moved to New Albany, Indiana, and has practiced law with Boehl Stopher & Graves for over 15 years, successfully handling countless workers compensation and civil lawsuits.

E. Michael Ooley
Boehl Stopher & Graves, LLP, New Albany

Mike Ooley has been a practicing attorney for 25 years, and successfully represented numerous corporations, businesses and individuals in a wide variety of matters. His current practice is focused on workers' compensation and firearms law.Mike is also a registered civil and family mediator. As a mediator, Mike is a member of the Freedom Mediation Group, where he and fellow founding members, Curt Moutardier and Alex Ooley, serve as registered mediators for both civil and domestic matters. Before becoming an attorney, Mike served as a U.S. Army Field Artillery Officer. Mike is an active National Rifle Association certified instructor, Second Amendment Foundation Training Division certified instructor, and has completed a wide array of civilian training in the firearm and self-defense area. Mike's favorite course to teach is one that he developed jointly with his son Alex, who is also an attorney, entitled "Legal Concepts for Concealed Carry and Self Defense with a Firearm." In addition, Mike enjoys spending time outdoors and is involved in a land clearing business with his wife of 33 years and his oldest son, Ryan.

Michael A. Schoening
Nation Schoening Moll, PC, Fortville

Michael A. Schoening, Partner, born Burlingame, California. Admitted to Indiana and U. S. District Court, Northern and Southern District of Indiana, 1982; admitted to Illinois Bar, 1983; U. S. Court of Appeals, 7th Circuit, 1987; and U. S. Supreme Court, 1989. Education: Illinois Wesleyan University (B.A, 1979); John Marshall Law School (J.D., 1982). Law Clerk, The Honorable George B. Hoffman, Court of Appeals of Indiana, 1982-1984. Deputy Attorney General, Indiana, 1986-1992; Member: American Bar Association; Indiana Workers Compensation Institute, Defense Trial Counsel of Indiana, Workers Compensation Section. Practice Areas: Workers Compensation Insurance Defense, Civil Litigation and Administrative Law. BV rated.

Sally A. Voland
Dugan & Voland LLC, Indianapolis

Sally A. Voland is a founding partner of the Indianapolis firm of Dugan & Voland LLC. She concentrates her practice in employment law and represents private and public sector management in all aspects of worker's compensation matters.

Ms. Voland received her J.D. degree, summa cum laude, from Indiana University School of Law and is a member of all Indiana District Court Bars and the Indiana State Bar. Ms. Voland is a fellow of the College of Workers' Compensation Lawyers. She serves on the Board of Kids' Chance of Indiana and is past chair and current member of the worker's compensation section of the Defense Trial Counsel of Indiana. Ms. Voland is a member of the Indiana Worker's Compensation Institute, the Claims and Litigation Management Alliance, and the Indiana State Bar Association. She is a guest lecturer on employment topics and contributes to the SVDP Legal Clinic.

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Section One

Federal Employer Liability Act
vs.
Indiana Worker's Compensation Act

Curtis P. Moutardier
Boehl Stopher & Graves, LLP
New Albany, Indiana

Michael Ooley
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Section One

Federal Employer Liability Act vs.
Indiana Worker's Compensation Act…….. Curtis P. Moutardier
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PowerPoint Presentation

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Curt Moutardier & Mike Ooley

Federal Employer Liability Act
vs.
Indiana Worker's Compensation Act

History and Context

The industrial revolution advanced and production became the business of capital rather than the family unit, farmer, or artisan, injured workers and their families were often devastated by work-related injuries. Production became much more reliant on machines. Workers often had no guaranteed means of recovery for medical expenses and lost wages resulting from work-related injuries.

Federal Employers Liability Act (FELA)

The Federal Employers Liability Act (FELA) was enacted in 1908 to protect and compensate railroad workers injured on the job (why is that significant- because Casey Jones was killed 8 years too soon for his family to enjoy the Act)

“Casey” Jones

Jones was a locomotive engineer for the Illinois Central Railroad, based in Memphis, Tennessee, and Jackson, Mississippi. He was noted for his exceptionally punctual schedules, which sometimes required a degree of risk, though this may or may not have been a factor on his fatal last journey. However, there is some disagreement about the sequence of events on that April night in 1900.

“Casey” Jones

He was due to run passenger service from Memphis to Canton, Mississippi, departing 11:35pm. Owing to engineer absence, he had to take over another service through the day, which may have deprived him of sleep. He eventually departed 75 minutes late, but was confident of making up the time, with the powerful ten-wheeler Engine No. 382, known as "Cannonball.”

“Casey” Jones

Approaching Vaughan at high speed, he was unaware that three trains were occupying the station, one of them broken down and on his line. Some claim that he ignored a flagman signaling to him, though this person may have been out of sight around a bend or obscured by fog. However, all agreed that Jones managed to avert a potentially disastrous crash through his exceptional skill at slowing the engine and saving the lives of the passengers at the cost of his own. For this, he was immortalized in a classic Grateful Dead song entitled “Casey Jones.”

Fela Passed in 1908
What else was going on?

- William Howard Taft was elected President (what was his involvement in the Act? Scholars have debated)

- 1908 began with the first ever ball drop in Times Square, it was the year Wilbur Wright piloted a two-and-a-half-hour flight - the longest ever made at that time

- It was the year Admiral Robert Pearcy began his conquest of the North Pole

Fela Passed in 1908
What else was going on?

It was the year the Model-T went into production at Henry Ford's plant in Bedford, IN

Indiana Worker's Compensation Act passed in 1915

- Workers' compensation systems developed as a compromise. For the most part (affirmative defenses), a fault-based system was replaced with a system which approaches a no-fault insurance system and is designed to provide a more expedient administrative remedy. For instance, the common law defenses to liability are unavailable to the employer, while remedies for pain and suffering and consequential damages are unavailable to the employee. In a nutshell, the system started in Indiana in 1915 and was designed to give employees certain recovery of limited benefits in exchange for an exclusive remedy and limited liability for employers and a more predictable basis to integrate the cost of employee injuries into the products and services provided by businesses.

Indiana Comp Act Passed in 1915
What else was going on?

- Woodrow Wilson was President of the United States - Scholars have debated the level of his involvement, if any, in passing the Indiana Act.

- Rocky Mountain National Park was established

- Babe Ruth hits his first Home Run

- The movie “Inspiration” is released – the first mainstream movie in which a leading actress (Audrey Munson) appears nude.

Indiana Comp Act Passed in 1915
What else was going on?

The year that both Frank Sinatra and Muddy Waters were born.

FELA

45 U.S. Code § 51 - Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

FELA

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment . . .

FELA

- **45 U.S. Code § 53. Contributory negligence; diminution of damages.** In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

FELA

- *Betoney v. Union Pacific Railroad Company*, 701 P2d 62 (Col. Ct. App. 1984)

- FELA allows for a reduction of damages through proof of contributory negligence on the part of the employee.

- Intoxication bears on the issue of contributory negligence and would, thus, potentially affect the amount of damages recovered. However, intoxication is not a complete defense in a FELA action and, standing alone, does not create a jury question on whether a Plaintiff was within the scope of his employment.

FELA

- **45 U.S. Code § 54 - Assumption of risks of employment.** In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

FELA

What statutes could be violated??

FELA

- The Safety Appliance Act requires that railroad cars are equipped with certain protections for safety. Here are a few examples:

- The braking system of a train must be free of defects, The engineer should be able to control the speed of the train using the train’s air brakes. Car couplers must couple automatically upon impact and without employees entering the space between the cars.

FELA

- The Boiler Inspection Act applies specifically to the locomotive. It requires that all parts of a locomotive be in proper working condition and safe for the workers using them.

- It prohibits the presence of oil, grease, sand or any other “foreign object” on the locomotive which poses risk of injury to the workers using them.

FELA

- **45 U.S. Code § 55. Contract, rule, regulation, or device exempting from liability; set-off.** Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

FELA

- **45 U.S. Code § 56 - Actions; limitation; concurrent jurisdiction of courts.**No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued. Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

FELA

FELA actions brought in state court may not be removed to federal court. 28 U.S.C. § 1445(a) (2006). The procedural rules of a state court tort action will apply when a FELA action is brought in that state's courts. *Harding v. Consolidated Rail Corp.*, 620 A.2d 1185, 1188 (Pa.Super. 1993). But even in state courts, the *substantive* federal law will control the rights and obligations of the parties to a FELA action. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

FELA

- **45 U.S. Code § 59. Survival of right of action of person injured.** Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

FELA

Federal cases have held that the causation standard for FELA claims is lower than that of common law negligence claims. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506-507 (1957); *Accord*, *Ely v. Reading Co.*, 424 F.2d 758, 726 (C.A.3 1970); *but see Norfolk Southern Ry. Co. v. Sorrell*, 549 U.S. 158, 173 (2007), (Souter, J, concurring) (Souter, J., argues that *Rogers* did not alter the common law standard of causation, joined by Scalia, J. and Alito, J.); *see also McBride v. CSX Transp., Inc.*, 598 F.3d 388 (C.A.7 Ill. 2010) (citing *Rogers* in holding that the FELA alters the standard of causation; discusses *Rogers* and *Sorrell*), *aff'd, CSX Transp., Inc. v. McBride*, 131 S.Ct. 2630 (June 23, 2011) (opinion by Ginsburg, J.; Thomas, J., joining in part; Roberts, C.J., Scalia, J., Kennedy, J., and Alito, J., dissenting).

FELA

- *CSX Transportation v. McBride,* 564 U.S. 685 (2011)

- McBride was a locomotive engineer who filed suit under FELA after sustaining a debilitating hand injury.

- At issue was whether the causation instruction endorsed by the 7th Circuit was proper in FELA cases where that instruction did not include the term “proximate cause,” but did tell the jury Defendant’s negligence must “play a part no matter how small in bringing about the Plaintiff’s injury.”

FELA

- Justice Ginsberg wrote the Court's opinion and determined that in accordance with the text and purpose of the act; the Court's decision in *Rogers v. Missouri Pacific R. Co.*; and the uniform view of Federal Appellate Courts, that FELA did not incorporate "proximate cause" standards developed in non-statutory common law tort actions.

- The Court held that the charge proper in FELA cases simply tracked the language Congress employed, informing juries that a Defendant railroad caused or contributed to a Plaintiff's injury if the railroad's negligence played any part in bringing about the injury.

FELA

- Unlike Worker's Compensation, the worker has the right to sue for damages in either a state or federal court.

- FELA awards are also generally much higher than those for Worker's Compensation claims.

- FELA applies comparative fault to the award.

FELA

Originally, railroad employers fought the adoption of the Railroad Worker's Compensation system, whereas railroad unions favored this system. Now, employers would prefer to replace FELA with Worker's Compensation, but labor unions argue to maintain FELA.

Questions

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Section Two

Suspension Of Benefits vs. The Termination of TTD / TPD

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Klezmer Maudlin, P.C.
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Section Two

Suspension Of Benefits vs.
The Termination of TTD / TPD…….…… Brandon G. Milster

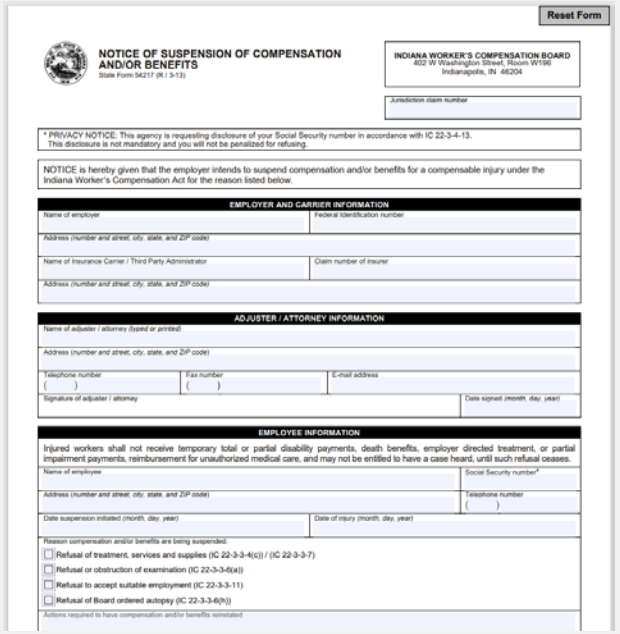
PowerPoint Presentation

SUSPENSION OF BENEFITS VS. THE TERMINATION OF TTD / TPD

Which, When, and How?

THE BASICS

- Indiana Worker's Compensation Board Forms
  - State Form 54217: Notice of Suspension of Compensation and/or Benefits
  - State Form 38911: Report of Temporary Total Disability/Temporary Partial Disability Termination



Reset Form

NOTICE OF SUSPENSION OF COMPENSATION AND/OR BENEFITS
State Form 54217 (R / 3-13)

INDIANA WORKER'S COMPENSATION BOARD
402 W Washington Street, Room W196
Indianapolis, IN 46204

Jurisdiction claim number

* PRIVACY NOTICE: This agency is requesting disclosure of your Social Security number in accordance with IC 22-3-4-13. This disclosure is not mandatory and you will not be penalized for refusing.

NOTICE is hereby given that the employer intends to suspend compensation and/or benefits for a compensable injury under the Indiana Worker's Compensation Act for the reason listed below.

EMPLOYER AND CARRIER INFORMATION

Name of employer | Federal identification number

Address (number and street, city, state, and ZIP code)

Name of Insurance Carrier / Third Party Administrator | Claim number of insurer

Address (number and street, city, state, and ZIP code)

ADJUSTER / ATTORNEY INFORMATION

Name of adjuster / attorney (typed or printed)

Address (number and street, city, state, and ZIP code)

Telephone number ( ) | Fax number ( ) | E-mail address

Signature of adjuster / attorney | Date signed (month, day, year)

EMPLOYEE INFORMATION

Injured workers shall not receive temporary total or partial disability payments, death benefits, employer directed treatment, or partial impairment payments, reimbursement for unauthorized medical care, and may not be entitled to have a case heard, until such refusal ceases.

Name of employee | Social Security number*

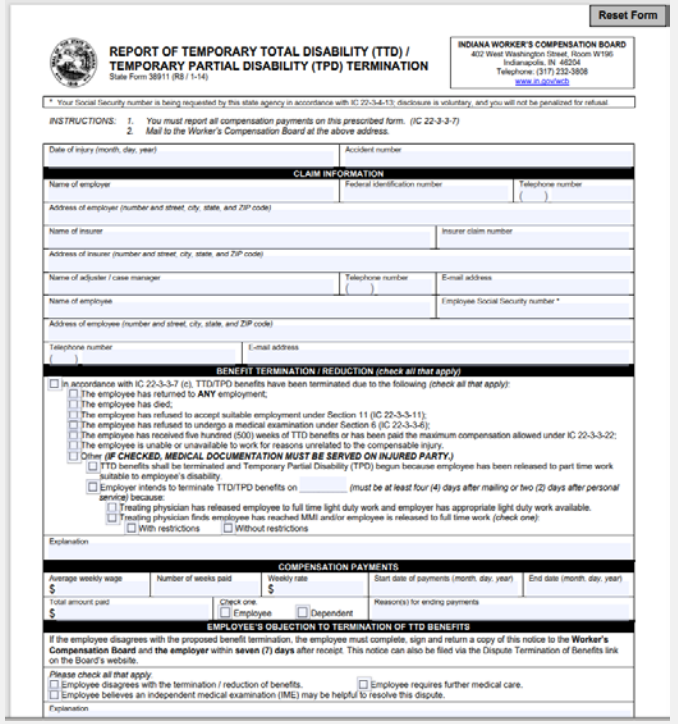
Address (number and street, city, state, and ZIP code) | Telephone number ( )

Date suspension initiated (month, day, year) | Date of injury (month, day, year)

Reason compensation and/or benefits are being suspended.

- ☐ Refusal of treatment, services and supplies (IC 22-3-3-4(c)) / (IC 22-3-3-7)
- ☐ Refusal or obstruction of examination (IC 22-3-3-6(a))
- ☐ Refusal to accept suitable employment (IC 22-3-3-11)
- ☐ Refusal of Board ordered autopsy (IC 22-3-3-6(h))

Actions required to have compensation and/or benefits reinstated



Reset Form

REPORT OF TEMPORARY TOTAL DISABILITY (TTD) / TEMPORARY PARTIAL DISABILITY (TPD) TERMINATION
State Form 38911 (R8 / 1-14)

INDIANA WORKER'S COMPENSATION BOARD
402 West Washington Street, Room W196
Indianapolis, IN 46204
Telephone: (317) 232-3808
www.in.gov/wcb

* Your Social Security number is being requested by this state agency in accordance with IC 22-3-4-13; disclosure is voluntary, and you will not be penalized for refusal.

INSTRUCTIONS: 1. You must report all compensation payments on this prescribed form. (IC 22-3-3-7)
2. Mail to the Worker's Compensation Board at the above address.

Date of injury (month, day, year) | Accident number

CLAIM INFORMATION

Name of employer | Federal identification number | Telephone number ( )

Address of employer (number and street, city, state, and ZIP code)

Name of insurer | Insurer claim number

Address of insurer (number and street, city, state, and ZIP code)

Name of adjuster / case manager | Telephone number ( ) | E-mail address

Name of employee | Employee Social Security number *

Address of employee (number and street, city, state, and ZIP code)

Telephone number ( ) | E-mail address

BENEFIT TERMINATION / REDUCTION (check all that apply)

☐ In accordance with IC 22-3-3-7 (c), TTD/TPD benefits have been terminated due to the following (check all that apply):
- ☐ The employee has returned to ANY employment;
- ☐ The employee has died;
- ☐ The employee has refused to accept suitable employment under Section 11 (IC 22-3-3-11);
- ☐ The employee has refused to undergo a medical examination under Section 6 (IC 22-3-3-6);
- ☐ The employee has received five hundred (500) weeks of TTD benefits or has been paid the maximum compensation allowed under IC 22-3-3-22;
- ☐ The employee is unable or unavailable to work for reasons unrelated to the compensable injury.
- ☐ Other (IF CHECKED, MEDICAL DOCUMENTATION MUST BE SERVED ON INJURED PARTY.)
  - ☐ TTD benefits shall be terminated and Temporary Partial Disability (TPD) begun because employee has been released to part time work suitable to employee's disability
  - ☐ Employer intends to terminate TTD/TPD benefits on _____ (must be at least four (4) days after mailing or two (2) days after personal service) because:
    - ☐ Treating physician has released employee to full time light duty work and employer has appropriate light duty work available.
    - ☐ Treating physician finds employee has reached MMI and/or employee is released to full time work (check one): ☐ With restrictions ☐ Without restrictions

Explanation

COMPENSATION PAYMENTS

Average weekly wage $ | Number of weeks paid | Weekly rate $ | Start date of payments (month, day, year) | End date (month, day, year)

Total amount paid $ | Check one. ☐ Employee ☐ Dependent | Reason(s) for ending payments

EMPLOYEE'S OBJECTION TO TERMINATION OF TTD BENEFITS

If the employee disagrees with the proposed benefit termination, the employee must complete, sign and return a copy of this notice to the **Worker's Compensation Board** and **the employer** within **seven (7) days** after receipt. This notice can also be filed via the Dispute Termination of Benefits link on the Board's website.

Please check all that apply:
- ☐ Employee disagrees with the termination / reduction of benefits.
- ☐ Employee requires further medical care.
- ☐ Employee believes an independent medical examination (IME) may be helpful to resolve this dispute.

Explanation

WHEN IS A SUSPENSION OF BENEFITS APPROPRIATE?

- A Refusal of treatment, services, and supplies (IC 22-3-3-4(c))/ (IC 22-3-3-7)
  - Often happens with missed medical appts/PT appts/rescheduling of appts. What constitutes a refusal?
- Refusal or obstruction of examination (IC 22-3-3-6(a))
  - Often takes place when Defendant sets a second opinion or "IME."
- Refusal to accept suitable employment (IC-22-3-3-11)
  - What qualifies as suitable employment? What is required to constitute a refusal?
- Refusal of Board ordered autopsy (IC 22-3-3-6(h))

WHEN IS A REPORT OF TTD/TPD TERMINATION APPROPRIATE?

- IC 22-3-3-7(c)
  - The employee has returned to ANY employment;
  - The employee has died;
  - The employee has refused to accept suitable employment;
  - The employee has refused to undergo a medical examination;
  - The employee has received 500 weeks of TTD or has been paid maximum compensation; or
  - The employee is unable or unavailable to work for reasons unrelated to the compensable injury.
  - OTHER…

WHEN IS A TERMINATION OF BENEFITS APPROPRIATE?

- OTHER
  - TTD benefits shall be terminated and TPD begun because employee has been released to part time work suitable to employee's disability.
  - Employer intends to terminate TTD/TPD on _____ (must be at least four (4) days after mailing or two (2) days after personal service) because:
    - 1) Treating physician has released employee to full time light duty work and employer has appropriate light duty work available, OR
    - 2) Treating physician finds employee has reached MMI and/or employee is released to full time work (check one)
      - With restrictions or Without restrictions.

THE PROBLEM: TO MUCH OVERLAP?

Suspension:	Termination:
• A Refusal of treatment, services, and supplies; • Refusal or obstruction of examination; or • Refusal to accept suitable employment	• The employee has refused to accept suitable employment • The employee has refused to undergo a medical examination • The employee is unable or unavailable to work for reasons unrelated to the compensable injury

GUIDANCE FROM THE WCB

- Notice provided on WCBs website regarding which form to file:
- From 2013-2014
  - **Notice:** Please note that the Notice of Suspension of Compensation and/or Benefits - SF 54217 form has been revised to allow for the suspension of compensation as well as benefits. As a result, please refrain from utilizing the Report Of Temporary Total Disability (TTD)/Temporary Partial Disability (TPD) Termination/Reduction - SF 38911 to suspend a TTD/TPD agreement. The purpose of the 38911 is to terminate a TTD/TPD agreement whereas the 54217 should be used to suspend.
- Does that help?

WCB GUIDANCE (CONT)

- Date: December 13, 2019
- INWCB has posted the Indiana EDI Claims Release 3.1, Version 1.5 EDI Requirement Tables (Rev: 12-12-19, Effective: 03-23-20) that are immediately available for download at https://inwcbedi.info/. You will find the updated tables under the "EDI Requirements" links on the left-hand side of the page. The changes to each document are located in the "INWCB Change Log" at the beginning of each document.
- A few changes we would like to draw to your attention are as follows:
- **Event Table:**
- Notice of Suspension, State Form 54217 will no longer be required to be filed (by EDI or by paper) with the Board. Notice should be sent to the injured worker using the form found on our website https://forms.in.gov/Download.aspx?id=8218 but this form will not need to be sent to the Board. We encourage those carriers who issue State Form 54217 to retain a copy of the issued form for their records.

CASE LAW HELP

- Krause v. Indiana University, 866 N.E.2d 846, 847 (Ind Ct. App. 2007)
  - Lower back injury to Krause in June 1991, and the claim was accepted by IU.
  - Treatment between 1992 and 1994 with Dr. Trammel, who referred Krause to Dr. Gregori for pain management.
  - In July 1995, Dr. Gregori gave her a 24%WP PPI rating.
  - Ongoing pain management issues with a discontinuation of treatment by Dr. Gregori for violation of pain management contract in May of 1996. Dr. Gregori agreed to continue to treat and then several disagreement on pain medications ensued, as well as direct requests to WC for a new treating physician.
  - In June of 1998, Krause began treating with Dr. Wagner as well as her family physician for her injury. Neither was authorized by WC.

- Krause Continued:
  - PPI settlement paid in April of 2002;
  - May 2002, 500 weeks of TTD would soon be paid.
  - SIF involvement following 500 weeks.
  - Issue of unpaid medical expenses.
    - SHM found that medical with Gregori reasonable and ok. Krause did not have right to seek medical on own. IUPUI not obligated to pay for anything after Gregori.
    - Full Board adopted some of SHM findings but said that IU is not relieved of obligation to provide further medical care; however, Krause is obligated to comply with IU's provider's treatment and she is not entitled to direct her own care.

- More Krause
  - COA said: in looking at IC 22-3-3-4(c): *The employee must be served with a notice setting forth the consequences of the refusal under this section. The notice must be in a form prescribed by the worker's compensation board.*
  - IU failed to provide the required prescribed statutory notice to Krause. Therefore, the Board Erred when it failed to find that IU was required to provide medical services to Krause after July of 1998.
- What we know:
  - A notice of suspension must be served if Defendant is to make an argument of Plaintiff refused medical services, supplies, etc.

WHEN DOES A NOTICE OF SUSPENSION BECOME A TERMINATION?

- Easy determinations on Termination:
  - Employee returned to work.
  - TTD is terminated at MMI/return to work without restrictions, or with a return to work with restrictions.
  - Employee has died.
- Easy determinations on Notice of Suspension:
  - Are there any?

HYPOTHETICAL ONE

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith sets Plaintiff's next appt for 4 weeks out, which would be after 4 weeks of PT, 3 times per week. PT is authorized one week after it is ordered and Plaintiff attends the first 3 sessions, misses two sessions due to having cold-like symptoms, and completes the remaining sessions before his return to Dr. Smith. Prior to Plaintiff's return to Dr. Smith, Dr. Smith bumps out Plaintiff's scheduled appt due to PT not being completed as ordered.
  - Should benefits be suspended? Has Plaintiff REFUSED medical care?
  - I think the answer most would come to - no refusal.
  - Does missing PT qualify as refusal of medical care? Has Plaintiff missed medical services?

HYPOTHETICAL TWO

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith recommends low back surgery and continuing PT. Surgery is authorized by Defendant, and prior to surgery taking place, Dr. Smith tests Plaintiff's A1C levels. The A1C levels come back a little high, and Dr. Smith wants to hold off on surgery until such time as the A1C levels go down a point or two. Plaintiff continues with authorized PT in the interim and immediately goes to his PCP for treatment to lower his A1Cs. Plaintiff starts a medical regiment that lowers his A1Cs in about 30-45 days and is adamant that he never knew he had elevated A1Cs and that it had never been a prior concern. Defendant issues the 38911the day surgery was delayed and refuses to reinstate benefits until such time as surgery takes place.
  - Was the 38911 proper? Was medical care or services ever refused?
  - Was Plaintiff ever unavailable for treatment? PT continued? Does that matter?
  - Does no history of A1C/diabetic issues matter?
  - Compliance with quickly lowering A1Cs matter?
  - What if the A1Cs would not come down in 6 months? Never? PT ends? Treatment stalls?

HYPOTHETICAL THREE

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith takes Plaintiff completely off work for 4 weeks. At the follow-up appt, Dr. Smith allows Plaintiff to return to light duty work. The restrictions change to light duty work on December 1st, a Thursday. On Friday, December 2nd, a light duty offer is sent directly to Plaintiff's attorney at 3:30 pm. The light duty offer is to start Monday morning, December 5th at 8 am. Plaintiff cannot start Monday morning and says that Plaintiff has to arrange for childcare before returning. Plaintiff offers to start Monday the 12th. Defendant suspends benefits December the 5th. Plaintiff is fired on December the 5th.
  - Was it proper to suspend benefits?
  - Does Defendant have to restart TTD due to the job termination?
  - What if Plaintiff rejected light duty because Plaintiff did not believe he/she could do it?
  - What if Plaintiff attempts to accept the job 2 weeks later, 2 months later (after obtaining counsel), a year later?
    - When did the refusal stop?

HYPOTHETICAL FOUR

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith recommends surgery. Prior to surgery, Plaintiff is asked to pass a drug screen. It comes back positive for marijuana, and Dr. Smith cancels surgery. Defendant issues the 38911 terminating TTD benefits. Dr. Smith states that she will not operate until such time as Plaintiff passes a drug screen.
  - Is 38911 proper? Should it have been a NOS?
  - What if living in a state where marijuana is legal but treating in Indiana?
  - What if it was heroine? What if it was non-prescribed opiates?
  - What if the Plaintiff stops immediately, and passes a drug screen quickly, but Dr. Smith will not allow surgery until 3 months clear/6 months clear?

HYPOTHETICAL FIVE

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith sets a follow-up appointment for 4 weeks out after PT takes place for 3 weeks. Plaintiff fails to attend PT, fails to attend the follow-up appt, and Defendant sends Plaintiff the Notice of Suspension to the address that Defendant has on file. Plaintiff is unrepresented. Plaintiff calls the adjuster 4 months later and asks why she has not been sent back to the doctor. Defendant states that Plaintiff's benefits were suspended and explains the process. Plaintiff says she had moved, and that is why she missed the PT and the follow-up doctor's appt. Defendant did not send the NOS certified. Defendant has no proof that Plaintiff ever received the NOS. The NOS is no longer filed with the WCB. Plaintiff has since had surgery that was reasonable and necessary and is seeking bill payment by WC. Plaintiff will remain off work from her surgeon, who does take workers compensation benefits and does have workers compensation patients from this carrier, miraculously.
  - Can Defendant rely on its' NOS?
  - Can Defendant be held responsible for the bill payment in the interim period?
  - Can Defendant be forced to direct care with Plaintiff's surgeon going forward?
  - Would it have mattered if Plaintiff had been represented?

HYPOTHETICAL SIX

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith recommends surgery. Plaintiff wishes to have a few weeks to think over whether surgery is in her best interests, and she explains that to Dr. Smith, who says that is reasonable. After one week, Defendant reaches out to Plaintiff's counsel and asks about surgery getting scheduled. Counsel states that the client is weighing her options and should know in a week or so. Defendant suspends benefits two days later. Plaintiff attends a scheduled follow-up (4 weeks after surgical recommendation), and Dr. Smith has another discussion with Plaintiff about surgery. Plaintiff opts to not have surgery, and Dr. Smith states that there is nothing else that he can offer and places Plaintiff at MMI and orders an FCE. Defendant issues a 38911. Plaintiff has not returned to work, and Plaintiff timely requests a Board IME. Defendant objects stating that benefits were suspended and that Plaintiff has not exhausted the recommended care by Dr. Smith.
  - Was it proper to issue the NOS before the return to Dr. Smith? Before 2 weeks after the surgical recommendation?
  - Was the 38911 necessary or properly filed?
  - When does a NOS turn into a 38911?
  - Should Plaintiff be allowed to proceed with the IME over Defendant's objection?

HYPOTHETICAL SEVEN

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith recommend light duty and a course of PT. No light duty can be accommodated, and TTD is paid. After a short course of PT and no resolution of symptoms, Dr. Smith orders an FCE. The FCE takes place and full duty/MMI release is given by Dr. Smith due to an inconsistent FCE. Plaintiff calls counsel and retains them. Within 2 days of the MMI release counsel for Plaintiff contacts the adjuster via email and requests a copy of any recent medical, confirmation of the status of benefits, and requests any 38911 that may have just been issued. No response is provided to counsel. After several follow-up attempts to garner a response, Plaintiff files the AAC with the WCB, and 30 days later defense counsel appears. Defense counsel fails to provide Plaintiff's counsel with the 38911 for another 45 days, while the claim is being reviewed, despite a request for the 38911 the day counsel appeared. Turns out the 38911 was filed the day after Plaintiff was found to be at MMI. Plaintiff's counsel requests an IME the day they receive the 38911. Defense counsel cannot obtain a file-marked copy or prove it was ever served on Plaintiff but believes it was.
  - Did Plaintiff timely request an IME?
  - Does Defendant have a duty to timely serve the 38911 on Plaintiff and/or Plaintiff's counsel?
  - Does this give rise to a lack of diligence motion? What if Plaintiff is found to need surgery upon completion of the IME?

HYPOTHETICAL EIGHT

- Defendant accepts Plaintiff's injury claim as compensable. Treatment is authorized with Dr. Smith, and Dr. Smith recommends surgery. After Dr. Smith recommends surgery, Defendant seeks an "IME" with another doctor. Doctor number two recommends surgery. In the meantime, Defendant conducts surveillance. Based on this footage, Defendant issues a Notice of Suspension of benefits based on Plaintiff purported performing an activity that is outside Plaintiff restrictions. TTD is stopped and no further medical care is provided.
  - Is the Notice of Suspension proper? Based on what?
  - Would it matter if the Dr. reviewed the surveillance footage and said surgery is no longer necessary?
  - Would it matter if the Dr. placed Plaintiff at MMI after the surveillance footage was reviewed and a 38911 was issued?

Section Three

The Application of Indiana's Evidentiary / Discovery Rules Within the Practice of Indiana Worker's Compensation

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Fortville, Indiana

Section Three

The Application of Indiana's Evidentiary / Discovery Rules Within the Practice of Indiana Worker's Compensation…....Michael A. Schoening

The Application of Indiana's Evidentiary / Discovery Rules Within the Practice of Indiana Worker's Compensation

By: Michael A. Schoening

The Worker's Compensation Board only really has one statute specifically pertaining to evidence to be introduced at hearing. That statute is Indiana Code §22-3-3-6. The statute is limited to medical records by its specific language and sets the standards for admissibility as follows:

> (1) The history of the injury, or claimed injury, as given by the patient.
>
> (2) Your diagnosis concerning the patient's physical or mental condition.
>
> (3) Your opinion concerning the causal relationship, if any, between the injury and the patient's physical or mental condition, including the reasons for your opinion.
>
> (4) Your opinion concerning whether the injury or claimed injury resulted in a disability or impairment and, if so, your opinion concerning the extent of the disability or impairment and the reasons for the opinion.
>
> (5) Your original signature.

Narrative reports must be exchanged at least thirty (30) days prior to hearing. Any objection to the reports must be filed at least twenty (20) days prior to the date of hearing. The parties can agree to rules pertaining to exhibits to be introduced. A Pre-Trial Order can be entered with deadlines for exchanging exhibits, listing exhibits, listing witnesses, etc. It is not clear whether entering into such an order would supersede the requirements of Indiana Code §22-3-3-6. An argument could be made that a scheduling order, even if entered as a Pre-Trial

Order, simply establishes dates for exchange of exhibits or filing objections and the requirements of Indiana Code §22-3-3-6 should still apply to the admissibility of narrative reports as exhibits.

There is an argument to be made that one cannot avoid the time limits of this rule by attempting to depose a doctor witness inside of the thirty-day requirement. Failure to object to a medical report as failing to meet the standards of this statute waives any further objection as to the adequacy of the statement. The question then arises, are there other ways to introduce medical records. Are there any requirements that pertain to non-medical records introduced as exhibits at hearing?

> 631 IAC 1-1-3. Rules of practice in proceedings
>
> Sec. 3. Except as provided below, the board will not be bound by any technical rules of practice in conducting hearings, but will conduct hearings and make investigations in reference to the questions at issue in a manner as in its judgment is best adapted to ascertain and determine expeditiously and accurately the substantial rights of the parties and to carry out justly the spirit of the Indiana worker's compensation act (IC 22-3-2 through IC 22-3-6) and the Indiana worker's occupational diseases act (IC 22-3-7). However, the board incorporates by reference the provisions of Trial Rules 26 through 37, as amended, of the Indiana Rules of Trial Procedure, into this rule.

631 IAC 1-1-3 specifically states the Board will not be bound by any technical rules of practice in conducting hearings. That would suggest the Board could ignore standard evidentiary rules applicable in trial practice. Pursuant to 631 IAC 1-1-3, the Board has specifically incorporated the trial rules 26-37 which pertain to discovery under their authority to conduct hearings.

> Rule 26. General provisions governing discovery.
> (A) *Discovery methods*. Parties may obtain discovery by one or more of the following methods:
> (1) depositions upon oral examination or written questions;
> (2) written interrogatories;

(3) production of documents, electronically stored information, or things or permission to enter upon land or other property, or inspection and other purposes;
(4) physical and mental examination;
(5) requests for admission.
Unless the court orders otherwise under subdivision (C) of this rule, the frequency of use of these methods is not limited.

Trial Rule 26 pertains to provisions generally admissible for discovery, including depositions, written interrogatories, request for production, and request for admission.

Rule 30. Depositions upon oral examination
(A) *When depositions may be taken.* After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of twenty [20] days after service of summons and complaint upon any defendant except that leave is not required:
(1) If a defendant has served a notice of taking deposition or otherwise sought discovery; or
(2) If special notice is given as provided in subdivision (B)(2) of this rule.
The attendance of witnesses may be compelled by the use of a subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.
(B) Notice of examination: general requirements – Special notice – Non-stenographic recording – Production of documents and things – Deposition of organization.
(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced thereunder shall be attached to or included in the notice.
(2) Leave of court, when required by subdivision (A) of this rule, is not required for the taking of a deposition by plaintiff if the notice:
(a) States that the person to be examined is about to go out of the state or will be unavailable for examination unless his deposition is taken before expiration of the twenty-day period; and

(b) Sets forth facts to support the statement.
The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief, the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.
If any party shows that when he was served with notice under this subdivision (B)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.
(3) The court may for cause shown enlarge or shorten the time for taking the deposition.
(4) If a party taking a deposition wishes to have the testimony recorded other than in a manner provided in Rule 74, the notice shall specify the manner of recording and preserving the deposition. The court may require stenographic taking or make any other order to assure that the recoded testimony will be accurate and trustworthy.
(5) The notice to a deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition.
(6) A party may in his notice name as the deponent an organization, including without limitation a governmental organization, or a partnership and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, executive officers, or other persons duly authorized and consenting to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. This subdivision (B)(6) does not preclude taking a deposition by any other procedure authorized in these rules.
(C) *Examination and cross-examination – Record of examination – Oath – Objections*. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(B). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means designated in accordance with subdivision (B)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.
All objections made at the time of examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. When there is an objection to a question, the

objection and reason therefor shall be noted, and the question shall be answered unless the attorney instructs the deponent not to answer, or the deponent refuses to answer, in this case either party may have the question certified by the Reporter, and the question with the objections thereto when so certified shall be delivered to the party requesting the certification who may then proceed under Rule 37(A). In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Rule 27 and Rule 30 lay the general ground rules for the taking of depositions most commonly taken advantage of.

Rule 31. Deposition of witnesses upon written questions.
(A) *Serving questions – Notice*. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:
(1) The name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; and
(2) The name or descriptive title and address of the officer before whom the deposition is to be taken.
A deposition upon written questions may be taken of an organization, including a governmental organization, or a partnership in accordance with the provisions of Rule 30(B)(6). Within twenty [20] days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten [10] days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten [10] days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

Rule 33. Interrogatories to parties.
(A) Availability – Procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party

> served or, if the party served is an organization including a governmental organization, or a partnership, by an officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of the court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

The requirements pertaining to the admissibility of depositions are set out in Rule 32.

Rule 33 outlines the parameters of interrogatories.

> Rule 34. Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes.
> (A) *Scope*. Any party may serve on any other party a request:
> (1) to produce and permit the party making the request, or someone acting on the requester's behalf, to inspect and copy any designated documents or electronically stored information (including, without limitations, writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations from which information can be obtained or translated, if necessary, by the respondent into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(B) and which are in the possession, custody or control of the party upon whom the request is served; or
> (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(B).
> (B) *Procedure*. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaints upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The quest may specify the form or forms in which electronically stored information is to be produced. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Service is dispensed with if the whereabouts of the parties is unknown.
> The party upon whom the request is served shall serve a written response within a period designated in the request, not less than thirty [30] days after the service thereof or within such shorter or

longer time as the court may allow. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless it is objected to, including an objection to the requested form or forms for producing electronically stored information, stating in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(A) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders, a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

If a request for electronically stored information does not specify the form or forms of production, a responding party must product the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.

A party need not product the same electronically stored information in more than one form.

(C) *Application to non-parties*:

(1) A witness or person other than a party may be requested to produce or permit the matters allowed by subsection (A) of this rule. Such request shall be served upon other parties and included in or with a subpoena served upon such witness or person.

(2) Neither a request nor subpoena to produce or permit as permitted by this rule shall be served upon a non-party until at least fifteen (15) days after the date on which the party intending to serve such request or subpoena serves a copy of the proposed request and subpoena on all other parties. Provided, however, that if such request or subpoena relates to a matter set for hearing within such fifteen (15) day period or arises out of a *bona fide* emergency, such request or subpoena may be served upon a non-party one (1) day after receipt of the proposed request or subpoena by all other parties.

Rule 34 the use of request for production. Rule 35 physical examination of persons which should or could dovetail with Indiana Code §22-3-3-6.

Rule 36. Requests for admission.

(A) *Request for admission*. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny or that the inquiry would be unreasonably burdensome. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the r4equirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion.

(B) *Effect of admission*. Any matter admitted under this rule is conclusively established unless the court on motion permits

> withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

Rule 36 outlines the rules pertaining to request for admission and Rule 37 sets out sanctions for failing to cooperate in discovery.

While the Board has declared, pursuant to 631 IAC 1-1-3, they are not bound by technical rules, their adoption of the specific trial rules pertaining to discovery suggest those rules can be cited and argued as a basis for certain actions pertaining to hearing preparation and evidence presentation. It has long been the policy of the Board to encourage parties to exchange evidence informally rather than pursue formal discovery. However, there are occasions when counsel may reasonably conclude they are ethically obligated to force compliance with the formal rules of discovery and evidence in preparation for or at hearing. The adoption of these discovery rules by the Board formally puts parties on notice the rules can be used both offensively and defensively where necessary. This allows for formal discovery related motion practice leading up to and during hearing.

RULES OF EVIDENCE

> RULE 201. Judicial Notice
> (a) **Kinds of Facts**. A court may take judicial notice of a fact. A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

> (b) **Kinds of Laws**. A court may take judicial notice of law. Law includes (1) the decisional, constitutional, and public statutory law, (2) rules of court, (3) published regulations of governmental agencies, (4) codified ordinances of municipalities, and (5) laws of other governmental subdivisions of the United States or of any state, territory or other jurisdiction of the United States.
> (c) **When Discretionary**. A court may take judicial notice, whether requested or not.
> (d) **When Mandatory**. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> (e) **Opportunity to be Heard**. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
> (f) **Time of Taking Notice**. Judicial notice may be taken at any stage of the proceeding.
> (g) **Instructing the Jury**. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 201 of the Indiana Rules of Evidence provides for judicial notice. Judicial notice is limited to evidence that is either generally known and credible or capable of accurate and ready determination as to its accuracy and credibility. The Board specifically has indicated, pursuant to 631 IAC, it may take judicial notice of its prior findings or of materials filed with the Board under its looser rules of procedure and under rule 201, as those materials filed with the Board should be capable of determination of their accuracy and credibility.

> RULE 609. Impeachment by Evidence of Conviction of Crime
> (a) **General Rule**. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.
> (b) **Time Limit**. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the

> confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Credibility of witnesses can be impeached by evidence of conviction of a crime. This rule is limited to crimes which bear upon credibility. Those crimes which maybe used for impeachment are specifically listed under Rule 609 and include murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement, or perjury, as well as a crime involving dishonestly or false statement, such as perjury. Evidence of a conviction for any of these crimes is not admissible if more than 10 years has passed since the date of conviction. Proof of criminal conviction should be made by submission of an official record which should be submitted as a certified exhibit as an official record or business record under the exceptions to be discussed subsequently. This obviously requires advanced preparation to obtain the record in a form that can be admitted and would likely be introduced during the cross examination of the witness whose credibility is to be impeached.

> RULE 612. Writing or Object Used to Refresh Memory.
> (a) **While Testifying**. If, while testifying, a witness uses a writing or object to refresh the witness's memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.
> (b) **Before Testifying**. If, before testifying, a witness uses a writing or object to refresh the witness's memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or depositions in which the witness is testifying.

Witnesses often cannot recall specific dates, times, events, or statements. They may testify to a general knowledge of a set of facts. Rule 612 allows for the use of a writing or other

object to refresh the witness' memory. If this process were to be followed by the book, one would ask the witness if they had previously prepared or seen a document or thing which would help them recall the facts to which they were being asked to testify. If they stated yes, they would then be asked if it would help them refresh their memory by looking at that object. If they said yes, the object would be provided and then removed from the witness' possession and the question re-asked.

Often witnesses are allowed to review notes, records, or other materials while they testify. The parties often request permission to allow a witness to review those materials either during testimony in deposition or hearing. However, one should be prepared to use this rule to refresh the memory of a witness should the parties agree or a party request and be granted a limitation on witnesses requiring them to testify from memory without reference to notes, charts or exhibits.

> RULE 613. Prior Statements of Witnesses
> (a) **Examining Witness Concerning Prior Statement**. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
> (b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness**. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).

Rule 613 provides for the use of prior statements of witnesses. This rule applies to parties as witnesses as well. This would include statements made by parties in prior hearings. The witness could be cross examined or their memory refreshed by reference to a written copy of that recorded statement from a prior hearing or proceeding.

For various reasons, whether impeachment or to refresh recollection, the statement to be used to challenge a witness' testimony at hearing should be present and available. In order to be admissible as an exhibit, the statement should be obtained in a manner which complies with one of the exceptions to hearsay discussed subsequently. It would be difficult to effectively cross-examine a witness and impeach their current testimony by use of a prior statement unless the prior statement was in a form that was admissible as evidence for the judge to compare to the witness' current testimony and determine whether or not the statements were contradictory.

> RULE 615. Separation of Witnesses.
> At the request of a party, the court shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses, and it may make the order on its own motion. This rule does not authorize the exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Rule 615 provides for separation of witnesses. Either party is entitled to have one representative present during all testimony. Other witnesses would be removed from the hearing room during the course of other parties' testimony. All witnesses should be directed not to discuss their testimony or any other person's testimony with any other witness or party.

A separation of witnesses can be used at hearing or deposition. A separation of witnesses is often not necessary or productive. However, where there are questions about facts, especially those regarding the facts surrounding an accident or injury, a separation of witnesses may be prudent. Obviously, if the effort is to obtain independent testimony about disputed facts regarding the existence of a particular event or events, a separation of witnesses prevents witnesses from comparing their recollection to testimony they hear before they present their testimony. The process can be used in hearing and deposition.

> RULE 701. Opinion Testimony by Lay Witnesses
> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Rule 701 allows for opinion testimony by lay witnesses. There is case law which allows claimants to testify about their perceived disability. Obviously, those witnesses' testimony would be subject to challenge as to their credibility and understanding of the precise nature and components of the facts or opinions they are providing testimony to support.

> RULE 702. Testimony by Experts
> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.
> (b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.

Rule 702 provides the requirement that testimony of experts must be deemed based upon appropriate scientific principles and reliable.

The testimony of experts has additional layers of requirements not present for lay witnesses. This is due to the fact the subject matter of expert testimony depends upon the credibility, training, and expertise of the witness offering an expert opinion. Thus, the use of curriculum vitae and other materials to establish the education, training, and/or certification, if necessary, of the witness are all necessary. Those elements establish whether or not a Hearing Member or fact finder can rely upon the testimony of a particular witness on a particular fact.

The second layer of inquiry is directed at the opinion of the expert after their qualifications and credentials have been established. In order to be dispositive, the opinion of an

expert must not only be formulated by an expert whose qualifications are established but the opinion must be supported by evidence establishing the opinion was reached based upon facts, principles, and conditions that are commonly relied upon and deemed determinative by the experts who offer opinions on those questions. There are standards for the reliability of medical opinions on causation. There are similar but distinguishable standards for opinions on scientific facts and conditions. A great deal of medical evidence can be introduced in worker's compensation and even more so in occupational disease cases relative to not only the medical condition but also the conditions, exposures, and materials that contribute to or cause the alleged injury or are cited as safety equipment, safety policies, etc.

> RULE 703. Basis of Opinion Testimony by Experts
> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. Experts may testify to opinions based on inadmissible evidence, provided that it is of the type reasonably relied upon by experts in the field.

Rule 703 allows an expert opinion to be based upon inadmissible evidence so long as that evidence is of the type reasonably relied upon by that type of expert to reach an opinion. The expert may be required to disclose all facts underlying their opinion.

HEARSAY

Hearsay is defined as a statement made by a declarant out of court which is introduced for the purpose of establishing the truth of the statement. The methods of introducing hearsay depend upon, to a degree, whether or not the out-of-court declarant is available or unavailable for testimony at hearing.

Hearsay evidence is admissible at hearing. However, it cannot be the basis for a finding of fact unless corroborated by other evidence. Thus, one should consider whether that hearsay evidence may be corroborated or not, whether it can be introduced under another rule or

exception to the Hearsay Rule. An argument can be made that if the objection to the evidence on the basis is cured by admission through a recognized exception to the Hearsay Rule that evidence then can become the basis for a finding of fact without corroboration.

While the Board is not bound by the technical rules of procedure for the purpose of hearing, those rules should still be considered as they impact how evidence could or should be admitted and the limits on its consideration by a Hearing Member.

> RULE 803. Hearsay Exceptions: Availability of Declarant Immaterial
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness.
> (1) Present sense impression. A statement describing or explaining a material event, condition, or transaction, made while the declarant was perceiving the event, condition or transaction, or immediately thereafter.
> (21) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
> (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it related to the execution, revocation, identification, or terms of declarant's will.
> (4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
> (5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
> (6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of

acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or data compilations in any form, of a public office or agency, setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

(9) Records of vital statistics. Records or data compilations in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation in any form was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony,

that a diligent search failed to disclose the record, report, statement, or data compilation, or entry.
(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.
(12) Marriage, baptismal, and other similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules of practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.
(13) Family records. Statements of Fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.
(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that in in that office.
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purposes of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.
(16) Statements in ancient documents. Statements in a document in existence thirty years or more, the authenticity of which is established.
(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.
(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relief upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets that contradict the expert’s testimony on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If

> admitted, the statements may be read into evidence but may not be received as exhibits.
> (19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.
> (20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.
> (21) Reputation as to character. Reputation of a person's character among associates or in the community.
> (22) Judgment of previous conviction. Evidence of a final judgment entered after a trial or upon a plea of guilty (but n ot upon a plea of nolo contendere) adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.
> (23) Judgment as to person, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

A. Statements that would otherwise be inadmissible as hearsay may be admissible if they are a statement of an out of court person's present sense impression, excited utterance, or a statement of their then existing mental, emotional, or physical condition. All of these statements can be important in the worker's compensation setting. A witness to an incident may describe statements made by an injured worker or anyone else at the work scene if one can establish one of these exceptions are met.

B. Statements made for the purpose of medical diagnosis can be admissible. However, this is simply a statement upon which a physician may or may not have relied. It does not establish causation or constitute a medical finding.

C. Recorded recollection memorandum of statements made by a witness who now cannot recall those statements may be admissible if it can be shown the recorded recollection was made and adopted by the witness when the matter was fresh in the witness' memory and reflects their knowledge correctly at that time.

D. Records of regularly conducted business activity. A memorandum, report, records, or compilation of materials kept in the regular course of business may be admissible as an exception to the hearsay rule. The record must have been created at or near the time the information was generated by a person with knowledge of the information and recorded in the regular course of business activity. It must be shown it is the regular practice of that business to record, report, or collect the data being asserted as a regular business record. The supporting findings to allow this information as a regular business record can be done by testimony or affidavit by a qualified witness.

E. The absence of an entry in a record that is kept as a regular business record can be used to create a negative inference. If records are established as regular business records, the absence of an entry that would be appropriate can be cited as an indication challenging testimony about that fact that does not appear within the regular business records. There are certain public records that are not included with the exception of hearsay. Investigative reports by police, law enforcement, government, or public office. Market reports, commercial publications, quotations, in essence compilations of data generally used and relied upon by the public are exceptions to the hearsay rule. This can include weather reports.

F. Learned treatise. To the extent used to direct a witness or expert witness on specific points during direct or cross examination, a learned treatise can be used. The treatise can be used to contradict or support the expert's testimony. The subject must be established by a reliable

authority before that learned treatise can be used to challenge a witness statement. The Hearing Member can be asked to rule upon their determination the material being submitted as a learned treatise is qualified before being used to cross examine or support a witness' testimony.

> RULE 804. Hearsay Exceptions: Declarant Unavailable
> (a) **Definition of Unavailability**. "Unavailability as a witness" includes situations in which the declarant (1) is excepted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) testifies to a lack of memory of the subject matter of the declarant's statement; or (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process or other reasonable means. A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.
> (b) **Hearsay Exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.
> (1) Former testimony. Testimony given as a witness at another hearing of the same or different proceedings, or in a deposition taken in compliance with the law in the course of the same or another proceedings, if the party against whom the testimony is now offered, or, in a civil action or proceedings, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
> (2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.
> (3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

> (4) Statement of personal or family history. (A) A statement concerning the declarants own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of person or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoptions, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Rule 804 provides a hearsay exception where a witness is unavailable. A witness may be unavailable if they are exempted from court by the court, refuses to testify, testifies to their lack of memory of subject matter or detail, is unable to be present at hearing, is unavailable at hearing and their whereabouts is unknown. Hearsay does not exclude the following testimony where the witness is unavailable. Former testimony of that witness who is unavailable. A statement under the belief under impending death. A statement against the witness' interest. A statement of personal or family history.

> RULE 901. Requirement of Authentication or Identification.
> (a) **General Provision**. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
> (b) **Illustrations**. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
> (1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.
> (2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.
> (3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.
> (4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.
> (5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or

> recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.
> (6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.
> (7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.
> (8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 30 years or more at the time it is offered.
> (9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.
> (10) Methods provided by statute or rule. Any method or authentication or identification provided by the Supreme Court of this State or by a statute or as provided by the Constitution of this State.

Rule 901 requires authentication evidence by a witness. There are several methods of authenticating statements, including testimony of a witness that has knowledge of the facts that are being asserted, an opinion on handwriting, so long as the person is familiar with the individual asserted to have performed the handwriting, comparison by an expert witness, distinctive voice identification, telephone conversations, public records and reports authorized by law or filed in a public office. Some records are self-authenticating under Rule 902. These are records that are commonly identified to the general public such as public documents, official publications, newspapers and periodicals, trade materials, documents containing a certificate of acknowledgement, commercial paper.

Section Four

Can ADR be Used in Worker's Compensation & What Ethical Issues are Involved?

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Section Four

Can ADR be Used in Worker's Compensation & What Ethical Issues are Involved?..... Timothy O. Malloy
Wm. Douglas Lemon

CHAPTER ONE

CONFLICT

AND

APPROACHES TO CONFLICT RESOLUTION

Introduction

As an attorney for 46 years representing both plaintiff's and defendant's, injured persons, and insurance companies they all have one basic thing in common: They want resolution of the conflict/case in which they are involved.

This presentation should in no way is to be taken as a slight to resolution by submission to a hearing member or judge, sometimes that is the only way a case can be resolved. This presentation should be seen as another tool in the toolbox of methodologies to resolve conflicts, disputes, and cases along with submission to a hearing memembers.

This presentation is meant to simply explore the **alternative** tools in that toolbox.

Mediation, you will discover, is about enhanced negotiation and communication skills. It draws from diplomacy and international relations, game theory, sociology, psychology, and the growing independent field of conflict and dispute resolution. The chapter is a brief introductory overview of conflict, approaches to resolution, the kinds of conflict, and approached to negotiations.

Conflict. We all recognize the dictionary definition of "conflict", meaning a clash between hostile or opposing elements or ideas.[1] Conflict can also arise out of competition for scarce resources or out of a struggle to change the status quo. It is surprising that Black's Law Dictionary does not even define the word "conflict" since the law deals with conflicts every day. Black's prefers to use the term "dispute", which is defined as a conflict or controversy. If your experience has been like most attorneys', you have not been educated to analyze conflict on a higher level,

[1] The New Merriam Webster Pocket Dictionary.

even though you may deal with any number of conflicts on your legal practice every day. This overview will probably be an "aha!" experience for you: it supplies the language to put your experiences and intuitions into an analytical framework. This ability to do higher level analysis will be important to you as both a negotiator and as a mediator.

Conflict in and of itself is not negative. In fact, the Chinese symbol for conflict combines "danger" with "opportunity". We tend to supply the negative overtones because we associate conflict with adversarial conduct, a winner and a loser, or with war. We may remember situations where we walked away from a situation in which we felt powerless to do otherwise; or we may remember those who used physical force or coercion to make us comply with their wishes. These two extremes in conflict resolution behavior may arouse the uncomfortable feeling which we associate with conflict, examples of win/lose behavior in which we have been the frustrated loser. Conflict is frequently seen as bad, wrong, undesirable, negative, emotionally uncomfortable, a crisis situation or the symptom of a problem. However, conflict serves several positive functions: it can strengthen group cohesiveness; it can reduce tension, clarify goals and objectives, establish group norms or act as an agent of change.[2]

There is a range of conflict resolution behaviors, all of which may be useful and appropriate at some time.

The Range of Conflict Resolution Responses[3]

Avoidance
Informal problem-solving discussions
Negotiation
Mediation
Administrative/Executive Dispute Resolution
Arbitration
Judicial adjudication
Legislative
Extralegal—Nonviolent, such as civil disobedience
Violent, such as physical coercion or war

[2] See **Negotiation,** 2nd ED., p. 15.
[3] See Moore, The Mediation Process, pp. 4-9.

Commentators in the field further refine conflict in two types, pure and mixed.[4] In a pure conflict, all interests are incompatible.[5] A mixed conflict allows for some satisfaction of all interests.[6]

Conflicts can arise in various areas, each of which may call for different approaches and strategies. Moore divides these into five areas:

interest conflicts;
structural conflicts;
value conflicts;
relationship conflicts;
and data conflicts.[7]

Interest conflicts are caused by issues, procedural interests or psychological interests that are perceived to be or are competitive.[8] Structural conflicts are caused by time constraints, unequal power or authority, unequal control or distribution of resources, destructive patterns of behavior or interaction, or geographic, physical, or environmental factors that hinder cooperation.[9] Value conflicts arise from different criteria for evaluating ideas or behavior, opposing goals of equal value, and different ways of life, religion, culture, etc.[10] Relationship conflicts are caused by strong emotions, poor communication, repetitive aggressive behavior, and similar factors.[11] Data conflicts arise out of lack of information or misinformation, or different ideas about relevancy, interpretation, or assessment procedures.[12] Further discussion of these conflicts are included in Chapter Seven on Mediator Interventions.

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[4] The Mediation Process, p. 64.
[5] Id.
[6] Id.
[7] Moore, The Mediation Process, page 27.

[8] Id.

[9] Id.

[10] Id.

[11] Id.

[12] ID

Different approaches to conflict resolution yield different results. Some approaches, the competitive approaches, yield win/lose outcomes. Litigation and arbitration are examples of win/lose, competitive approaches to conflict resolution.[13] This is also referred to in the field as zero-sum or all-or-nothing outcomes.

Sometimes the outcome is lose/lose.[14] Neither party may achieve a satisfactory result. This outcome is possible as the result of poor compromise, in which both parties trade off desired items and end up with a solution which neither wants. A lose/lose result is also possible where the parties have escalated their conflict levels to the point where their mutual goal is to inflict as much harm (expense, delay, negative publicity) as possible. A compromise outcome is also considered a possible outcome on its own.[15]

The outcome that has received much attention is the win/win outcome,[16] or what I refer to as the "lose less/lose less" outcome. Those who work in this field have recently looked for methods to achieve better results, in which both parties' interests can be accommodated, the win/win result. [17] Some commentators have been skeptical of this possibility, regarding it as ivory tower wishful thinking (fine in theory, impossible in practice). However, the methods devised to reach these win/win solutions have become the basis of many of the skills used by facilitators, mediators, and others acting as third-party neutrals.

Commentators who work in this field also separated the approaches to negotiation along similar lines.

Approaches to Conflict

Win/Lose (Competitive)
Lose/Lose
Compromise
Win/Win or Problem-Solving

[13] Moore, the Mediation Process, p. 67

[14] Id

[15] Id. at page 66.

[16] Moore, page 67.

[17] See e.g. Getting to Yes, Fisher and Ury.

One approach to negotiation, also known as the distributive, fixed pie, or win/lose approach.[18] This approach is characterized by a scarcity model of dividing up resources: in other words, there are not enough resources for both parties to have what each needs or desires, so they are competing to obtain more of the scarce resource than the other party. In other words, there are only so many dollars in the packet, and a dollar for you is one dollar less for me.

Another approach to negotiation is the avoidance[19] or withdrawal approach. For whatever reason, one party simply allows the transaction to occur without significant interaction.

A third approach is the accommodation approach.[20] One of the negotiating parties may feel it is more important to address how the other party feels about the issue, rather than address the substantive issues.

A fourth approach is the negotiated compromise,[21] something that is familiar to most people. It is frequently what people think of first when they think of negotiations.

The last approach is the approach of interest-based negotiation.[22] This is also known as the win/win model or cooperative, problem-solving model of negotiation.

[18] See Moore, pages 67,68.

[19] Moore, page 69.

[20] Moore, page 69.

[21] Moore, page 70.

[22] Moore, page 71. See also Getting to Yes, Fisher and Ury.

These approaches are frequently categorized on how important two factors are to the parties in the negotiation: the substantive issues, and the relationship issues. A negotiator who takes the competitive approach places high importance on substance but little importance on the relationship between the negotiating parties. A negotiator who takes the avoidance approach cares little for either the substance or the relationship issues. In accommodation, the negotiator cares a lot about the relationship, but little about the substance. In interest-based negotiations, the negotiator places a high value on both the substantive issues and the relationship issues. Negotiated compromise falls somewhere in the middle on both aspects.

Chapter Two

Forms of ADR: Mediation Defined and Distinguished

Chapter Two

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CHAPTER TWO

FORMS OF ALTERNATIVE DISPUTE RESOLUTION

Effective January 1, 1992, the Indiana Supreme Court adopted Rules for Alternative Dispute Resolution (ADR), becoming one of the first states in the nation to adopt such rules.[1] Since that time, the Supreme Court has added Rule 7, on ethics, and the ADR Rules have been amended. The rules provide procedures for five forms of ADR:

1. Mediation
2. Arbitration
3. Mini-trials
4. Summary jury trials and
5. Private judges

The rules also recognize other forms of ADR, such as settlement negotiations, conciliation, facilitation, convening or conflict assessment, neutral evaluation and fact-finding, multidoor case allocations, and negotiated rule-making.[2] Although mediation was the primary form of ADR acknowledged under the original Rules, this has been omitted from the current rules.[3]

MEDIATION Mediation has been described as "facilitated negotiation".[4] It is one of the oldest forms of dispute resolution. Historically many religious communities have used mediation as one of the primary forms of dispute resolution, and it has also been popular in the commercial arena.[5]

Mediation is quick, private, relatively cheap, and informal. Mediation can preserve relationships between the parties, and the parties can arrive at their own solutions custom tailored to their individual

[1] Indiana was the third or fourth state to adopt statewide rules for court-based referrals of cases to ADR.

[2] ADR Rule 1.1

[3] ADR Rules effective Jan. 1, 1992, Preamble.

[4] Ending It, p. 133.

[5] Ending It, p. 134.

situations. They are not limited by concepts of legal remedy or what a judge can order, since they can by agreement do things that a judge could not order them to do. However, mediation does not set precedents, it does not punish lawbreakers or cheaters, and does not equalize the bargaining power between the participants.[6]

The chart at the end of this chapter compares the features of mediation to negotiation, arbitration and litigation.

Mediation is defined in ADR Rule 1.3(a) as a process in which a neutral third person, called a mediator, acts to encourage, and assist in the resolution of a dispute between two or more parties. It is informal and non-adversarial process whose objective is to help the disputing parties reach a mutually acceptable agreement on all or any part of the issues in dispute.[7] The key distinguishing feature of mediation is that the mediator is **not** a decision-maker. Decision-making authority rests with the parties, not the mediator.[8] The mediator's goal is to help the parties reach an agreement which is acceptable to them. The mediator's function is to assist the parties in identifying issues, to foster joint problem solving, to explore settlement alternatives, and to act in other ways consistent with these activities.[9]

The general outlines of the process are repeated and expanded in Rule 2.1, which described the purpose of mediation. Rule 2.1 reiterates that the agreement reached by the parties is to be based on their own autonomous decisions and not on the decision of the mediator. The rule also requires that parties are their representatives mediate in good faith, even though they are not required to reach an agreement.

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[6] Ending It, p. 12.

[7] ADR Rule 1.3 (A)

[8] ADR Rule 1.3 (A)

[9] ADR Rule 1.3 (A)

As originally contemplated by the Rules, some types of cases were outside the scope of the ADR Rules. The rules did not apply to:

- Criminal proceedings;
- Actions to enforce infractions or ordinance violations;
- Juvenile proceedings;
- Forfeitures of seized parties;
- Habeas corpus or other extraordinary writs;
- Such other matters may be specified by the order of the Indian Supreme Court;
- Matters in which there is a very great public interest, and which must receive an immediate decision in the trial and appellate courts;
- Small claims proceedings.[10]

The current rules state that the ADR rules apply in all civil and domestic relations litigation matters filed in all Circuit, Superior, County, Municipal and Probate Courts. [11]

[10] ADR Rule 1.4 (A)-(H). It seems likely that small claims proceedings will ultimately have their own set of ADR Rules, as they have their own procedural rules.

[11] ADR Rule 1.4

A matter may be referred to mediation upon court's own motion or upon the motion of any party, fifteen or more days after the period for peremptory change of venue has expired.[12] The time limits for domestic relations cases are different and shorter (seven days), and this applies to most of the ADR rules where there is a time limit.

When a civil case has been selected or mediation, a party may object within 15 days after the order selecting the case.[13] The objection must be in writing and must specify the grounds for objection.[14] The opposing party may respond to the objection.[15]

Factors to be considered in determining whether a case shall proceed to mediation are:

The willingness of the parties to mutually resolve their dispute;

The ability of the parties to participate in the mediation process;

The need for discovery and the extent to which it has been conducted;

Any other factors which affect the potential for fair resolution of the dispute through mediation.[16]

The rules provide fifteen (15) days for the parties in a civil case to :

Choose a mediator from the Commission's Registry;[17] or agree on a non-registered mediator, who must be approved by the trial court and who serves with leave of court.[18]

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[12] ADR Rule 2.2, Rule 1.6

[13] ADR Rule 2.2. The Objection period for domestic relations cases is 7 days.

[14] ADR Rule 2.2

[15] Rule 2.2, which provides that the court shall promptly consider the objection and any response . . .

[16] Rule 2.2

[17] See Chapter 6 on the Registry and application.

[18] ADR Rule 2.4. The Period is 7 days for domestic relations cases.

If the parties do not agree upon a mediator, the court names a panel of three mediators from the establishment of a registry or database for alternate striking.[19] The plaintiff (actually, "the side initiating the lawsuit") strikes first.[20]

A selected mediator may choose not to serve for any reason.[21] A party can request that the court replace a mediator for good cause shown.[22]

The mediation procedure is set out in Rule 2.7. It requires the mediator to advise the participants of certain matters,[23] and specifies who must attend the mediation conference.[24] In civil cases, the parties and their attorneys are required to attend unless excused by the court, as well as representatives with settlement authority and other "necessary individuals".[25] Others, including nonparties, can also attend at the discretion of the mediator.[26] Otherwise, mediation sessions are not open to the public.[27]

Within ten (10) days of the mediation, the mediator reports to the court the status of the mediation.[28]

A mediator may terminate the proceedings upon either of the following:

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[19] Rule 2.4

[20] ADR Rule 2.4

[21] ADR Rule 2.4

[22] ADR Rule 2.4

[23] ADR Rule 2.7(A). ADR Rule 7.3. See Chapter 5 on Opening Statements.

[24] Rule 2.7(B)

[25] ADR Rule 2.7(B)(2)

[26] ADR Rule 2.7(B)(1). This section of the Rule now applies only to domestic relations cases. But in my opinion the Rules still grant the mediator the authority to allow others to attend. See Rule 2.11 concerning "other invited persons".

[27] ADR Rule 2.7(B)(4)

[28] ADR Rule 2.7(E)(1)

Whenever the mediator believes that continuation of the process would harm or prejudice one or more of the parties or the children;[29]

Whenever the ability or the willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely.[30]

A party may terminate mediation any time after two sessions have been completed.[31]

When terminating the mediation, the mediator shall not state the reason for the termination unless it is due to conflict of interest or bias on the part of the mediator.[32] In that event, another mediator may be assigned by the court.

If the parties do not agree. If the parties do not agree, the mediator reports to the court the lack of agreement without any comment or recommendation.[33]

If the parties' consent, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process or other action by any party which, if resolved or completed, would facilitate the possibility of settlement.[34]

If the parties agree. If the parties reach an agreement, Rule 2.7(E)(2) provides that he agreement shall be reduced to writing and signed by the parties and their counsel, thereby giving the board notice of resolution of the agreement is then filed with the court in domestic relations cases.[35] If the agreement is a complete

[29] ADR Rule 2.7(D)

[30] ADR Rule 2.7(D)

[31] ADR Rule 2.7(D)

[32] ADR Rule 2.7(D)

[33] ADR Rule 2.7(E)(1)

[34] ADR Rule 2.7(E)(1)

[35] ADR Rule 2.7(E)(2)

resolution, a joint stipulation of disposition shall be filed with the court.[36] Under ADR Rule 2.7(E)(2), in all other matters the agreement is required to be filed only by agreement of the parties.

Effect of agreement. In the event of any breach of failure to perform under the agreement, upon motion and after hearing the court may impose sanctions, including entry of judgement on the agreement.[37]

Sanctions for breach for ADR Rules. Rule 2.10 on sanctions provides that a court may impose sanctions on any **attorney** or **party representative** who fails to comply with these mediation rules. The sanctions are limited to assessment mediation costs and/or attorney fees relevant to the process.

Confidentiality. Unlike Florida, which provides for blanket confidentiality for mediation proceedings, the Indiana rule states that mediation shall be regarded as settlement negotiations.[38] Mediation is regarded as settlement negotiations, and evidence of them is admissible under certain circumstances.

Rule 2.1, which incorporates Evidence Rule 408, provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, which was a dispute as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, or negating a contention of undue delay . . . Compromise negotiations encompass alternative dispute resolution.

[36] ADR Rule 2.7(E)(2)

[37] ADR Rule 2.7 (E)(3)

[38] ADR Rule 2.11

ARBITRATION

In Indiana ADR Rule 3 governs arbitration. Unlike mediation, arbitration is a decision-making process, and it may be binding to non-binding. You may find non-binding arbitration helpful as a tool for guiding later settlement discussions. Arbitration is more formal and "legalistic" than mediation. It is an adversarial process, like litigation.

Arbitration is more likely to result in decision (by third party) as opposed to settlement.[39] It is not necessarily less expensive than litigation.[40] Arbitration has grown to be more like litigation and has incorporated many litigation procedures. It may be quicker than a litigated result, but its similarity to litigation may cause it to cost the same. Arbitration is private, and the parties can select their own decision maker. This is an advantage where a decision make with specific substantive knowledge (such as construction or engineering) is desirable. The parties can agree to their own standards to be applied in resolving their dispute. The parties pay all costs since the process is not publicly supported. Arbitrator's awards have limited appealability.

"Baseball" or "final offer" arbitration is an option that is sometimes suggested. Each party submits a bottom-line proposal for resolution of the dispute: each side then puts on its case, and the arbitrator maychoose only one position or the other.[41] This avoids an arbitrator's decision that splits the difference between the parties' positions.

"High-low" arbitration generally refers to a process where the parties agree that the arbitrator may resolve a case within a range determined by the parties.

Because ADR terms and techniques are sometimes (wrongly) used interchangeably, I encourage you to ask exactly what the person means when a particular technique is suggested. One person's baseball arbitration is another's high-low arbitration.

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[39] Settling Disputes, page 28.

[40] Id.

[41] Settling Disputes, page 60.

In Indiana, binding arbitration is available in a pending case upon agreement of the parties[42], although the court can order non-binding arbitration.[43] The Rules do not require that an arbitrator be trained, in the same way that mediators attend certified training. The arbitrators on the court list are lawyers engaged in practice of law within the State who are willing to serve as arbitrators.[44] The rules of discovery apply in arbitration, but the traditional rules of evidence need not be applied with regard to the presentation of testimony.[45] Arbitration proceeding are not open to the public.[46] Arbitration procedures are set forth in ADR Rule 3.4.

Most voluntary arbitration occurs as the result of a contractual provision between the parties, although parties can agree to arbitrate a dispute after the dispute has arisen. In some states the arbitration process is court annexed. Court-annexed arbitration is non-binding and is usually a prerequisite to trial. Although the process is non-binding, if a party rejects the arbitrator's award and proceeds to trail, there is usually a financial disincentive if the party does not do better at trial than the arbitrator's ward which was rejected.[47] Some states which have court annexed arbitration are Michigan, Connecticut, and Illinois.[48]

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[42] ADR Rule 3.1

[43] ADR Rule 1.6

[44] ADR Rule 3.3

[45] ADR Rule 3.4(C),(D)

[46] ADR Rule 3.4 (D)

[47] Ending It, page. 79.

[48] Id.

MINI-TRIALS

Mini trials are governed by ADR Rule 4. Mini trial is a settlement process where each side presents a highly abbreviated summary of its case to senior officials with settlement authority.[49] The proceedings may be presided over by a neutral advisor, who may give advisory opinions or rulings if invited to do so.[50] Following the presentation, the officials seek a negotiated settlement of the dispute.

I do not see much application for this modality in workers compensation per se.

SUMMARY JURY TRIAL

However, since there are no rights to a jury trial in workers compensation no further explanation is needed.

PRIVATE JUDGES

However, since this form is not germane to workers compensation per se we will not be exploring this further.

[49] ADR Rule 1.3(C)

[50] Id.

OTHER PROCEDURES

Med/Arb. This hybrid procedure is pronounced "medard", and as you might guess is a combination of mediation and arbitration procedures. There are actually two different kinds of med/arb. In one kind of procedure, sometimes called med/arb(same), the neutral acts first as a mediator. If the parties are unable to reach agreement in mediation, the same neutral becomes an arbitrator and makes a decision for the parties.[51] Many people have raised concerns about this, since the person acting as a mediator is in position to learn confidential information from the parties. They believe that the mediator will consciously or subconsciously use that information in making the decision as an arbitrator. The other concern is that the mediation process will not be effective because the parties will not share information likely to result in a settlement with the mediator, for fear that this information will somehow negatively affect the arbitrator's decision.

In med/arb (different)[52], the mediator and arbitrator roles are filled by two different people, to address the concerns raised above. The issue raise by med/arb (different) is that a new person, the arbitrator, must be educated by the parties in order to make the decision, resulting in some duplication of effort by the parties since they must educate the mediator and the arbitrator about the case.

Conciliation and facilitation. Conciliation has been defined as an unstructured process of facilitating communication between parties.[53] It is one step below mediation, and usually refers to only preliminary involvement by a third party.[54] Facilitation is a process in which a neutral intervenor

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[51] See article,

[52] Article, page

[53] Alternate Dispute Resolution, AmJur2d Section 9

[54] Settling Disputes, p. 24.

manages the discussion process; the participants identify the problems and procedures for resolution: a facilitator does not offer settlement suggestions. At one time conciliation and mediation were synonymous.[55] Some commentators now use facilitation to refer only to the person who acts as a moderator in large meetings.[56] There is considerable overlap in the terms, and they are not always used consistently. Mediation sometimes incudes conciliation and facilitation techniques within the process.[57]

Neutral evaluations/panel evaluations. The parties may select a neutral third person to evaluate the settlement value or range of their case. They may make an abbreviated presentation to the neutral, who then comments on the settlement value for the case.

A panel evaluation is also used by the parties to help them arrive at a settlement. In a panel evaluation, a neutral panel of generally three members evaluated a case after abbreviated hearing.[58] The panel may come up with a settlement value or a settlement range.[59] The panel can be chosen by the parties, and sometimes consists of a plaintiff's lawyer, a defense lawyer, and a judge or other person who is perceived as neutral. The panel members can be asked to comment on the strengths and weaknesses of the abbreviated case presented to them.[60]

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[55] Settling Disputes, p. 24.

[56] Id.

[57] As a matter of interest, the Federal Mediation and Conciliation Service deals only with labor disputes.

[58] Ending It, p. 26.

[59] Id.

[60] Ending It, p 26.

Factfinding. In fact-finding, a third party gives the parties or the decisionmaker (such as a judge or arbitrator) neutral findings of fact, which may or may not be coupled with a recommended solution.[61] However, this format seems to have little or not real application or benefit in a worker's compensation matter.

Negotiated rulemaking. Negotiated rulemaking is also called regulatory negotiation or "reg Neg". Representatives of opposing special interest groups from industry, consumer, and environmental groups are asked to sit down together with the agencies involved and negotiate government regulations.[62] This is another approach that is included for completeness sake but has little application or value to a worker's compensation matter.

Neutral experts. If a case involves technical questions, such as engineering or scientific issues, the parties may agree on a neutral expert, who will then provide an opinion which the parties are free to abide by.[63] The neutral expert can be chosen from the relevant field, and persons such as physicists, architects, engineers, hydrologists, etc. have been chosen to act as neutral experts.

[61] Settling Disputes, p. 26.

[62] Settling Disputes, p. 26.

[63] Settling Disputes, p. 25.

CHART 2-2

COURT-REFERRED MEDIATION

1. Case selection by judge or party
2. Objection (if any)
3. Response to objection
4. Selection of mediator
5. Conference scheduled
6. Confidential statement of the case may be submitted by parties
7. Mediation conference(s)
8. Report to the court
9. Filing of agreement/stipulation of dismissal

CHAPTER THREE

THE BENEFITS OF MEDIATION

FOR CLIENT AND ATTORNEYS

Introduction

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time." Abe Lincoln.

The common wisdom is that at least 90% of cases filed settle before trial.[1] At least one study has shown that 45% of personal injury cases settle in the last 10 days before trial, with a similar pattern for commercial cases.[2] This results in inefficient use of judicial resources, and delay; the phenomenon of crowded dockets and empty courtrooms. If you practice in highly populated counties, you may have already noticed that the change in the automatic change of venue rule has resulted in some degree of overload on the counties' existing courts.

Effective use of ADR techniques can resolve cases more quickly, which results in more efficient use of judicial resources. Simply put, the cases that would have settled in any event will settle more quickly, clearing the docket and making the courts available for those cases and issues that need a judicial determination for resolution. Given these facts, mediation provides opportunities to benefit both the attorney and the client.

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[1] See Susan M. Leeson and Bryan M. Johnston, Ending it: Dispute Resolution in America (1988), pages 105-106. Some estimates of the settlement rate are as high as 95-98%.

[2] Id. About 2.5% of cases settled the day of trial; 42.5% settled within 2 to 10 days of trial.

Benefits for Clients

There are many advantages to mediation.

1. The mediation proceedings are private and confidential (to the degree provided in ADR Rule 2.11). If you have a case which you client desires to keep information private, mediation can provide a forum for keeping confidential information confidential. (Example: trade secrets)
2. Mediation has a high success rate (estimated at 80%). The success rate varies between completely voluntary mediation and court-ordered or mandatory mediation. A Florida study showed that cases referred to mediation settle much more quickly than those that were not.[3] In that study, older cases settled as rapidly as other mediation cases.[4]
3. Mediation can preserve the relationships between the disputants far better that litigation can.[5] It provides a constructive, forward-looking problem-solving structure on the negotiations, rather that the blame-placing approach of other resolution techniques.[6] In other words, it is a cooperative process, not an adversarial one.[7]

[3] See Florida's Alternative Dispute Resolution Project/Florida Dispute Resolution Center, Karl D. Schultz (Thirteenth Judicial Circuit)

[4] Id.

[5] Settling Disputes, page 11.

[6] Ending It, Page 133.

[7] Mediate, Don't Litigate, Peter Lovenheim.

4. Mediation can be faster and cheaper than litigation or arbitration. The Florida study showed that mediation was less costly and that mediated cases settled much more rapidly than those which were not.[8]
5. Mediation has a high client satisfaction rate.
6. Mediation can help the parties clarify the law and the facts of their dispute. It can help the parties resolve discovery issues as well.
7. Mediation can resolve a dispute without settling legal precedent.[9] Your client may wish to avoid making law in a particular case.
8. Mediation is not limited by concepts of legal remedies and may provide for a flexible or "custom" solution to the dispute which is not available as a legal remedy.[10] For example, if the parties are businesses, they may arrive at a joint venture for mutual profitability as part of a resolution, something which a court could not order them to do.
9. Mediation is informal and less intimidating than the court room. Your client may feel more comfortable in an informal setting.
10. The disputants keep control of the outcome in mediation.[11] They are not required to agree but may feel more comfortable with a solution of this own making. Mediated

[8] Florida's Alternative Dispute Resolution Project: Florida Dispute Resolution Center Karl D. Schultz.

[9] Settling Disputes, page 12.

[10] Settling Disputes, page 11.

[11] Ending It, pages 133-34.

agreements have a higher compliance rate than judgments do.[12] When the parties participate in the making of an agreement, they have more commitment to it than to an order which is imposed upon them by the judge.

11. Mediation gives the parties a chance to tell their stories, in their own words, and to talk about how the case affects them personally and emotionally. Many clients do not feel that they have had a true "day in court" at a trial because of the artificial question and format that the legal system imposes on testimony, and the interruptions and objections of the opposing side.
12. Mediation can help you educate the opposing party. The other side may not have realistically evaluated the case, and this education can help encourage the opponent in a more realistic appraisal of the case.
13. If your client has strong negative feelings for the opposing party, the mediator can act as a buffer and help the parties arrive at a settlement which those strong feelings might otherwise prevent.
14. Mediation can result in partial agreements, making trial of the remaining issues easier and less costly.
15. The study of Florida court-referred mediation shows that mediation is fair and can provide greater access to justice (for those who could not otherwise afford a resolution).[13]

[12] Mediate, Don't Litigate.

[13] See the Florida Alternative Dispute Resolution Demonstration Project cited above.

Benefits for Attorneys

Some attorneys have been resistant to mediation. There has been some concern about raising barriers to the trial process by requiring parties to expend additional sums for mediation, and also some concern about how the use of mediation will affect lawyers' practice and income. I hope that the discussion above of the benefits of mediation has shown that parties do receive a valuable benefit as a result of the process, regardless of whether it results in an agreement.

As to the second issue, it would be disingenuous to say that mediation will have no effect on lawyers. Some lawyers may face losing some income because cases will settle earlier and therefore generate less fee income. However, much of the push for ADR has come from consumers of legal services. This means that lawyers who ignore their clients' desires for ADR may lose their clients to attorneys who will make use of these techniques. If you want to keep or expand your client base, you will need to make use of these techniques. As one example, insurers are increasingly looking to ADR methods to control legal costs associated with outside counsel. It is no secret that many if not most people cannot afford legal services or the expense of trial.[14] Yet it may be possible that many more people can afford legal assistance in an ADR forum for dispute resolution. The push for litigation alternatives has come both from businesses and insurance companies, and individuals and consumer groups. The businesses and insurers are looking for ways to control legal expenses; individuals and consumers are looking for ways to resolve disputes when they cannot afford traditional legal services. In order to remain competitive, lawyers will need to become acquainted with and use these methods.

[14] Linda R. Singer, Settling Disputes (1990), page 4. It is estimated that 1% of the United States' population receives 95% of legal services.

Further, any loss of fees associated with quicker settlements can be compensated by expanding you client base. Attorneys will be able to represent more clients because more people can afford to have legal representation in a mediated resolution than can afford to have legal representation through full-blown discovery and trial. This is the greater access to justice aspect of making ADR more available to the public.

Some plaintiffs' attorneys have embraced mediation, because it results in many instances in quicker settlement, and they can receive a contingency fee with less or more efficient work in the case.

Client satisfaction is high with some methods of ADR, particularly mediation. Lawyers can improve their own reputations, as well as the image of the bar, with higher client satisfaction.

Mediation can assist with "client control" or education where the client has unrealistic expectations about the outcome or costs of a trial. The mediator can, by artful questions and discussion, provide that dose of reality which can help the client make a more educated choice about settlement. Exposing your client to the arguments of the other side may help your client arrive at a more balanced evaluation of the case.

If you have an "impossible adversary", the mediator can provide a buffer between you and that adversary, making productive negotiations possible.

Further, you may soon be required to be interested and knowledgeable about ADR. Proposals are now under consideration to make it an ethical requirement for lawyers to advise their clients of the options which exist for resolution of disputes.

Even if you do not settle, you may still have benefitted from the process. A mediation which does not result in an agreement can help with preparation for trial: it can focus the issues

and the discovery needed and establish settlement ranges. Mediation can also result in partial settlement and eliminate some issues and parties.

Disadvantages

Mediation is not the answer in every case. Mediation does not set precedents.[15] If you client desires to make law or have a determination which will help them determine a course of action in other similar cases, mediation cannot provide this. Mediation does not provide a forum for punishing lawbreakers or cheats.[16] It is unlikely that someone who cheats will participate in good faith in negotiations in mediation. Further, mediation does not address "unfair" unequal bargaining power between the participants.[17] The fact that one party has a stronger position or case does not militate against mediation. It is the situation where one party has an "unfair" advantage that may be a factor against mediation. For example, is there is coercion or violence in the relationship, any resulting agreement is probably not voluntary, and results in a situation of injustice for the weaker or coerced participant.

[15] Settling Disputes, page 12.

[16] Settling Disputes, page 12.

[17] Settling Disputes, page 12.

CHAPTER FOUR

STRUCTURE OF THE MEDIATION PROCESS

The mediation process can be divided into six phases.

1. Mediator's Opening Statement[1]
2. The Parties' Opening Statement
3. The Joint Session or Working Session[2]
4. The Private Session or Caucus
5. Closing and Agreement
6. Drafting the Agreement[3]

The Mediator's Opening Statement. The mediator's opening statement serves several purposes; it sets the tone for the proceedings; it explains to the participants the procedures which they will follow; and it provides the parties with the chance to learn something about their mediator. It provides a chance for the parties to introduced and is also a chance for the mediator and the parties to determine if the required parties are in attendance.

[1] See Chapter Five.

[2] See Chapter Seven.

[3] See Chapter 11.

Who Should Attend. ADR Rule 2.7(B)(2) requires that:

All parties, attorneys with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.[4]

The mediator is interested in removing obstacles to agreement. This mean that the legal parties are not necessarily the only ones who need to attend to maximize the chance of agreement. The mediator may need to urge the parties to bring or make available person such as lienholders or significant other who may need to approve the settlement or who can impact the settlement that the parties may reach.

In a case involving insurance, a representative of the insurer and the insured may need to attend. The insured can help provide factual information that may impact settlement even if he or she does not possess settlement authority.

The parties' opening statements. Each of the parties gives an opening statement. The purpose of this statement is to give the mediator a brief overview of the facts of the case, and an idea of the settlement negotiations which may have already occurred. In cases where that parties are represented by counsel, the attorney for each party generally makes this presentation. The mediator may also ask for comment for the parties themselves.

This section allows the mediator to glean the issues in the case, any time limitations which may affect the negotiations, an idea of the relationships between the parties (and counsel), and areas for further discussion or questions. Mediators can and do ask questions during this

[4] ADR Rule 2.7 (B)(1) requires that the parties and their attorneys shall be present at any mediation session involving domestic relations proceedings unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present.

phase. However, mediators should be aware of the impact questions will have early in the proceedings, especially when asked in the presence of all the parties. Some questions may be better asked in private session when the mediator has the opportunity to meet with the party alone.

The Joint Session or Working Session. After the opening statements, the mediator will move the participants to the next phase of the mediation process, the joint session or working session. Generally, this flows smoothly from the parties' openings by the mediator's questions to the parties. A joint session is exactly what is sounds like: a meeting with all the parties, counsel, and the mediator present. During this phase they begin to focus their discussions on the issues and possible resolutions. There is no particular time limit for this phase. If the parties have never discussed settlement before, this phase may be lengthy. If the parties have had settlement discussions. This phase may be rather short. The mediator should not treat this phase as a formality before getting to "the good stuff" in private session.

The joint session is a valuable opportunity to get a feel for the issues that this particular case presents: the legal issues, the communication issues, the information issues, the relationship issues, etc. This opportunity for the mediator to assess the issues and obstacles to settlement is a valuable part of the process and should not be shortchanged.

A mediator has the option of meeting with the attorneys only in a joint session. However, this is an option that should be exercised sparingly and only with good reason. After all, the case belongs to the parties, not he attorneys. Many participants have a distrust of the legal system and lawyers. If the mediator meets with attorneys alone, some clients begin to feel suspicious and may feel that there is some conspiratorial deal-making being done. The mediator must guard

against compromising the parties' feelings (and consequently their behavior) in the mediation process.

The joint session generally provides the mediator with an opportunity to set the agenda for the discussions. Many personal injury cases tent to fall naturally into two parts, liability, and damages (in that order). Do not allow assumptions like this to control. You must be aware that if damages are small enough, detailed discussions of liability may not be necessary, etc.

The mediator should also be prepared to vary the amount of involvement in the proceeding. If the parties are able to communicate well, little may be required of the mediator to guide the discussions. If the parties have relationship or communication issues, more involvement may be required of the mediator.

The private session or caucus. At some point in the joint session the mediator will decide that meeting with each side privately will be helpful in moving the parties' negotiations forward. This is the private session or caucus and is one of the features that distinguishes mediation from other forms of dispute resolution.

Since the mediator is not a decision-maker, these private communications are ethically permissible, the rules regarding *ex parte* communications with decision-makers (such as judges) is that such private meetings are generally not permitted. Mediators need to be aware of this ethical issue in guarding against the temptation to become a decision-maker in the process.[5]

Private communications are confidential. This means that they are not to re revealed to the other side unless permission is given by the party to do so. Mediators again need to be very

[5] See Chapter 13.

careful in their notes, questions, comments, etc. to avoid revealing confidential information obtained in private sessions.

Private sessions provide the opportunity for mediators to get information which a party may be reluctant to reveal in front of the opposing party. Such information includes settlement ranges or authority, evidence issues, trial strategy, etc. Information obtained in private session helps the mediator to determine what strategies will be useful in moving the parties toward an agreement.

Private session also provides the parties with a safe forum to talk about legal and nonlegal aspects of the case, its impact on them, and their ideas of what a settlement will look like. This opportunity to tell their stories in their own words is very valuable to most participants, and an opportunity that is not available in other legal proceedings. In other contexts the legal system imposes the artificial question-and-answer format on the parties' communications, and limits the content with rules about relevancy and evidence. This chance to talk freely about the emotional aspects of the case is sometimes referred to as "venting". (Some commentators use "venting" to connote only negative or unproductive expressions of emotion.)

The mediator can also employ interventions more effectively in private session.

The mediator usually meets with each party to the case privately. The order in which they meet is subject to the mediator's discretion and the parties' wishes. This sequence of private meetings usually follows naturally because of the information which the mediator needs or wishes to discuss. However, it also preserves the appearance of fairness, impartiality, and equal treatment by the mediator.

The joint sessions/private sessions are repeated as often as in necessary and productive.

Closure and/or agreement. If the parties reach impasse, one of the parties or the mediator will generally declare an impasse and end the session. The mediator will close the proceeding by speaking with the parties about what happens next. The mediator usually thanks the parties and acknowledges their efforts to reach an agreement. If no agreement is reached, the mediator generally lets the parties know that a report stating this will be filed. The mediator may discuss the option of scheduling additional sessions or procedures for obtaining and exchanging information which the parties may need before discussing settlement again.

If the parties reach agreement, the mediator will still thank the parties and acknowledge their efforts in reaching an agreement. The mediator then takes steps to see that the parties' agreement is clear and that all parties understand the elements of the agreement. The agreement should then be reduced to writing or otherwise memorialized.[6] The written agreement can then be signed by all parties, or the agreement can be recorded and acknowledged by all parties orally.

[6] See Chapter 11.

Indiana Rules of Court
Rules for Alternative Dispute Resolution

Including Amendments Received Through January 1, 2021
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Preamble

These rules are adopted in order to bring some uniformity into **alternative dispute resolution** with the view that the interests of the parties can be preserved in settings other than the traditional judicial dispute resolution method.

RULE 1. GENERAL PROVISIONS

Rule 1.1. Recognized Alternative Dispute Resolution Methods

Alternative dispute resolution methods which are recognized include settlement negotiations, non-binding arbitration, mediation, conciliation, facilitation, mini-trials, summary jury trials, private judges and judging, convening or conflict assessment, neutral evaluation and fact-finding, multi-door case allocations, and negotiated rulemaking.

Rule 1.2. Scope of These Rules

Alternative dispute resolution methods which are governed by these rules are (1) Mediation, (2) Arbitration, (3) Mini-Trials, (4) Summary Jury Trials, and (5) Private Judges.

Rule 1.3. Alternative Dispute Resolution Methods Described

(A) Mediation. This is a process in which a neutral third person, called a mediator, acts to encourage and to assist in the resolution of a dispute between two (2) or more parties. This is an informal and nonadversarial process. The objective is to help the disputing parties reach a mutually acceptable agreement between or among themselves on all or any part of the issues in dispute. Decision-making authority rests with the parties, not the mediator. The mediator assists the parties in identifying issues, fostering joint problem-solving, exploring settlement alternatives, and in other ways consistent with these activities.

(B) Arbitration. This is a process in which a neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision. The decision may be binding or nonbinding. Only non-binding arbitration is governed by these rules.

(C) Mini-Trials. A mini-trial is a settlement process in which each side presents a highly abbreviated summary of its case to senior officials who are authorized to settle the case. A neutral advisor may preside over the proceeding and give advisory opinions or rulings if invited to do so. Following the presentation, the officials seek a negotiated settlement of the dispute.

(D) Summary Jury Trials. This is an abbreviated trial with a jury in which the litigants present their evidence in an expedited fashion. The litigants and the jury are guided by a neutral who acts as a presiding official who sits as if a judge. After an advisory verdict from the jury, the presiding official may assist the litigants in a negotiated settlement of their controversy.

(E) Private Judges. This is a process in which litigants employ a private judge, who is a former judge, to resolve a pending lawsuit. The parties are responsible for all expenses involved in these matters, and they may agree upon their allocation.

Rule 1.4. Application of Alternative Dispute Resolution

These rules shall apply in all civil and domestic relations litigation filed in all Circuit, Superior, County, Municipal, and Probate Courts in the state.

Rule 1.5. Immunity for Persons Acting Under This Rule
A registered or court approved mediator; arbitrator; person acting as an advisor or conducting, directing, or assisting in a mini-trial; a presiding person conducting a summary jury trial and the members of its advisory jury; and a private judge; shall each have immunity in the same manner and to the same extent as a judge in the State of Indiana.

Rule 1.6. Discretion in Use of Rules
Except as herein provided, a presiding judge may order any civil or domestic relations proceeding or selected issues in such proceedings referred to mediation, non-binding arbitration or mini-trial. The selection criteria which should be used by the court are defined under these rules. Binding arbitration and a summary jury trial may be ordered only upon the agreement of the parties as consistent with provisions in these rules which address each method.

Rule 1.7. Jurisdiction of Proceeding
At all times during the course of any alternative dispute resolution proceeding, the case remains within the jurisdiction of the court which referred the litigation to the process. For good cause shown and upon hearing on this issue, the court at any time may terminate the alternative dispute resolution process.

Rule 1.8. Recordkeeping
When a case has been referred for alternative dispute resolution, the Clerk of the court shall note the referral and subsequent entries of record in the Chronological Case Summary under the case number initially assigned. The case file maintained under the case number initially assigned shall serve as the repository for papers and other materials submitted for consideration during the alternative dispute resolution process. The court shall report on the Quarterly Case Status Report the number of cases resolved through alternative dispute resolution processes.

Rule 1.9. Service of Papers and Orders
The parties shall comply with Trial Rule 5 of the Rules of Trial Procedure in serving papers and other pleadings on parties during the course of the alternative dispute resolution process. The Clerk of the Circuit Court shall serve all orders, notices, and rulings under the procedure set forth in Trial Rule 72(D).

Rule 1.10. Other Methods of Dispute Resolution
These rules shall not preclude a court from ordering any other reasonable method or technique to resolve disputes.

Rule 1.11. Alternative Dispute Resolution Plans.
A county desiring to participate in an alternative dispute resolution program pursuant to IC 33-23-6 must develop and submit a plan to the Indiana Judicial Conference, and receive approval of said plan from the Chief Administrative Officer (CAO) of the Indiana Office of Judicial Administration.

RULE 2. MEDIATION

Rule 2.1. Purpose
Mediation under this section involves the confidential process by which a neutral, acting as a mediator, selected by the parties or appointed by the court, assists the litigants in reaching a mutually acceptable agreement. The role of the mediator is to assist in identifying the issues, reducing misunderstanding, clarifying priorities, exploring areas of compromise, and finding points of agreement as well as legitimate points of disagreement. Any agreement reached by the parties is to be based on the autonomous decisions of the parties and not the decisions of the mediator. It is anticipated that an agreement may not resolve all of the disputed issues, but the process can reduce points of contention. Parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement.

Rule 2.2. Case Selection/Objection
At any time fifteen (15) days or more after the period allowed for peremptory change of judge under Trial Rule 76(B) has expired, a court may on its own motion or upon motion of any party refer a civil or domestic relations case to mediation. After a motion referring a case to mediation is granted, a party may object by filing a written objection within seven (7) days in a domestic relations case or fifteen (15) days in a civil case. The party must specify the grounds for objection. The court shall promptly consider the objection and any response and determine whether the litigation should then be mediated or not. In this decision, the court shall consider the willingness of the parties to mutually resolve their dispute, the ability of the parties to participate in the mediation process, the need for discovery and the extent to which it has been conducted, and any other factors which affect the potential for fair resolution of the dispute through the mediation process. If a case is ordered for mediation, the case shall remain on the court docket and the trial calendar.

Rule 2.3. Listing of Mediators: Commission Registry of Mediators
Any person who wishes to serve as a registered mediator pursuant to these rules must register with the Indiana Supreme Court Commission for Continuing Legal Education (hereinafter "Commission") on forms supplied by the Commission. The registrants must meet qualifications as required in counties or court districts (as set out in Ind. Administrative Rule 3(A)) in which they desire to mediate and identify the types of litigation which they desire to mediate. All professional licenses must be disclosed and identified in the form which the Commission requires.

The registration form shall be accompanied by a fee of $50.00 for each registered area (Civil or Domestic). An annual fee of $50.00 shall be due the second December 31st following initial registration. Registered mediators will be billed at the time their annual statements are sent. No fee shall be required of a full-time, sitting judge.

The Commission shall maintain a list of registered mediators including the following information: (1) whether the person qualified under A.D.R. Rule 2.5 to mediate domestic relations and/or civil cases; (2) the counties or court districts in which the person desires to mediate; (3) the type of litigation the person desires to mediate; and (4) whether the person is a full-time judge.

The Commission may remove a registered mediator from its registry for failure to meet or to maintain the requirements of A.D.R. Rule 2.5 for non-payment of fees. A registered mediator must maintain a current business and residential address and telephone number with the Commission. Failure to maintain current information required by these rules may result in removal from the registry.

For the billing of calendar year 2011, when this Rule becomes effective, registered mediators must pay the $50.00 annual fee and a one-time fee of $25.00 for the time period July 1, 2011-December 31, 2011, for a total of $75.00 per registration area. The annual fee shall be $50.00 per calendar year per registration area thereafter.

On or before October 31 of each year, each registered mediator will be sent an annual statement showing the mediator's educational activities that have been approved for mediator credit by the Commission.

Rule 2.4. Selection of Mediators

Upon an order referring a case to mediation, the parties may within seven (7) days in a domestic relations case or within fifteen (15) days in a civil case: (1) choose a mediator from the Commission's registry, or (2) agree upon a non-registered mediator, who must be approved by the trial court and who serves with leave of court. In the event a mediator is not selected by agreement, the court will designate three (3) registered mediators from the Commission's registry who are willing to mediate within the Court's district as set out in Admin. R. 3 (A). Alternately, each side shall strike the name of one mediator. The side initiating the lawsuit will strike first. The mediator remaining after the striking process will be deemed the selected mediator.

A person selected to serve as a mediator under this rule may choose not to serve for any reason. At any time, a party may request the court to replace the mediator for good cause shown. In the event a mediator chooses not to serve or the court decides to replace a mediator, the selection process will be repeated.

Rule 2.5. Qualifications of Mediators

(A) Civil Cases: Educational Qualifications.

(1) Subject to approval by the court in which the case is pending, the parties may agree upon any person to serve as a mediator.

(2) In civil cases, a registered mediator must be an attorney in good standing with the Supreme Court of Indiana.

(3) To register as a civil mediator, a person must meet all the requirements of this rule and must have either: (1) taken at least forty (40) hours of Commission approved civil mediation training in the three (3) years immediately prior to submission of the registration application, or (2) completed forty (40) hours of Commission approved civil mediation training at any time and taken at least six (6) hours of approved Continuing Mediation Education in the three (3) years immediately prior to submission of the registration application.

(4) However, a person who has met the requirements of A.D.R. Rule 2.5(B)(2)(a), is registered as a domestic relations mediator, and by December 31 of the second full year after meeting those requirements completes a Commission approved civil crossover mediation training program may register as a civil mediator.

(5) As part of a judge's judicial service, a judicial officer may serve as a mediator in a case pending before another judicial officer.

(B) Domestic Relations Cases: Educational Qualifications.

(1) Subject to approval of the court, in which the case is pending, the parties may agree upon any person to serve as a mediator.

(2) In domestic relations cases, a registered mediator must be either: (a) an attorney, in good standing with the Supreme Court of Indiana; (b) a person who has a bachelor's degree or advanced degree from an institution recognized by a U.S. Department of Education approved accreditation organization, e.g. The Higher Learning Commission of the North Central Association of Colleges and Schools. Notwithstanding the provisions of (2)(a) and (b) above, any licensed professional whose professional license is currently suspended or revoked by the respective licensing agency, or has been relinquished voluntarily while a disciplinary action is pending, shall not be a registered mediator.

(3) To register as a domestic relations mediator, a person must meet all the requirements of this rule and must have either: (1) taken at least forty (40) hours of Commission approved domestic relations mediation training in the

three (3) years immediately prior to submission of the registration application, or (2) taken at least forty (40) hours of Commission approved domestic relations mediation training at any time, and taken at least six (6) hours of approved Continuing Mediation Education in the three (3) years immediately prior to submission of the registration application.

(4) However, if a person is registered as a civil mediator and by December 31 of the second full year after meeting those requirements completes a Commission approved domestic relations crossover mediation training program (s)he may register as a domestic relations mediator.

(5) As part of a judicial service, a judicial officer may serve as a mediator in a case pending before another judicial officer.

(C) Reasons to Delay or Deny Registration. The Commission may delay (pending investigation) or deny registration of any applicant seeking to register as a mediator pursuant to A.D.R. 2.5(A) or 2.5(B) based on any of the grounds listed in A.D.R. Rule 7.1.

(D) Continuing Mediation Education ("CME") Requirements for All Registered Mediators. A registered mediator must complete a minimum of six hours of Commission approved continuing mediation education anytime during a three-year educational period. A mediator's initial educational period commences January 1 of the first full year of registration and ends December 31 of the third full year. Educational periods shall be sequential, in that once a mediator's particular three-year period terminates, a new three-year period and six hour minimum shall commence. Mediators registered before the effective date of this rule shall begin their first three-year educational period January 1, 2004.

(E) Basic and Continuing Mediation Education Reporting Requirements. Subsequent to presenting a Commission approved basic or continuing mediation education training course, the sponsor of that course must forward a list of attendees to the Commission. An attendance report received more than thirty (30) days after a program is concluded must include a late processing fee as approved by the Indiana Supreme Court. Received, in the context of an application, document(s), and/or other item(s) which is or are requested by or submitted to the Commission, means delivery to the Commission; mailed to the Commission by registered, certified or express mail return receipt requested or deposited with any third-party commercial carrier for delivery to the Commission within three (3) calendar days, cost prepaid, properly addressed. Sending by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit. This list shall include for each attendee: full name; attorney number (if applicable); residence and business addresses and phone numbers; and the number of mediation hours attended. A course approved for CME may also qualify for CLE credit, so long as the course meets the requirements of Admission and Discipline Rule 29. For courses approved for both continuing legal education and continuing mediation education, the sponsor must additionally report continuing legal education, speaking and professional responsibility hours attended.

(F) Accreditation Policies and Procedures for CME.

(1) *Approval of courses.* Applications must be accompanied by an application fee as approved by the Indiana Supreme Court. An "application" means a completed application form, with all required attachments and fees, signed and dated by the Applicant. Applications received more than thirty (30) days after the conclusion of a course must include a late processing fee. The Commission shall approve the course, including law school classes, if it determines that the course will make a significant contribution to the professional competency of mediators who attend. In determining if a course, including law school classes, meets this standard the Commission shall consider whether:

(a) the course has substantial content dealing with alternative dispute resolution process;

(b) the course deals with matters related directly to the practice of alternative dispute resolution and the professional responsibilities of neutrals;

(c) the course deals with reinforcing and enhancing alternative dispute resolution and negotiation concepts and skills of neutrals;

(d) the course teaches ethical issues associated with the practice of alternative dispute resolution;

(e) the course deals with other professional matters related to alternative dispute resolution and the relationship and application of alternative dispute resolution principles;

(f) the course deals with the application of alternative dispute resolution skills to conflicts or issues that arise in settings other than litigation, such as workplace, business, commercial transactions, securities, intergovernmental, administrative, public policy, family, guardianship and environmental; and,

(g) in the case of law school classes, in addition to the standard set forth above the class must be a regularly conducted class at a law school accredited by the American Bar Association.

(2) Credit will be denied for the following activities:

(a) Legislative, lobbying or other law-making activities.

(b) In-house program. The Commission shall not approve programs which it determines are primarily designed for the exclusive benefit of mediators employed by a private organization or mediation firm. Mediators within related companies will be considered to be employed by the same organization or law firm for purposes of this rule. However, governmental entities may sponsor programs for the exclusive benefit of their mediator employees.

(c) [Reserved].

(d) Courses or activities completed by self-study.

(e) Programs directed to elementary, high school or college student level neutrals.

(3) *Procedures for Sponsors.* Any sponsor may apply to the Commission for approval of a course. The application must:

(a) be received by the Commission at least thirty (30) days before the first date on which the course is to be offered;

(b) Include the nonrefundable application fee in order for the application to be reviewed by the Commission. Courses presented by non-profit sponsors which do not require a registration fee are eligible for an application fee waiver.

Courses presented by bar associations, Indiana Continuing Legal Education Forum (ICLEF) and government or academic entities will not be assessed an application fee, but are subject to late processing fees.

Applications received less than thirty (30) days before a course is presented must also include a late processing fee in order to be processed by the Commission.

Either the provider or the attendee must pay all application and late fees before a mediator may receive credit.

Fees may be waived in the discretion of the Commission upon a showing of good cause.

(c) contain the information required by and be in the form set forth in the application approved by the Commission and available upon request;

(d) be accompanied by the written course outline and brochure used by the Sponsor to furnish information about the course to mediators; and

(e) be accompanied by an affidavit of the mediator attesting that the mediator attended the course together with a certification of the course Sponsor as to the mediator's attendance. If the application for course approval is made before attendance, this affidavit and certification requirement shall be fulfilled within 5 thirty (30) days after course attendance. Attendance reports received more than thirty (30) days after the conclusion of a course must include a late processing fee.

Course applications received more than (1) one year after a course is presented may be denied as untimely.

(4) *Procedure for Mediators.* A mediator may apply for credit of a live course either before or after the date on which it is offered. The application must:

(a) be received by the Commission at least thirty (30) days before the date on which the course is to be offered if they are seeking approval before the course is to be presented. If the applicant is seeking accreditation, the Sponsor must apply within thirty (30) days of the conclusion of the course.

(b) include the nonrefundable application fee in order for the application to be reviewed by the Commission. Courses presented by non-profit sponsors which do not require a registration fee are eligible for an application fee waiver.

Either the provider or the attendee must pay all application and late fees before a mediator may receive credit.

Fees may be waived in the discretion of the Commission upon a showing of good cause.

(c) contain the information required by and be in the form set forth in the application approved by the Commission and available upon request;

(d) be accompanied by the written course outline and brochure used by the Sponsor to furnish information about the course to mediators; and

(e) be accompanied by an affidavit of mediator attesting that the mediator attended the course together with a certification of the course Sponsor as to the mediator's attendance. If the application for course approval is made before attendance, this affidavit and certification must be received by the Commission within thirty (30) days after course attendance. An attendance report received more than thirty (30) days after the conclusion of a course must include a late processing fee.

Course applications received more than one (1) year after a course is presented may be denied as untimely.

(G) Procedure for Resolving Disputes. Any person who disagrees with a decision of the Commission and is unable to resolve the disagreement informally, may petition the Commission for a resolution of the dispute. Petitions must be received by the Commission within thirty (30) days of notification by the Commission of the Commission's decision and shall be considered by the Commission at its next regular meeting, provided that the petition is received by the Commission at least ten (10) business days before such meeting. The person filing the petition shall have the right to attend the Commission meeting at which the petition is considered and to present relevant evidence and arguments to the Commission. The rules of pleading and practice in civil cases shall not apply, and the proceedings shall be informal as directed by the Chair. The determination of the Commission shall be final subject to appeal directly to the Supreme Court.

(H) Confidentiality. Filings with the Commission shall be confidential. These filings shall not be disclosed except in furtherance of the duties of the Commission or upon the request, by the mediator involved, or as directed by the Supreme Court.

(I) Rules for Determining Education Completed.

(1) *Formula.* The number of hours of continuing mediation education completed in any course by a mediator shall be computed by:

(a) Determining the total instruction time expressed in minutes;

(b) Dividing the total instruction time by sixty (60); and

(c) Rounding the quotient up to the nearest one-tenth (1/10).

Stated in an equation the formula is:

$$\frac{\text{Total Instruction time (in minutes)}}{\text{Sixty (60)}} = \text{Hours completed (rounded up the nearest 1/10)}$$

(2) *Instruction Time Defined.* Instruction time is the amount of time when a course is in session and presentations or other educational activities are in progress. Instruction time does not include time spent on:

(a) Introductory remarks;

(b) Breaks; or

(c) Business meetings

(3) A registered mediator who participates as a teacher, lecturer, panelist or author in an approved continuing mediation education course will receive credit for:

(a) Four (4) hours of approved continuing mediation education for every hour spent in presentation.

(b) One (1) hour of approved continuing mediation education for every four (4) hours of preparation time for a contributing author who does not make a presentation relating to the materials prepared.

(c) One (1) hour of approved continuing mediation education for every hour the mediator spends in attendance at sessions of a course other than those in which the mediator participates as a teacher, lecturer or panel member.

(d) Mediators will not receive credit for acting as a speaker, lecturer or panelist on a program directed to elementary, high school or college student level neutrals, or for a program that is not approved under Alternative Dispute Resolution Rule 2.5(E).

Rule 2.6. Mediation Costs

Absent an agreement by the parties, including any guardian ad litem, court appointed special advocate, or other person properly appointed by the court to represent the interests of any child involved in a domestic relations case, the court may set an hourly rate for mediation and determine the division of such costs by the parties. The costs should be predicated on the complexity of the litigation, the skill levels needed to mediate the litigation, and the litigants' ability to pay. Unless otherwise agreed, the parties shall pay their mediation costs within thirty (30) days after the close of each mediation session.

Rule 2.7. Mediation Procedure

(A) Advisement of Participants. The mediator shall:

(1) advise the parties of all persons whose presence at mediation might facilitate settlement; and

(2) in child related matters, ensure that the parties consider fully the best interests of the children and that the parties understand the consequences of any decision they reach concerning the children; and

(3) inform all parties that the mediator (a) is not providing legal advice, (b) does not represent either party, (c) cannot determine how the court would apply the law or rule in the parties' case, or what the outcome of the case would be if the dispute were to go before the court, and (d) recommends that the parties seek or consult with their own legal counsel if they desire, or believe they need legal advice; and

(4) explain the difference between a mediator's role and a lawyer's role when a mediator knows or reasonably should know that a party does not understand the mediator's role in the matter; and

(5) not advise any party (i) what that party should do in the specific case, or (ii) whether a party should accept an offer; and

(6) advise a party who self-identifies or who the mediator identifies as a victim after screening for domestic or family violence, also known as intimate partner violence or abuse, or coercive control (hereinafter, "domestic violence") that the party will only be required to be present at mediation sessions in accordance with Rule 2.7(B)(1) below.

(B) Mediation Conferences.

(1) The parties and their attorneys shall be present at all mediation sessions involving domestic relations proceedings unless otherwise agreed. At the discretion of the mediator, non-parties to the dispute may also be present. A party who self-identifies or who the mediator identifies as a victim after screening for domestic violence shall be permitted to have a support person present at all mediation sessions. The mediator may terminate the mediation at any time when a participant becomes disruptive to the mediation process.

(2) All parties, attorneys with settlement authority, representatives with settlement authority, and other necessary individuals shall be present at each mediation conference to facilitate settlement of a dispute unless excused by the court.

(3) A child involved in a domestic relations proceeding, by agreement of the parties or by order of the court, may be interviewed by the mediator out of the presence of the parties or attorneys.

(4) Mediation sessions are not open to the public.

(5) The mediator may meet jointly or separately with the parties and may express an evaluation of the case to one or more of the parties or their representatives. The mediator shall advise the parties that the mediator's evaluation is not legal advice.

(C) Confidential Statement of Case. Each side may submit to the mediator a confidential statement of the case, not to exceed ten (10) pages, prior to a mediation conference, which shall include:

(1) the legal and factual contentions of the respective parties as to both liability and damages;

(2) the factors considered in arriving at the current settlement posture; and

(3) the status of the settlement negotiations to date.

A confidential statement of the case may be supplemented by damage brochures, videos, and other exhibits or evidence. The confidential statement of the case shall at all times be held privileged and confidential from other parties unless agreement to the contrary is provided to the mediator.

(D) Termination of Mediation.

(1) The mediator shall terminate or decline mediation whenever the mediator believes:

(a) that of the meditation process would harm or prejudice one or more of the parties or the children;

(b) the ability or willingness of any party to participate meaningfully in mediation is so lacking that a reasonable agreement is unlikely;

(c) due to conflict of interest or bias on the part of the mediator;

(d) or mediation is inappropriate for other reasons

(2) At any time after two (2) sessions have been completed, any party may terminate mediation.

(3) The mediator shall not state the reason for terminating or declining mediation except to report to the court, without further comment, that the mediator is terminating or declining mediation.

(E) Report of Mediation: Status.

(1) Within ten (10) days after the mediation, the mediator shall submit to the court, without comment or recommendation, a report of mediation status. The report shall indicate that an agreement was or was not reached in whole or in part or that the mediation was extended by the parties. If the parties do not reach any agreement as to any matter as a result of the mediation, the mediator shall report the lack of any agreement to

the court without comment or recommendation. With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.

(2) If an agreement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. In domestic relations matters, the agreement shall then be filed with the court. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the agreement shall be filed with the court only by agreement of the parties.

(3) In the event of any breach or failure to perform under the agreement, upon motion, and after hearing, the court may impose sanctions, including entry of judgment on the agreement.

(F) Mediator's Preparation and Filing of Documents in Domestic Relations Cases.

At the request and with the permission of all parties in a domestic relations case, a Mediator may prepare or assist in the preparation of documents as set forth in this paragraph (F).

The Mediator shall inform an unrepresented party that he or she may have an attorney of his or her choosing (1) be present at the mediation and/or (2) review any documents prepared during the mediation. The Mediator shall also review each document drafted during mediation with any unrepresented parties. During the review the Mediator shall explain to unrepresented parties that they should not view or rely on language in documents prepared by the Mediator as legal advice. When the document(s) are finalized to the parties' and any counsel's satisfaction, and at the request and with the permission of all parties and any counsel, the Mediator may also tender to the court the documents listed below when the mediator's report is filed.

The Mediator may prepare or assist in the preparation of only the following documents:

(1) A written mediated agreement reflecting the parties' actual agreement, with or without the caption in the case and "so ordered" language for the judge presiding over the parties' case;

(2) An order approving a mediated agreement, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(3) A summary decree of dissolution, with the caption in the case, so long as the decree is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the summary decree reflects the terms of the mediated agreement;

(4) A verified waiver of final hearing, with the caption in the case, so long as the waiver is in the form of a document that has been adopted or accepted by the court in which the document is to be filed;

(5) A child support calculation, including a child support worksheet and any other required worksheets pursuant to the Indiana Child Support Guidelines or Parenting Time Guidelines, so long as the parties are in agreement on all the entries included in the calculations;

(6) An income withholding order, with the caption in the case, so long as the order is in the form of a document that has been adopted or accepted by the court in which the document is to be filed and the order reflects the terms of the mediated agreement.

Rule 2.8. Rules of Evidence

With the exception of privileged communications, the rules of evidence do not apply in mediation, but factual information having a bearing on the question of damages should be supported by documentary evidence whenever possible.

Rule 2.9. Discovery

Whenever possible, parties are encouraged to limit discovery to the development of information necessary to facilitate the mediation process. Upon stipulation by the parties or as ordered by the court, discovery may be deferred during mediation pursuant to Indiana Rules of Procedure, Trial Rule 26(C).

Rule 2.10. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against any attorney, or party representative who fails to comply with these mediation rules, limited to assessment of mediation costs and/or attorney fees relevant to the process.

Rule 2.11. Confidentiality and Admissibility

(A) Confidentiality.

(1) Mediation sessions shall be confidential and closed to all persons other than the parties of record, their legal representatives, and persons invited or permitted by the mediator.

(2) The confidentiality of mediation may not be waived.

(3) A mediator shall not be subject to process requiring the disclosure of any matter occurring during the mediation except in a separate matter as required by law.

(4) This Rule shall not prohibit the disclosure of information authorized or required by law.

(B) Admissibility.

(1) Mediation shall be regarded as settlement negotiations governed by Indiana Evidence Rule 408.

(2) Evidence discoverable outside of mediation shall not be excluded merely because it was discussed or presented in the course of mediation.

RULE 3. ARBITRATION

Rule 3.1. Agreement to Arbitrate

At any time fifteen (15) days or more after the period allowed for a peremptory change of venue under Trial Rule 76(B) has expired, the parties may file with the court an agreement to arbitrate wherein they stipulate whether arbitration is to be binding or nonbinding, whether the agreement extends to all of the case or is limited as to the issues subject to arbitration, and the procedural rules to be followed during the arbitration process. Upon approval, the agreement to arbitrate shall be noted on the Chronological Case Summary of the Case and placed in the Record of Judgments and Orders for the court.

Rule 3.2. Case Status During Arbitration

During arbitration, the case shall remain on the regular docket and trial calendar of the court. In the event the parties agree to be bound by the arbitration decision on all issues, the case shall be removed from the trial calendar. During arbitration the court shall remain available to rule and assist in any discovery or pre-arbitration matters or motions.

Rule 3.3. Assignment of Arbitrators

Each court shall maintain a listing of lawyers engaged in the practice of law in the State of Indiana who are willing to serve as arbitrators. Upon assignment of a case to arbitration, the plaintiff and the defendant shall, pursuant to their stipulation, select one or more arbitrators from the court listing or the listing of another court in the state. If the parties agree that the case should be presented to one arbitrator and the parties do not agree on the arbitrator, then the court shall designate three (3) arbitrators for alternate striking by each side. The party initiating the lawsuit shall strike first. If the parties agree to an arbitration panel, it shall be limited to three (3) persons.

If the parties fail to agree on who should serve as members of the panel, then each side shall select one arbitrator and the court shall select a third. When there is more than one arbitrator, the arbitrators shall select among themselves a Chair of the arbitration panel. Unless otherwise agreed between the parties, and the arbitrators selected under this provision, the Court shall set the rate of compensation for the arbitrator. Costs of arbitration are to be divided equally between the parties and paid within thirty (30) days after the arbitration evaluation, regardless of the outcome. Any arbitrator selected may refuse to serve without showing cause for such refusal.

Rule 3.4. Arbitration Procedure

(A) Notice of Hearing. Upon accepting the appointment to serve, the arbitrator or the Chair of an arbitration panel shall meet with all attorneys of record to set a time and place for an arbitration hearing. (Courts are encouraged to provide the use of facilities on a regular basis during times when use is not anticipated, i.e. jury deliberation room every Friday morning.)

(B) Submission of Materials. Unless otherwise agreed, all documents the parties desire to be considered in the arbitration process shall be filed with the arbitrator or Chair and exchanged among all attorneys of record no later than fifteen (15) days prior to any hearing relating to the matters set forth in the submission. Documents may include medical records, bills, records, photographs, and other material supporting the claim of a party. In the event of binding arbitration, any party may object to the admissibility of these documentary matters under traditional rules of evidence; however, the parties are encouraged to waive such objections and, unless objection is filed at least five (5) days prior to hearing, objections shall be deemed waived. In addition, no later than five (5) days prior to hearing, each party may file with the arbitrator or Chair a pre-arbitration brief setting forth factual and legal positions as to the issues being arbitrated; if filed, pre-arbitration briefs shall be served upon the opposing party or parties. The parties may in their Arbitration Agreement alter the filing deadlines. They are encouraged to use the provisions of Indiana's Arbitration Act (IC 34-57-1-1 et seq.) and the Uniform Arbitration Act (IC 34-57-2-1 et seq.) to the extent possible and appropriate under the circumstances.

(C) Discovery. Rules of discovery shall apply. Thirty (30) days before an arbitration hearing, each party shall file a listing of witnesses and documentary evidence to be considered. The listing of witnesses and documentary evidence shall be binding upon the parties for purposes of the arbitration hearing only. The listing of witnesses shall designate those to be called in person, by deposition and/or by written report.

(D) Hearing. Traditional rules of evidence need not apply with regard to the presentation of testimony. As permitted by the arbitrator or arbitrators, witnesses may be called. Attorneys may make oral presentation of the facts supporting a party's position and arbitrators are permitted to engage in critical questioning or dialogue with representatives of the parties. In this presentation, the representatives of the respective parties must be able to substantiate their statements or representations to the arbitrator or arbitrators as required by the Rules of Professional Conduct. The parties may be

permitted to demonstrate scars, disfigurement, or other evidence of physical disability. Arbitration proceedings shall not be open to the public.

(E) Confidentiality. Arbitration proceedings shall be considered as settlement negotiations as governed by Ind. Evidence Rule 408. For purposes of reference, Evid.R. 408 provides as follows:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.

(F) Arbitration Determination. Within twenty (20) days after the hearing, the arbitrator or Chair shall file a written determination of the arbitration proceeding in the pending litigation and serve a copy of this determination on all parties participating in the arbitration. If the parties had submitted this matter to binding arbitration on all issues, the court shall enter judgment on the determination. If the parties had submitted this matter to binding arbitration on fewer than all issues, the court shall accept the determination as a joint stipulation by the parties and proceed with the litigation. If the parties had submitted the matter to nonbinding arbitration on any or all issues, they shall have twenty (20) days from the filing of the written determination to affirmatively reject in writing the arbitration determination. If a nonbinding arbitration determination is not rejected, the determination shall be entered as the judgment or accepted as a joint stipulation as appropriate. In the event a nonbinding arbitration determination is rejected, all documentary evidence will be returned to the parties and the determination and all acceptances and rejections shall be sealed and placed in the case file.

Rule 3.5. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against any party or attorney who fails to comply with the arbitration rules, limited to the assessment of arbitration costs and/or attorney fees relevant to the arbitration process.

RULE 4. MINI-TRIALS

Rule 4.1. Purpose

A mini-trial is a case resolution technique applicable in litigation where extensive court time could reasonably be anticipated. This process should be employed only when there is reason to believe that it will enhance the expeditious resolution of disputes and preserve judicial resources.

Rule 4.2. Case Selection/Objection

At any time fifteen (15) days or more after the period allowed for peremptory change of venue under Trial Rule 76(B) has expired, a court may, on its own motion or upon motion of any party, select a civil case for a mini-trial. Within fifteen (15) days after notice of selection for a mini-trial, a party may object by filing a written objection specifying the grounds. The court shall promptly hear the objection and determine whether a mini-trial is possible or appropriate in view of the objection.

Rule 4.3. Case Status Pending Mini-Trial

When a case has been assigned for a mini-trial, it shall remain on the regular docket and trial calendar of the court. The court shall remain available to rule and assist in any discovery or pre-mini-trial matter or motion.

Rule 4.4. Mini-Trial Procedure

(A) Mini-Trial. The court will set a time and place for hearing and direct representatives with settlement authority to meet and allow attorneys for the parties to present their respective positions with regard to the litigation in an effort to settle the litigation. The parties may fashion the procedure by agreement prior to the mini-trial as they deem appropriate.

(B) Report of Mini-Trial. At a time set by the court, the parties, or their attorneys of record, shall report to the court. Unless otherwise agreed by the parties, the results of the hearing shall not be binding.

(1) The report shall indicate that a settlement was or was not reached in whole or in part as a result of the mini-trial. If the parties did not reach any settlement as to any matter as a result of the mini-trial, the parties shall report the lack of any agreement to the court without comment or recommendation. By mutual agreement of the parties the report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolve or completed, would facilitate the possibility of a settlement.

(2) If a settlement is reached, in whole or in part, it shall be reduced to writing and signed by the parties and their counsel. If the agreement is complete on all issues, a joint stipulation of disposition shall be filed with the court. In all other matters, the settlement shall be filed with the court only by agreement of the parties.

(C) Confidentiality. Mini-trials shall be regarded as settlement negotiations as governed by Ind.Evidence Rule 408. Mini-trials shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons. The participants in a mini-trial shall not be subject to process requiring the disclosure of any matter discussed during the mini-trial, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by or on behalf of the parties.

(D) Employment of Neutral Advisor. The parties may agree to employ a neutral acting as an advisor. The advisor shall preside over the proceeding and, upon request, give advisory opinions and rulings. Selection of the advisor shall be based upon the education, training and experience necessary to assist the parties in resolving their dispute. If the parties cannot by agreement select an advisor, each party shall submit to the court the names of two individuals qualified to serve in the particular dispute. Each side shall strike one name from the other party's list. The court shall then select an advisor from the remaining names. Unless otherwise agreed between the parties and the advisor, the court shall set the rate of compensation for the advisor. Costs of the mini-trial are to be divided equally between the parties and paid within thirty (30) days after conclusion of the mini-trial.

Rule 4.5. Sanctions

Upon motion by either party and hearing, the court may impose sanctions against a party or attorney who intentionally fails to comply with these mini-trial rules, limited to the assessment of costs and/or attorney fees relevant to the process.

RULE 5. SUMMARY JURY TRIALS

Rule 5.1. Purpose

The summary jury trial is a method for resolving cases in litigation when extensive court and trial time may be anticipated. This is a settlement process, and it should be employed only when there is reason to believe that a limited jury presentation may create an opportunity to quickly resolve the dispute and conserve judicial resources.

Rule 5.2. Case Selection

After completion of discovery, the resolution of dispositive motions, and the clarification of issues for determination at trial, upon written stipulation of the parties, the court may select any civil case for summary jury trial consideration.

Rule 5.3. Agreement of Parties

A summary jury trial proceeding will be conducted in accordance with the agreement of the parties or their attorneys of record as approved by the court. At a minimum, this agreement will include the elements set forth in this rule.

(A) Completion Dates. The agreement shall specify the completion dates for:

(1) providing notice to opposing party of witnesses whose testimony will be summarized and/or introduced at the summary jury trial, proposed issues for consideration at summary jury trial, proposed jury instructions, and verdict forms;

(2) hearing pre-trial motions; and

(3) conducting a final pre-summary jury trial conference.

(B) Procedures for Pre-summary Jury Trial Conference. The agreement will specify the matters to be resolved at pre-summary jury trial conference, including:

(1) matters not resolved by stipulation of parties or their attorneys of record necessary to conduct a summary jury trial without numerous objections or delays for rulings on law;

(2) a final pre-summary jury trial order establishing procedures for summary jury trial, issues to be considered, jury instructions to be given, form of jury verdict to be rendered, and guidelines for presentation of evidence; and

(3) the firmly fixed time for the summary jury trial.

(C) Procedure/Presentation of Case. The agreement shall specify the procedure to be followed in the presentation of a case in the summary jury trial, including:

(1) abbreviated opening statements;

(2) summarization of anticipated testimony by counsel;

(3) the presentation of documents and demonstrative evidence;

(4) the requisite base upon which the parties can assert evidence; and

(5) abbreviated closing statements.

(D) Verdict and Records. All verdicts in a summary jury trial shall be advisory in nature. However, the parties may stipulate, prior to the commencement of the summary jury trial that a unanimous verdict or a consensus verdict shall be deemed a final determination on the merits. In the event of such a stipulation, the verdict and the record of the trial shall be filed with the court and the court shall enter judgment accordingly.

Rule 5.4. Jury
Jurors for a summary jury trial will be summoned and compensated in normal fashion. Six (6) jurors will be selected in an expedited fashion. The jurors will be advised on the importance of their decision and their participation in an expedited proceeding. Following instruction, the jurors will retire and may be requested to return either a unanimous verdict, a consensus verdict, or separate and individual verdicts which list each juror's opinion about liability and damages. If a unanimous verdict or a consensus verdict is not reached in a period of time not to exceed two (2) hours, then the jurors shall be instructed to return separate and individual verdicts in a period of time not to exceed one (1) hour.

Rule 5.5. Post Determination Questioning
After the verdict has been rendered, the jury will be advised of the advisory nature of the decision and counsel for each side will be permitted to ask general questions to the jury regarding the decisions reached which would aid in the settlement of the controversy. Counsel shall not be permitted to ask specific questions of the jury relative to the persuasiveness of the form of evidence which would be offered by particular witnesses at trial, the effectiveness of particular exhibits, or other inquiries as could convert summary jury trials from a settlement procedure to a trial rehearsal.

Rule 5.6. Confidentiality
Summary jury trials which are advisory shall be regarded as settlement negotiations as governed by Ind.Evidence Rule 408.

Summary jury trials shall be closed to all persons other than the parties of record, their legal representatives, the jurors, and other invited persons. The participants in a summary jury trial shall not be subject to process requiring the disclosure of any matter discussed during the summary jury trial, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by or on behalf of the parties.

Rule 5.7. Employment Of Presiding Official
A neutral acting as a presiding official shall be an attorney in good standing licensed to practice in the state of Indiana. The parties by agreement may select a presiding official. However, unless otherwise agreed, the court shall provide to the parties a panel of three (3) individuals. Each party shall strike the name of one (1) individual from the panel list. The party initiating the lawsuit shall strike first. The remaining individual shall be named by the court as the presiding official. Unless otherwise agreed between the parties and the presiding official, the court shall set the rate of compensation for the presiding official. Costs of the summary jury trial are to be divided equally between the parties and are to be paid within thirty (30) days after the conclusion of the summary jury trial.

RULE 6. PRIVATE JUDGES

Rule 6.1. Case Selection
Pursuant to IC 33-38-10-3(c), upon the filing of a written joint petition and the written consent of a registered private judge, a civil case founded on contract, tort, or a combination of contract and tort, or involving a domestic relations matter shall be assigned to a private judge for disposition.

Rule 6.2. Compensation of Private Judge and County
As required by IC 33-38-10-8, the parties shall be responsible for the compensation of the private judge, court personnel involved in the resolution of the dispute, and the costs of facilities and materials. At the time the petition for appointment of a private judge is filed, the parties shall file their written agreement as required by this provision.

Rule 6.3. Trial By Private Judge/Authority
(A) All trials conducted by a private judge shall be conducted without a jury. The trial shall be open to the public, unless otherwise provided by Supreme Court rule or statute.

(B) A person who serves as a private judge has, for each case heard, the same powers as the judge of a circuit court in relation to court procedures, in deciding the outcome of the case, in mandating the attendance of witnesses, in the punishment of contempt, in the enforcement of orders, in administering oaths, and in giving of all necessary certificates for the authentication of the record and proceedings.

Rule 6.4. Place Of Trial Or Hearing
As provided by IC 33-38-10-7, a trial or hearing in a case referred to a private judge may be conducted in any location agreeable to the parties, provided the location is posted in the Clerk's office at least three (3) days in advance of the hearing date.

Rule 6.5. Recordkeeping
All records in cases assigned to a private judge shall be maintained as any other public record in the court where the case was filed, including the Chronological Case Summary under the case number initially assigned to this case. Any judgment or designated order under Trial Rule 77 shall be entered in the Record of Judgments and Orders for the court where the case was filed and recorded in the Judgment Record for the Court as required by law.

RULE 7. CONDUCT AND DISCIPLINE FOR PERSONS CONDUCTING ADR

Rule 7.0. Purpose

This rule establishes standards of conduct for persons conducting an alternative dispute resolution ("ADR") process governed pursuant to ADR Rule 1.2, hereinafter referred to as "neutrals."

Rule 7.1. Accountability And Discipline

A person who serves with leave of court or registers with the Commission pursuant to ADR Rule 2.3 consents to the jurisdiction of the Indiana Supreme Court Disciplinary Commission in the enforcement of these standards. The Disciplinary Commission, any court or the Continuing Legal Education Commission may recommend to the Indiana Supreme Court that a registered mediator be removed from its registry as a sanction for violation of these rules, or for other good cause shown, including but not limited to any current or past suspension or revocation of a professional license by the respective licensing agency; any relinquishment of a professional license while a disciplinary action is pending; any current or past disbarment; any conviction of, plea of nolo contendere to, or any diversion or deferred prosecution to any state or federal criminal charges (felonies, misdemeanors, and/or infractions), juvenile charges, or violation of military law (unless the conviction, nolo plea, diversion, or deferred prosecution has been expunged pursuant to law).

Rule 7.2. Competence

A neutral shall decline appointment, request technical assistance, or withdraw from a dispute beyond the neutral's competence.

Rule 7.3. Disclosure and Other Communications

(A) A neutral has a continuing duty to communicate with the parties and their attorneys as follows:

(1) notify participants of the date, time, and location for the process, at least ten (10) days in advance, unless a shorter time period is agreed by the parties;

(2) describe the applicable ADR process or, when multiple processes are contemplated, each of the processes, including the possibility in nonbinding processes that the neutral may conduct private sessions;

(3) in domestic relations matters, distinguish the ADR process from therapy or marriage counseling;

(4) disclose the anticipated cost of the process;

(5) advise that the neutral does not represent any of the parties;

(6) disclose any past, present or known future

(a) professional, business, or personal relationship with any party, insurer, or attorney involved in the process, and

(b) other circumstances bearing on the perception of the neutral's impartiality;

(7) advise parties of their right to obtain independent legal counsel;

(8) advise that any agreement signed by the parties constitutes evidence that may be introduced in litigation; and

(9) disclose the extent and limitations of the confidentiality of the process consistent with the other provisions of these rules.

(B) A neutral may not misrepresent any material fact or circumstance nor promise a specific result or imply partiality.

(C) A neutral shall preserve the confidentiality of all proceedings, except where otherwise provided.

Rule 7.4. Duties

(A) A neutral shall observe all applicable statutes, administrative policies, and rules of court.

(B) A neutral shall perform in a timely and expeditious fashion.

(C) A neutral shall be impartial and shall utilize an effective system to identify potential conflicts of interest at the time of appointment. After disclosure pursuant to ADR Rule 7.3(A)(6), a neutral may serve with the consent of the parties, unless there is a conflict of interest or the neutral believes the neutral can no longer be impartial, in which case a neutral shall withdraw.

(D) A neutral shall avoid the appearance of impropriety.

(E) A neutral may not have an interest in the outcome of the dispute, may not be an employee of any of the parties or attorneys involved in the dispute, and may not be related to any of the parties or attorneys in the dispute.

(F) A neutral shall promote mutual respect among the participants throughout the process.

Rule 7.5. Fair, Reasonable and Voluntary Agreements

(A) A neutral shall not coerce any party.

(B) A neutral shall withdraw whenever a proposed resolution is unconscionable.

(C) A neutral shall not make any substantive decision for any party except as otherwise provided for by these rules.

Rule 7.6. Subsequent Proceedings

(A) An individual may not serve as a neutral in any dispute on which another neutral has already been serving without first ascertaining that the current neutral has been notified of the desired change.

(B) A person who has served as a mediator in a proceeding may act as a neutral in subsequent disputes between the parties, and the parties may provide for a review of the agreement with the neutral on a periodic basis. However, the neutral shall decline to act in any capacity except as a neutral unless the subsequent association is clearly distinct from the issues involved in the alternative dispute resolution process. The neutral is required to utilize an effective system to identify potential conflict of interest at the time of appointment. The neutral may not subsequently act as an investigator for any court-ordered report or make any recommendations to the Court regarding the mediated litigation.

(C) When multiple ADR processes are contemplated, a neutral must afford the parties an opportunity to select another neutral for the subsequent procedures.

Rule 7.7 Remuneration

(A) A neutral may not charge a contingency fee or base the fee in any manner on the outcome of the ADR process.

(B) A neutral may not give or receive any commission, rebate, or similar remuneration for referring any person for ADR services.

RULE 8. OPTIONAL EARLY MEDIATION

Preamble.

The voluntary resolution of disputes in advance of litigation is a laudatory goal. Persons desiring the orderly mediation of disputes not in litigation may elect to proceed under this Rule.

Rule 8.1. Who May Use Optional Early Mediation.

By mutual agreement, persons may use the provisions of this Rule to mediate a dispute not in litigation. Persons may participate in dispute resolution under this Rule with or without counsel.

Rule 8.2. Choice of Mediator.

Persons participating in mediation under this Rule shall choose their own mediator and agree on the method of compensating the mediator. Mediation fees will be shared equally unless otherwise agreed. The mediator is governed by the standards of conduct provided in Alternative Dispute Resolution Rule 7.

Rule 8.3. Agreement to Mediate.

Before beginning a mediation under this Rule, participants must sign a written Agreement To Mediate substantially similar to the one shown as Form A to these rules. This agreement must provide for confidentiality in accordance with Alternative Dispute Resolution Rule 2.11; it must acknowledge judicial immunity of the mediator equivalent to that provided in Alternative Dispute Resolution Rule 1.5; and it must require that all provisions of any resulting mediation settlement agreement must be written and signed by each person and any attorneys participating in the mediation.

Persons participating in mediation under this Rule shall have the same ability afforded litigants under Trial Rule 26(B)(2) of the Rules of Trial Procedure to obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a settlement under this Rule or to indemnify or reimburse for payments made to satisfy a settlement under this Rule.

Rule 8.4. Preliminary Considerations.

The mediator and participating persons should schedule the mediation promptly. Before beginning the mediation session, each participating person is encouraged to provide the mediator with a written confidential summary of the nature of the dispute, as outlined in Alternative Dispute Resolution Rule 2.7(c).

Rule 8.5. Good Faith.

In mediating their dispute, persons should participate in good faith. Information sharing is encouraged. However, the participants are not required to reach agreement.

Rule 8.6. Settlement Agreement.

(A) In all matters not involving the care and/or support of children, if an agreement is reached, to be enforceable, all agreed provisions must be put in writing and signed by each participant. This should be done promptly as the mediation concludes. A copy of the written agreement shall be provided to each participant.

(B) Notwithstanding the other provisions of this Rule 8, in matters involving the care and/or support of children, mediated agreements put in writing and signed by all participants may be binding on the participants, but are only enforceable after review and approval by the appropriate court that would have jurisdiction over the care and/or support of the children.

Rule 8.7. Subsequent ADR and Litigation.
If no settlement agreement is reached, put in writing, and signed by the participants, the participants may thereafter engage in litigation and/or further alternative dispute resolution.

Rule 8.8. Deadlines Not Changed.
WARNING: Participation in optional early mediation under this Rule does not change the deadlines for beginning a legal action as provided in any applicable statute of limitations or in any requirement for advance notice of intent to make a claim (for example, for claims against government units under the Indiana Tort Claims Act).

Y L. COLWELL, J.D.
all Mediation Services
8329 Linden Avenue
Munster, Indiana 46321-1820
(219) 838-9001/Fax (219) 838-8848

FORM 25

MEDIATION AGREEMENT

We have agreed to mediate a matter now currently pending in (Court), entitled X v. Y, Cause No. _____. We have engaged Joy L. Colwell to act as our mediator.

We agree as follows:

1. Each side shall pay the mediator one-half of her hourly fee. We agree to compensate her at the total hourly rate of $____.00, to be paid at the rate of $xx.00 per hour by each side.

2. It is understood that although the mediator is an attorney, as the mediator she does not represent either or both parties, nor does she give legal advice. She is employed by us to assist us both as our mediator, facilitating our discussions and negotiations.

3. Each party is advised to consider independent legal advice and representation. We understand that we may attend with our attorneys and may consult with our counsel at any time.

4. We understand that mediation is a process in which a neutral third party assists us in discussing a resolution of our dispute. We understand that we may discuss and/or resolve all or part of the issues in dispute. The process is informal and nonadversarial, and all decision-making authority rests with the us, the parties. We understand that the mediator does not make any decisions for us, and do not expect her to act as a judge for us. Any agreement reached is to be based on the voluntary decisions of the parties, and not on the decisions, opinions or suggestions of the mediator.

Other persons who may be of assistance in the discussions may be permitted to attend the mediation conference by agreement of the parties.

4. (LIMITED CONFIDENTIALITY) Mediation conferences are private and confidential. However, the rules of evidence may not require the exclusion of evidence otherwise discoverable merely because it is presented in the mediation conference. Mediation is regarded as settlement negotiations, and may be admissible for proving bias or prejudice of a witness or to negate a contention of undue delay. Although the process is confidential, the mediator may be required by law to disclose certain statements, such as statements of intent to commit a crime or a confession of child abuse.

5. (BLANKET CONFIDENTIALITY) We agree that as a mediator, Joy L. Colwell is not subject to process requiring disclosure of any matter discussed during the mediation. Any such matter discussed during mediation shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical

13. Although we are not required to reach an agreement, we agree to mediate in good faith.

Agreed to: Date: _____, 1994

_____ _____

_____ _____
Attorney Attorney

_____
Joy L. Colwell,
Mediator

Please sign and return a duplicate to the mediator at:
8329 Linden Ave.
Munster, IN 46321

The signed duplicate may be returned to the mediator at the scheduled conference.

Form 17

LEMON, ARMEY,
HEARN
LEININGER
Attorneys at Law

210 North Buffalo Street
Warsaw, Indiana 46580
P.O. Box 770
Warsaw, Indiana 46581-0770

Telephone 219-268-9111
Fax 219-268-9197

Robert L. Rasor
(1922-1997)
Thomas R. Lemon
Michael E. Armey
R. Steven Hearn
Daniel K. Leininger
Jane L. Kauffman
Wm. Douglas Lemon
Mark C. Sherer

December 6, 2001

ATTORNEYS NAMES, ADDRESSES, ETC.

RE:

Dear Counsel:

It has been agreed that the captioned matter be submitted to mediation which will proceed pursuant to the Indiana A.D.R. Rule, and any local rules which pertain to Courts in which the action is pending. As the selected mediator it is my obligation to inform you of the various aspects of this proceeding and the following is in compliance with the Indiana Rule.

1. Anticipated Cost. You have agreed that the first session of this mediation will be held **on , 2001, commencing at a.m.,** (Warsaw time). This session will last as long as necessary for the hopeful settlement of this case and will discontinue when the parties so desire. The mediation costs will be $ .00 per hour (4-hour minimum). This includes hearing and preparation time and will be divided equally among the parties unless otherwise agreed upon by the parties or ordered by the Court. It is not anticipated miscellaneous expenses such as telephone, copying and other expenses will exceed $100.00 total, but if for any reason the parties require extraordinary expenses, I will so inform you before any sums are spent. If a case settles, cancels or is otherwise postponed, less than 30 days prior to the mediation and the selected mediation date cannot be rescheduled, please see the enclosed ADR Termination and Postponement Policy. If more than one day is requested for a mediation [back-to-back], and the extra days are not required, there will be a $400.00 charge for each unused day.

2. Representation. As is set forward in the Rules, the mediator does not represent any of the parties and, as a mediator, remains neutral with respect to the issues pending in this case. It is hoped that the mediator can help the parties reach their own solution without making judgmental decisions.

a. The legal and factual contentions of the respective parties as to both liability and damages;
b. The factors considered in arriving at the current settlement posture; and
c. The status of the settlement negotiations to date.

Further, information may be supplied as set forth under Rule 2.7(c)(3).

8. In addition to the above, I want to emphasize again that it is important for the real parties to be personally present with actual authority to settle the case. I have found that, when a case has taken longer to settle or did not settle, one or more of the parties were not present or were not in a position to proceed in good faith settlement negotiations and needed to rely on some person other than themselves to reach a decision. Accordingly, I encourage each of the attorneys to make certain the right person is available to assist in the settlement of the case.

If you have any questions, please feel free to contact me.

Very truly yours,

Thomas R. Lemon

TRL/kp
Enclosures

* or as is modified by any local rule.

cc: The Honorable

Form 13

CIVIL MEDIATION AGREEMENT AND DISCLOSURE STATEMENT

The purpose of this Agreement is to ensure that our mediation clients understand the nature, costs and terms of our service and the responsibilities they have to maintain the confidentiality of the mediation process, and to set out the information which must be disclosed under the Rules for Alternative Dispute Resolution.

1. Although the mediator is an attorney, as the mediator she does not represent either or both parties. She does not and will not give legal advice or counsel to the participants.

2. Each party is advised to consider independent legal advice, if you have not already done so.

3. Mediation is a process in which an independent, neutral third party (the mediator) assists the parties in discussing a resolution of their dispute. The mediator assists in identifying issues, facilitating joint problem-solving, and exploring settlement options. You may discuss and/or resolve all or part of the issues in dispute. The process is informal and nonadversarial, and all decision-making authority rests with the parties. Parties may attend with counsel and may consult with their counsel at any time. Other persons who may be of assistance in the discussions may be permitted to attend the mediation conference.

4. Mediation conferences are private and confidential. However, the rules of Alternative Dispute Resolution do not require the exclusion of evidence otherwise discoverable merely because it is presented in the mediation conference. Mediation is regarded as settlement negotiations, and may be admissible for proving bias or prejudice of a witness or to negate a contention of undue delay. Likewise, there are certain statements, such as intention to commit a crime, or a confession of child abuse, which the mediator is required by law to disclose. You are advised to review ADR Rule 2.11 with counsel to determine the consequences of disclosure of information in mediation.

5. The mediator has no relationship with the parties or their counsel, nor does she have any personal or financial or other interest in the subject matter of the case which could result in bias or a conflict of interest.

6. If, at the end of the mediation process, the parties agree, then any factual documentation revealed during the mediation session may be disclosed to the parties or their attorneys.

7. The parties may introduce the written mediated agreement into evidence if the agreement is signed by all parties.

8. The parties known to the mediator who may facilitate discussions are:

14. I understand that parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement. Any agreement reached is based on the voluntary decisions of the parties, and not on the decisions of the mediator.

Agreed to: DATE: _____, 199____

_____ Client

_____ Client

_____ Attorney

_____ Attorney

Please sign and return a duplicate to the mediator at:

The signed duplicate may be returned to the mediator at the first scheduled conference.

Form 13-3

FORM 14

CIVIL MEDIATION AGREEMENT AND DISCLOSURE STATEMENT

The purpose of this Agreement is to ensure that our mediation clients understand the nature, costs and terms of our service and the responsibilities they have to maintain the confidentiality of the mediation process, and to set out the information which must be disclosed under the Rules for Alternative Dispute Resolution.

1. Although the mediator is an attorney, as the mediator she does not represent either or both parties. She does not and will not give legal advice or counsel to the participants.

2. Each party is advised to consider independent legal advice, if you have not already done so.

3. Mediation is a process in which an independent, neutral third party (the mediator) assists the parties in discussing a resolution of their dispute. The mediator assists in identifying issues, facilitating joint problem-solving, and exploring settlement options. You may discuss and/or resolve all or part of the issues in dispute. The process is informal and nonadversarial, and all decision-making authority rests with the parties. Parties may attend with counsel and may consult with their counsel at any time. Other persons who may be of assistance in the discussions may be permitted to attend the mediation conference.

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5. The mediator has no relationship with the parties or their counsel, nor does she have any personal or financial or other interest in the subject matter of the case which could result in bias or a conflict of interest.

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7. The parties may introduce the written mediated agreement into evidence if the agreement is signed by all parties.

8. The parties known to the mediator who may facilitate discussions are:

14. I understand that parties and their representatives are required to mediate in good faith, but are not compelled to reach an agreement. Any agreement reached is based on the voluntary decisions of the parties, and not on the decisions of the mediator.

Agreed to: DATE: _____, 199____

_____
Client

_____
Client

_____
Attorney

_____
Attorney

Please sign and return a duplicate to the mediator at:

The signed duplicate may be returned to the mediator at the first scheduled conference.

Form 14-3

Form 7

STATE OF INDIANA	)	IN THE	CIRCUIT COURT
	) SS:		
COUNTY OF	)	CAUSE NO.:	

Plaintiff,	)
	)
vs.	)
	)
Defendant.	)

CONFIDENTIAL REPORT OF MEDIATION

The above-captioned matter was submitted to mediation on , commencing at o'clock a.m. Present were the following:

1. , Plaintiff.

2. , Attorney for Plaintiff.

3. , Attorney for Defendant.

4. , Claims Representative for the Defendant.

5. Thomas R. Lemon, Mediator.

Following mediation, the captioned matter settled on the following terms and conditions:

1. The defendant will pay to the plaintiff the sum of $ _____ , which will be delivered on or before _____. It is agreed that said settlement check will not be negotiated or deposited until the Release hereinafter mentioned has been signed and placed in the United States mail to counsel for the defendant.

2. Counsel for the defendant will prepare a Release for the plaintiff's signature appropriate for this type of case in the State of Indiana, which will contain a "hold harmless" and indemnity provision with respect to any liens or encumbrances resulting from this cause of action.

3. It is further agreed counsel for the defendant will prepare the appropriate Stipulation of Dismissal with Prejudice and Order which will be forwarded to counsel for the plaintiff for signature and filing with the Court.

Section Five

2021 In Review

Sally A. Voland
Dugan & Voland LLC
Indianapolis, Indiana

Section Five

BIBLIOGRAPHY / ICLEF

1. *National Collegiate Athletic Association vs. Shawne Alston et al*
   594 U.S. ____ (S.C.2021)

2. *National Collegiate Athletic Association Athletic Grant-In-Aid*
   958 F.3rd 1239 (9th Cir Ct. App. 2021)

3. *National Collegiate Athletic Association Athletic Grant-In-Aid*
   375 F.Supp.3rd 1058 (N.D.Cal 2019)

4. NCAA.org: National Collegiate Athletic Association: NIL Policy 2021

5. California Fair Pay to Play Act

6. CLM.org: Council on Litigation Management: The State of Pay for Play 9-20-21

7. Department of Labor: DOL.gov: Workplace Violence Program

8. Occupational Safety & Health Administration / OSHA.gov
   National Institute of Occupational Safety & Health / NIOSH.gov:
   Federal Vaccine Mandates
   Workplace Safety Guidelines

9. Association of Flight Attendants: AFACWA.org

10. Federal Aviation Administration / FAA.gov: Justice Department Enforcement

11. Center for Disease Control / CDC.gov: Work-Related Musculoskeletal Disorders and Ergonomics

12. Coronavirus-Related Restrictions in Every State
    American Association of Retired Persons: AARP.org: 10/7/21

13. *Klaassen Et Al v. Trustees of Indiana University* / Fed. District Court, 7th Cir Ct. App, US Supreme Court

14. NBA.com: COVID-19 Protocols

15. WCI360.com: Worker's Compensation Institute

2021 In Review

Presented By: Sally A. Voland

- Sally Voland received her J.D. degree, summa cum laude, from Indiana University School of Law and is a member of all Indiana District Court Bars and the Indiana State Bar. Sally is a fellow of the College of Workers' Compensation Lawyers. She served on the Board of Kids' Chance of Indiana and is past chair and current member of the worker's compensation section of the Defense Trial Counsel of Indiana. Sally participates in the Indiana Worker's Compensation Institute, and the Claims and Litigation Management Alliance. She is a guest lecturer on employment topics and serves the SVDP Legal Clinic. Sally was a founding partner of Dugan & Voland LLC.

Pay for Play

Supreme Court of the United States
National Collegiate Athletic Association vs. Alston Et. Al.
Argued March 31, 2021
Decided June 21, 2021

The case addressed the NCAA's restrictions on athletic compensation and potential violations of Federal antitrust law. Former players who became Plaintiffs maintained that the lower courts ruling granting an additional $5,900.00 in educational awards to athletes was fair and right. The NCAA argued against the expansion.

Pay for Play

The present debate continues over compensation to athletes for their name, image, and likeness (NIL). Several state NIL laws could take effect consistent with the Court's ruling.

Pay for Play

Some call the compensation structure exploitation.

Some call it preservation of amateur sports.

Pay for Play

Oral arguments on amateur status and NCAA policy met criticism for allowing coaches, administrators and executives to reap the benefits of high salaries while students go unpaid despite the value of their work. The Plaintiffs argued that schools were conspiring and agreeing with competitors to pay no salaries to the students --- arguably in violation of antitrust law.

Pay for Play

The NCAA argued that it should receive exceptional treatment in the way of antitrust law generally intended to promote competition that benefits consumers.

Pay for Play

National Collegiate Athletic Association vs. Alston et. al.

Case History

- Judgement for Plaintiffs at the District Court: National Collegiate Athletic Association Athletic Grant in Aid cap antitrust litigation 375 Federal Sup 3rd 1058 (N.D. California 2019).
- Affirmed 958 F 3rd 1239 (9th Circuit 2020).

Pay for Play

Case Background

The NCAA promulgates rules for student athletes that play in its programs. These programs are revenue-generators for the individual schools in the conferences, much a result of widely televised and marketed games. Rules limiting the type of compensation that a school could give a student athlete was purportedly to keep college athletics from becoming a professional sport. At one time even non-cash related benefits like scholarships and internships were disallowed to avoid “pay to play” claims.

Pay for Play

In O’Bannon vs. NCAA, college athletes complained that they did not receive compensation for their names and likeness in college athletic program video games, in violation of the Sherman Act and antitrust law. The District Court and 9th Circuit found in favor of the athletes. The NCAA had agreed to review its policies for name, image, and likeness in conjunction with the California’s Fair Pay to Play Act passed in October 2019 due for enforcement in 2023 which would allow students more control for sponsorships and endorsements.

Pay for Play

NCAA vs. Alston was a combination of additional lawsuits challenging the NCAA's restrictions on educational compensation for athletes. Restrictions on non-cash education related benefits which were against NCAA rules violated antitrust law. Computers, science equipment, musical instruments and other tangible items not included in the cost of attendance calculation (scholarships) but related to academic studies could be allowed. In addition, post-eligibility scholarships to complete undergraduate or graduate degrees, vocational school, tutoring, expenses related to studying abroad and paid post-eligibility internships were addressed. Cash awards unrelated to education could still be limited by the NCAA.

Pay for Play

The NCAA complained the lower courts decisions could create a pay for play program if the compensation was expanded to allow, for example, an internship with Nike for $500,000.00 a semester, which would end all auspices of amateurism.

Pay for Play

Legal Impact

The Supreme Court addressed restrictions on education-related payments and not direct compensation payments to athletes. However, several states are introducing laws giving student athletes more control over the use of their name, image, and likeness. In addition, congress had been reviewing possible action given the NCAA's lack of action addressing NIL. The NCAA acknowledged it would work with Federal representatives to chart the path forward given the clear message from the courts.

Pay for Play

The Alston decision changes the landscape with NCAA and student athletes. Suspending amateurism rules for NIL was one clear result.

Pay for Play

The Court found the NCAA was acting in violation of Section 1 of the Sherman Act which prohibits “contract, combination, or conspiracy in restraint of trade or commerce.” In applying the “rule of reason” (a judicial doctrine of antitrust law), the Court clearly found the NCAA was subject to antitrust legislation.

Pay for Play

The court conducted a fact-specific assessment of market structure to see if the restraints actually affected competition. Because the NCAA could not justify its limits on educational-related compensation for student athletes other than to maintain the amateurism of college sports, the court noted the lack of economic analysis. In contrast, the Plaintiffs showed that college sports popularity had increased following prior allowances in additional educational benefits.

Pay for Play

The Supreme Court decision addressed a specific additional academic-related award of $5,900.00 to mirror an athletic award to student athletes available at conferences and colleges. However, the Court's ruling suggested that if broader issues were brought before it, the rule of reason would lead to the same result for benefits of all kinds.

Pay for Play

Individual schools are left to define and dispense educational benefits outside the NCAA restrictions. Moreover, state and federal legislation opening up name, image, and likeness opportunities could also impact student athletes.

Pay for Play

Student athletes, athletic representatives, marketing agencies, branders and broadcasters, have a stake in compensation and a massive change may be in the works.

Pay for Play

The NCAA position that their rules on amateurism preserved consumer demand was seen as inconsistent. Thousands of dollars are awarded above cost of attendance scholarships, thousands of dollars for insurance on players pro-worthy [See: Student Assistance Fund, Academic Enhancement Fund] --- and schools concern over compensation to student athletes was viewed as inconsistent since payment to amateur sport coaches, administrators, and programs is sizeable.

Pay for Play

Justice Cavanagh's concurring opinion.

Justice Cavanagh joined the unanimous Supreme Court decision that the NCAA is subject to antitrust scrutiny and NCAA violated it in restricting education-related benefits.

Pay for Play

It is uncontroverted that compensation rules by the NCAA lower the price of student athletic labor below market rates and students have no ability to negotiate. But there are less intrusive ways to preserve amateurism as suggested by the Court.

Pay for Play

Justice Cavanagh maintained that the NCAA's business model would be flatly illegal in almost any other industry in America. Maintaining artificially low compensation rates by saying it increases consumer benefit is not persuasive. Justice Cavanagh states price fixing is an antitrust problem.

Pay for Play

Name Image & Likeness [NIL]

3 elements of the legal concept of “right of publicity”. Permission is required from the person for use of name, image and likeness.

Pay for Play

Athletes argue that they bring in money for their schools, they bring exposure for their schools, playing for the team is hard work, takes lots of time, studies are harder, and they need a tutor, they need spending money, and they have no time for part-time work, and they have a potential for injury. Counter arguments include athletes get personal exposure, athletes get scholarship money and other pay, athletes get promoted for future opportunities, there are funds available to petition for expenses of daily living.

Pay for Play

Justice Kavanaugh let it be known that implementing a system where athletes are paid in cash or in-kind changes compensation rules in college sports. If pay for play develops, a student athletic could be considered an employee of the school under the Worker's Compensation Acts of that state.

Pay for Play

In other words, the student athlete could meet the general definition of an employee (performing services for another for valuable consideration).

Pay for Play

Questions for the Future:

1) Compensation for student athletes in revenue and nonrevenue sports?
2) Must an athlete be paid for services, receive a scholarship, or be involved in a revenue producing sport to make the definition of employee?
(3) How does Title IX impact arrangements?

Pay for Play

Worker's Compensation

If the student athlete is considered an employee and is injured in the course and scope of employment what could that look like?

- What if the student athlete sustains an injury which renders him no longer an athlete but just a student (without financial assistance or a college sports career)?
- How to calculate average weekly wage?
- Light duty work?
- Discharge for cause?
- Violation of Rules?
- Attendance?
- Drug/alcohol?
- Curfews?
- Injuries during practice or game?

Pay for Play

Medical treatment

- Selection of medical providers?
- Completion of care at maximum medical improvement?
- Reasonable and necessary treatment?
- Delays in treatment and impact on athletes?

Pay for Play

The Courts caution the Parties to strike a path in cooperation and negotiation (avoid litigation).

Workplace Safety

Recent estimates suggest that workplace violence results in billions of dollars in loss every year. Healthcare workers are most often affected. Populations include medics, ER personnel, and nursing staff. Those in trauma or neuropsychology areas are often impacted.

Workplace Safety

According to the Occupational Safety & Health Administration (OSHA), an average of almost two million U.S. workers report having been a victim of violence at work each year. HR professionals spend time and effort on violence prevention but can also be a target population.

Workplace Safety

The National Institute of Occupational Safety & Health (NIOSH), defines workplace violence as the act or threat of violence, ranging from verbal abuse to physical assaults, directed toward people at work or on duty.

Workplace Safety

Workplace Violence Response

The Federal Occupational Safety & Health Act includes the general duty clause requiring employers to furnish to employees a place of employment which is free from recognized hazards that are causing or likely to cause death or serious physical harm. Some states require employees to implement workplace violence prevention programs. eg. California Workplace Violence Prevention in Healthcare Rule.

Workplace Safety

The FedEx Indiana warehouse shooting was one of the deadliest workplace episodes in over a year. Eight people were fatally injured and an additional five were hospitalized.

Workplace Safety

Teachers can also be the target of workplace violence. Aggressive behavior in the schools can result in kicking, hitting, biting, pushing, shoving, and other physical encounters.

Workplace Safety

Worker's Compensation Claims

When worker's compensation and workplace violence intersect, it must generally be shown that the loss occurred in the scope of employment and while the employee was working.

Workplace Safety

According to the Occupational Safety & Health Administration, the agency of the United States Department of Labor “workplace violence is any act with threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the worksite. It ranges from threats and verbal abuse to physical assaults and even homicide.

Workplace Safety

Effective Intervention

Create a policy…respond to reported incidents... investigate all reports...provide feedback to employees...request assistance from experts including those in the workplace, HR, employee assistance programs, security, and medical.

Workplace Safety

Warning signs include attendance problems…productivity decreases…inconsistent work patterns…lapse of safety…changes in health, hygiene, or behavior…exhibiting stress…depression…or aggression to coworkers.

Workplace Safety

Violence in the skies

The Association of Flight Attendants revealed a survey identifying 85% of respondents dealt with unruly passengers, 17% of which involved physical incidents. Related triggers included drunk passengers and masking rules. Reported incidents included shoving, kicking, throwing trash, and stalking flight crews.

Workplace Safety

Flight delays and cancellations were also common factors which escalated unruly behavior. Classes offered to flight attendants around the country focused on defense and de-escalation techniques.

Workplace Safety

The FAA announced a zero-tolerance policy in July. It has the authority to pursue legal enforcement against a passenger who interferes with crew members up to and including civil penalties and bans from flying.

Musculoskeletal Disorders in the Workforce

Information from the Centers for Disease Control and Prevention website confirms the toll musculoskeletal disorders take in the workplace.

Musculoskeletal Disorders in the Workforce

The Bureau of Labor Statistics of the Department of Labor provides the definition of MSD's as:

> Musculoskeletal system and connected tissue diseases and disorders of bodily reaction; bending, climbing, crawling, reaching, twisting - - - sometimes over-exertion or repetitive motion. In other words, musculoskeletal disorders are not classified as trips, falls or similar incidents.

Musculoskeletal Disorders in the Workforce

High cost to the employer includes absenteeism, changes in productivity, increased health care expense, lost workdays and worker’s compensation costs.

Musculoskeletal Disorders in the Workforce

Examples of MSD’s include sprains, strains and tears, back pain, carpal tunnel, and hernias.

Musculoskeletal Disorders in the Workforce

MSDs can result from heavy lifting, vibratory tools, overhead work, and awkward positions.

Musculoskeletal Disorders in the Workforce

If the work environment during performance of work contributes significantly to the condition or the condition is exacerbated or exaggerated because of work conditions, musculoskeletal disorders claims may arise.

Musculoskeletal Disorders in the Workforce

Ergonomics is coordinating workplace conditions and job demands to the capability of the worker. Eliminating injuries associated with over-use of muscles is the goal. Personal protective equipment can also be utilized.

Musculoskeletal Disorders in the Workforce

Typical examples of claims arise when employees spend many hours at a workstation that might involve awkward posture, material handling, repetition, vibration, temperature extremes and inadequate lighting.

Musculoskeletal Disorders in the Workforce

Personal protective equipment can include respirators, safety shoes, hardhats, goggles, air plugs, splints, belts and similar devices.

Musculoskeletal Disorders in the Workforce

Administrative controls such as reducing shift length or overtime, scheduled breaks, rotating job stations, training and techniques are utilized.

Musculoskeletal Disorders in the Workforce

Engineering controls could include mechanical devices for heavy loads or packaging, height adjustable workstations, and expeditious access to work tools.

COVID-19 Mandates

Indiana University Vaccine Mandate upheld by Federal Courts.

The Federal Judge Damon Leichty sided with Indiana University in refusing to issue an injunction for the vaccine mandate based on students' contention the mandate was unconstitutional.

COVID-19 Mandates

Coronavirus-related restrictions in the 50 states.

See attached.

COVID-19 Mandates

Federal Vaccine Mandates

President Biden’s order requiring vaccinations: OSHA develops rules for companies with 100 or more employees, federal employees, government contractors and healthcare workers who treat patients on Medicare and Medicaid.

COVID-19 Mandates

Exemptions are allowed for medical and religious reasons. Mandates vary from state to state but typically cover some combination of government employees and contractors, healthcare workers, teachers and employees in state-operated settings such as prisons. Some allow frequent testing and mask wearing as an alternative to vaccination.

COVID-19 Mandates

Some states have prohibited vaccine mandates either through legislation or executive orders. Montana is currently the only state that prohibits private employers from mandating the vaccine for their employees.

COVID-19 Mandates

Private Businesses

The Equal Employment Opportunity Commission issued guidance that private businesses could adopt mandatory vaccination policies as long as they did not discriminate.

COVID-19 Mandates

Now that the Food and Drug Administration gave full approval for the vaccines, businesses like Walmart, Google, and state businesses, Rolls Royce, healthcare institutions, and IU Medical Center, have instituted vaccine mandates for employees.

COVID-19 Mandates

Incentives for vaccination programs.

- Lessening of restrictions.
- Monetary incentives.
- Free and local vaccination options.

COVID-19 Mandates

NBA vaccination policy

Although no mandates are issued, relief from strict protocols for individuals and teams if the level of 85% vaccination is achieved have addressed some vaccine hesitancy.

COVID-19 Mandates

Once vaccinated, athletes may no longer have to wear masks in the weight room, vaccinated family members can travel with them, athletes can carpool or use Uber lift, and reduce Covid testing.

COVID-19 Mandates

Athletes and staff can avoid wearing Kinexon tracking devices for contact tracing. They can eat in restaurants without restriction and gather in the clubhouse.

COVID-19 Mandates

U.S. states can legally require vaccinations including as a condition of participation and public activities such as school. Employers can make them mandatory as a condition of employment.

Questions???

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION *v.* ALSTON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–512. Argued March 31, 2021—Decided June 21, 2021*

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on "amateur" student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. §1. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court

*Together with No. 20–520, *American Athletic Conference et al.* v. *Alston et al.*, also on certiorari to the same court.

Syllabus

"struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." 958 F. 3d 1239, 1263. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. 15–36.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a "rule of reason" analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are "undue." *Ohio* v. *American Express Co.*, 585 U. S. ___, ___. Whether a particular restraint is undue "presumptively" turns on an application of a "rule of reason analysis." *Texaco, Inc.* v. *Dagher*, 547 U. S. 1, 5. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ___. Pp. 15–24.

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express*, 585 U. S., at ___. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or "quick look." See *Dagher*, 547 U. S., at 7, n. 3; *Board of Regents*, 468 U. S., at 109, n. 39. But not here. Pp. 15–19.

(2) The NCAA next contends that the Court's decision in *Board of*

Regents expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one "entirely consistent with the goals of the Sherman Act." *Id.*, at 120. But that sort of passing comment on an issue not presented is not binding, nor is it dispositive here. Pp. 19–21.

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not "commercial enterprises" but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411, 424. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that "the special characteristics of [the NCAA's] particular industry" should exempt it from the usual operation of the antitrust laws is "properly addressed to Congress." *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679, 689. Pp. 21–24.

(b) The NCAA's remaining attacks on the district court's decision lack merit. Pp. 24–36.

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. Rather, only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" did the district court find the restraints unlawful. Pp. 24–29.

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." But a party cannot declare a restraint "immune from § 1 scrutiny" by relabeling it a product feature. *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 199, n. 7. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. Pp. 29–30.

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will "micromanage" its business. Judges must indeed be sensitive to the possibility that the "continuing

Syllabus

supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 415. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. Pp. 30–36.

958 F. 3d 1239, affirmed.

GORSUCH, J., delivered the opinion for a unanimous Court. KAVANAUGH, J., filed a concurring opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 20–512 and 20–520

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

20–512 *v.*

SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL., PETITIONERS

20–520 *v.*

SHAWNE ALSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 2021]

JUSTICE GORSUCH delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 104, n. 27 (1984). The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion that cut both ways. The

court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852–1924, pp. 15–16 (1993). He offered the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, Unpaid Professionals 6–7 (1999) (Zimbalist); Rushin, Inside the Moat, Sports Illustrated, Mar. 3, 1997. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the "'junket'" as an experience "'as unique and irreproducible as the Rhodian colossus,'" Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree of Doctor of Laws, Yale University Commencement, June 30, 1886, in Speeches by Oliver Wendall Holmes, p. 27 (1918), but it was football that really caused

college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues." Zimbalist 7. Schools regularly had "graduate students and paid ringers" on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, The College Athlete, McClure's Magazine, June 1905, p. 124. The absence of academic residency requirements gave rise to "'tramp athletes'" who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." *Ibid.* The next week, he "was back at West Virginia's law school." *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that "'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.'" Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. *Id.*, at 8. President Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that

"[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906); see also Proceedings of the Eleventh Annual Convention of the National Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. *Id.*, at 87. College football was "not a student's game"; it was an "organized commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." *Id.*, at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." *Id.*, at xiv–xv. One coach estimated that a rival team "spent over $200,000 a year on players." Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, 28 Stan. L. & Pol'y Rev. 181, 190 (2017). In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.'" Zimbalist 22–23. He reportedly said: "'[A] wealthy guy puts big

bucks under my pillow every time I score a touchdown. Hell, I can't afford to graduate.'" *Id.*, at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. *Ibid.* And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019) (hereinafter D. Ct. Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Cu-*

riae 10. In 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon* v. *National Collegiate Athletic Assn.*, 802 F. 3d 1049, 1054–1055 (CA9 2015). The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship limits to an amount that is generally several thousand dollars higher than previous limits. D. Ct. Op., at 1064.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id.*, at 1072. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id.*, at 1072, n. 15. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id.*, at 1072. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id.*, at 1073. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments "'incidental to athletics participation,'" including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id.*, at 1064, 1071, 1074. The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of

$10,000 for students to attend graduate school after their athletic eligibility expires. *Id.*, at 1074. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id.*, at 1069.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id.*, at 1063. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id.*, at 1090.

At the center of this thicket of associations and rules sits a massive business. The NCAA's current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id.*, at 1077, n. 20. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id.*, at 1063; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that year." D. Ct. Op., at 1063. All these amounts have "increased consistently over the years." *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per

year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between $2 to $5 million. *Ibid.* College athletic directors average more than $1 million annually. *Ibid.* And annual salaries for top Division I college football coaches approach $11 million, with some of their assistants making more than $2.5 million. *Id.*, at 17–18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." D. Ct. Op., at 1062, 1065, n. 5. Specifically, they alleged that the NCAA's rules violate §1 of the Sherman Act, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." 15 U. S. C. §1.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce." D. Ct. Op., at 1066.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. This Court has "long recognized that in view of the common law and the law in this country when the Sherman Act was

passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.'" *Ohio* v. *American Express Co.*, 585 U. S. ___, ___ (2018) (slip op., at 8) (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc.* v. *Dagher*, 547 U. S. 1, 5 (2006); *Standard Oil Co. of N. J.* v. *United States*, 221 U. S. 1, 60–62 (1911). That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.* (brackets and internal quotation marks omitted).

In applying the rule of reason, the district court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and FBS football, wherein each class member participates in his or her sport-specific market." D. Ct. Op., at 1097. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id.*, at 1067. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id.*, at 1067, 1070. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id.*, at 1070.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive

effects in the relevant market." *Id.*, at 1067. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." *Id.*, at 1097. In a market without the challenged restraints, the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." *Id.*, at 1068. "Student-athletes would receive offers that would more closely match the value of their athletic services." *Ibid.* And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. *Id.*, at 1067; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, D. Ct. Op., at 1070, n. 12, and the NCAA does not pursue them here. The NCAA's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. *Id.*, at 1098.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id.*, at 1063–1064, 1072–1073; see also *supra*, at 3–7. The court noted that the NCAA "nowhere define[s] the

nature of the amateurism they claim consumers insist upon." D. Ct. Op., at 1070. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, *id.*, at 1074, noting the testimony of a former SEC commissioner that he's "'never been clear on . . . what is really meant by amateurism.'" *Id.*, at 1070–1071.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." *Id.*, at 1070. The court observed, for example, that the NCAA's "only economics expert on the issue of consumer demand" did not "study any standard measures of consumer demand" but instead simply "interviewed people connected with the NCAA and its schools, who were chosen for him by defense counsel." *Id.*, at 1075. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id.*, at 1074, 1076. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would "not negatively affect consumer demand." *Id.*, at 1076. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." *Id.*, at 1082. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id.*, at 1083.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the same procompetitive effect as the

challenged set of rules." *Id.*, at 1104. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id.*, at 1088. On no account, the court found, could such education-related benefits be "confused with a professional athlete's salary." *Id.*, at 1083. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id.*, at 1088.

The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to

Pet. for Cert. in No. 20–512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). *Id.*, at 168a–169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14–md–02541, ECF Doc. 1329, pp. 5–6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits "'related to education.'" App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. And the court explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id.*, at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F. 3d 1239, 1263 (CA9 2020). The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, Antitrust Law ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, *e.g.*, *Mandeville Island Farms, Inc.* v.

American Crystal Sugar Co., 334 U. S. 219, 235 (1948); *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, 549 U. S. 312, 321 (2007); 2A Areeda & Hovenkamp ¶352c, pp. 288–289 (2014); 12 *id.*, ¶2011a, at 132–134.

Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12. But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20–512, p. 14, or a "'quick look,'" Brief for Petitioners in No. 20–520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact

that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See *Dagher*, 547 U. S., at 7; *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 22–23 (1979).

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express*, 585 U. S., at ___–___ (slip op., at 8–9) (internal quotation marks omitted).

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the "'twinkling of an eye.'" *Board of Regents*, 468 U. S., at 110, n. 39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981)); *American Needle, Inc.* v. *National Football League*, 560 U. S. 183, 203 (2010). That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F. 2d 210 (CADC 1986), for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market."

Id., at 217. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc.* v. *Forest City Enterprises, Inc.*, 776 F. 2d 185, 191 (CA7 1985) ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher*, 547 U. S., at 7, n. 3; *California Dental Assn.* v. *FTC*, 526 U. S. 756, 770 (1999). Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U. S. 877, 886–887 (2007); Easterbrook, On Identifying Exclusionary Conduct, 61 Notre Dame L. Rev. 972, 975 (1986) (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra*, at 26–27 (further reasons for caution).

None of this helps the NCAA. The NCAA *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can

(and in fact do) harm competition. See D. Ct. Op., at 1067. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents*, 468 U. S., at 101 (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the "'twinkling of an eye.'" *American Needle*, 560 U. S., at 203.

But this insight does not always apply. That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects of elaborate interleague cooperation are." *Id.*, at 199, n. 7. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. See, *e.g., Chicago Professional Sports Ltd. Partnership* v. *National Basketball Assn.*, 95 F. 3d 593, 600 (CA7 1996) ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players").

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division

I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. 468 U. S., at 94. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as "'illegal *per se*.'" *Id.*, at 100. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." *Id.*, at 101–102. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. *Id.*, at 109, n. 39. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard to see how the NCAA might object to a court providing a more cautious form of review before reaching a

similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.*, at 120.

See also *id.*, at 101, 102 (the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the like"). On the NCAA's telling, these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only assuming the reasonableness of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive . . . ." *Id.*, at 117 (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

Our confidence on this score is fortified by still another

factor. Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g.*, *American Express Co.*, 585 U. S., at ___–___ (slip op., at 10–12); 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. D. Ct. Op., at 1064. It has increased the size of permissible benefits "incidental to athletics participation." *Id.*, at 1066. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id.*, at 1072. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than $13.5 billion. *Ibid.* From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men's basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to $1.1 billion. D. Ct. Op., at 1077, n. 20.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be "infallible only because we are final," *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in result), but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and

its member schools are not "commercial enterprises" and instead oversee intercollegiate athletics "as an integral part of the undergraduate experience." Brief for Petitioner in No. 20–512, at 31. The NCAA represents that it seeks to "maintain amateurism in college sports as part of serving [the] societally important non-commercial objective" of "higher education." *Id.*, at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See D. Ct. Op., at 1066. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that "the economic significance of the NCAA's nonprofit character is questionable at best" given that "the NCAA and its member institutions are in fact organized to maximize revenues." 468 U. S., at 100–101, n. 22. Nor, on the other side of the equation, does anyone contest that the status of the NCAA's members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

Take two examples. In *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679 (1978), a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id.*, at 679–680. This Court rejected that appeal as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Id.*, at 695. The "statutory policy" of the Act is one of competition and it "precludes inquiry into the question whether competition is good or bad." *Ibid.* In *FTC* v. *Superior Court Trial Lawyers Assn.*, 493 U. S. 411 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. *Id.*, at 414. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: "The social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful." *Id.*, at 424.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U. S. 200 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. *Id.*, at 208–209. But this Court has refused to extend *Federal Baseball*'s reasoning to other sports leagues—and has even acknowledged criticisms of the decision as "'unrealistic'" and "'inconsistent'" and "aberration[al]." *Flood* v. *Kuhn*, 407 U. S. 258, 282 (1972) (quoting *Radovich* v. *National Football League*, 352 U. S. 445, 452 (1957)); see also Brief for Advocates for Minor Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). Indeed, as we have seen, this Court has already recognized that the NCAA itself *is* subject to the Sherman

Act.

The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." *Flood*, 407 U. S., at 279. The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." *National Soc. of Professional Engineers*, 435 U. S., at 689. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, *e.g.*, 7 U. S. C. §§291–292 (agricultural cooperatives); 15 U. S. C. §§1011–1013 (insurance); 15 U. S. C. §§1801–1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy. *National Soc. of Professional Engineers*, 435 U. S., at 695.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

When describing the rule of reason, this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for "'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.'" *American Express Co.*, 585 U. S., at ___ (slip op., at 9). As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the

defendant to show a procompetitive rationale for the restraint." *Ibid.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *Id.*, at ____–____ (slip op., at 9–10).

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See *supra*, at 15–19. The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. *California Dental*, 526 U. S., at 781; see also, *e.g.*, *Leegin Creative*, 551 U. S., at 885 ("'[T]he factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition'"); *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 768 (1984); 7 Areeda & Hovenkamp ¶1507a, at 442–444 (slightly different "decisional model" using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." D. Ct. Op., at 1067. This was no slight burden. According to one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen,

based on a voluminous record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See D. Ct. Op., at 1067. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id.*, at 1070. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F. 2d, at 227; *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 58, n. 29 (1977). That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance

of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id.*, ¶1505b, at 435–436.

Even worse, "[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F. 2d 227, 234 (CA1 1983) (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws "'can be difficult'"—and mistaken condemnations of legitimate business arrangements "'are especially costly, because they chill the very'" procompetitive conduct "'the antitrust laws are designed to protect.'" *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U. S. 398, 414 (2004). Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to "'[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, 12 N. Y. U. J. L. & Bus. 369, 377 (2016).

While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See D. Ct. Op., at 1070–1076, 1080–1083. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have any direct connection to consumer demand." *Id.*, at 1070.

To be sure, there is a wrinkle here. While finding the

NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id.,* at 1082–1083. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." D. Ct. Op., at 1104. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, however framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, *e.g.,* 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints "'patently and inexplicably stricter than is necessary'" to achieve the procompetitive benefits the league had demonstrated that the district court proceeded to declare a violation of the Sherman Act. D. Ct. Op., at 1104. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. Brief for Petitioner in No. 20–512, at 35–36.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra*, at 15–19. But none of that means a party can relabel a restraint as a product feature and declare it "immune from §1 scrutiny." *American Needle*, 560 U. S., at 199, n. 7. In this suit, as in any, the district court had to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by "substantially less restrictive alternative" means. D. Ct. Op., at 1104.

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the

NCAA had not adopted any consistent definition. *Id.*, at 1070. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id.*, at 1071–1074. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," *id.*, at 1100, and that some were "not necessary to preserve consumer demand," *id.*, at 1075, 1080, 1104. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner in No. 20–512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id.*, at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed, antitrust courts must give wide berth to business judgments before finding liability. See *supra*, at 15–19. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko*, 540 U. S., at 415. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra*, at 26–27. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko*, 540 U. S., at 408. Judges must be open to reconsideration and modification of decrees in light of changing market reali-

ties, for "what we see may vary over time." *California Dental*, 526 U. S., at 781. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko*, 540 U. S., at 415. Nor should any court "'impose a duty . . . that it cannot explain or adequately and reasonably supervise.'" *Ibid.* In short, judges make for poor "central planners" and should never aspire to the role. *Id.*, at 408.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. D. Ct. Op., at 1104–1105.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. D. Ct. Op., at 1104; App. to Pet. for Cert. in No. 20–512, at 168a–169a, ¶5. And the court emphasized

that its injunction applies only to the NCAA and multiconference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id.,* at 169a–170a, ¶¶6–7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships "at a sneaker company or auto dealership" with extravagant salaries as a "thinly disguised vehicle" for paying professional-level salaries. Brief for Petitioner in No. 20–512, at 37–38.

This argument rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits "that may be made available *from conferences or schools*." App. to Pet. for Cert. in No. 20–512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction "does not stop the NCAA from continuing to prohibit compensation from" sneaker companies, auto dealerships, boosters, "or anyone else." Brief for Respondents 47–48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only "a conference or institution" may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14–md–02541, ECF Doc. 1302–2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits

unrelated to legitimate educational activities—thus leaving the league room to police phony internships. As we've observed, the district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20–512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. *Id.*, at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *Id.*, at 168a–169a, ¶5; D. Ct. Op., at 1104. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20–512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team *achievement*" and that "[m]ost . . . are received by only a few student-athletes each year." *Ibid.* Meanwhile, the NCAA says, the district court's decree would allow a school to pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." D. Ct. Op., at 1088. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their

academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses on allowing schools to offer scholarships for "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20–512, at 167a–168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes "'luxury cars'" "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20–512, at 48–49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the

temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 284 (CA6 1898) (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: "'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of antitrust law.'" 958 F. 3d, at 1265. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 20–512 and 20–520

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

20–512 *v.*

SHAWNE ALSTON, ET AL.

AMERICAN ATHLETIC CONFERENCE, ET AL., PETITIONERS

20–520 *v.*

SHAWNE ALSTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 21, 2021]

JUSTICE KAVANAUGH, concurring.

The NCAA has long restricted the compensation and benefits that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally re-

strict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined." *Ante,* at 14.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. The Court makes clear that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85 (1984), were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. *Ante,* at 21. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante,* at 23–24; see also *Radovich* v. *National Football League*, 352 U. S. 445, 449–452 (1957). As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA's remaining compensation rules should be subject to ordinary rule of reason scrutiny. See *ante,* at 18–19.

Third, there are serious questions whether the NCAA's

remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, *e.g.*,

Texaco Inc. v. *Dagher*, 547 U. S. 1, 5 (2006). Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13–17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive

compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown* v. *Pro Football, Inc.*, 518 U. S. 231, 235–237 (1996); *Wood* v. *National Basketball Assn.*, 809 F. 2d 954, 958–963 (CA2 1987) (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different. The NCAA is not above the law.

List of Coronavirus-Related Restrictions in Every State

Most states have dropped coronavirus-related restrictions, but some local communities are reinstating them

by Dena Bunis and Jenny Rough, **AARP**, Updated October 7, 2021

CHRIS DELMAS / AFP

En español | For more than a year, governors across the country have issued orders and recommendations to their residents on the status of schools, businesses and public services in response to the coronavirus pandemic. As of July 1, most states had lifted the COVID-19 safety measures they had put in place. Now, as the delta variant spreads, cities and communities are reinstating mask mandates.

On Aug. 23, the U.S. Food and Drug Administration approved the first COVID-19 vaccine. On Sept. 9, President Joe Biden signed an executive order that requires all federal executive branch employees to get the vaccine. The president also directed the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) to require employers with more than 100 employees to mandate the vaccine or submit to regular testing. OSHA has yet to issue the rule, but some states have adopted mandates that apply to state and health workers.

When a state is listed as fully reopened, it means that businesses no longer have to follow capacity limits or curfews. Most public and private gatherings of any size are allowed (large indoor event venues may still be subject to restrictions). Domestic travelers are free to visit the state without quarantining or providing proof of a negative COVID-19 test. Minimal restrictions may still apply in certain settings. For example, masks or social distancing may still be required in nursing homes.

Many states have adopted Centers for Disease Control and Prevention (CDC) guidance on masks. The CDC updated its mask guidance July 27 to say that fully vaccinated individuals should wear a mask in public indoor spaces in areas of substantial or high COVID-19 transmission. Unvaccinated individuals should consider wearing a mask in all indoor public settings, regardless of transmission level in the area. Local governmental entities or private businesses may still have restrictions.

Here's a look at each state's restrictions:

• **Alabama:** Fully reopened. In May, Gov. Kay Ivey (R) signed a bill into law that prohibits local governmental entities, schools and businesses from requiring proof of vaccination as a condition for admission or to receive goods or services.

• **Alaska:** Fully reopened. Gov. Mike Dunleavy (R) issued a memo requiring employees, contractors and visitors to wear a mask in indoor state facilities, unless social distancing can be maintained. In April, Dunleavy issued an order banning all executive branch departments from requiring any person to provide proof of vaccination (vaccine passports).

• **Arizona:** Fully reopened. On Sept. 27, a Maricopa County superior court judge struck down a law that prohibited mask mandates in schools and limited local governments from enforcing similar COVID-19 policies. On Aug. 16, Gov. Doug Ducey (R) signed an order prohibiting local governments from issuing vaccine mandates. The order also requires local governments to provide earned sick leave to employees if they are exposed to COVID-19.

The Phoenix City Council requires individuals to wear a mask and practice social distancing inside city facilities, regardless of vaccination status.

• **Arkansas:** Fully reopened. Gov. Asa Hutchinson on Sept. 28 announced he would not renew the state's public health emergency related to COVID-19, which had just expired. Previously, he signed a bill that bans state and local mask mandates.

• **California:** Gov. Gavin Newsom (D) ended the stay-at-home order on June 15. The state health department has ordered all unvaccinated individuals age 2 and over to wear a mask in indoor public spaces and businesses. Newsom announced that effective Sept. 20, vaccination verification or a negative COVID-19 test is required for indoor events over 1,000. The same is strongly recommended, but not required, for outdoor events over 10,000. On Aug. 5, the health department issued an order that requires employees and health care workers to show proof of COVID-19 vaccination or submit to regular testing (once a week). The order also applies to employees who work in high-risk congregate settings, such as jails and senior residential facilities. On Aug. 11, the health department issued an order that requires school staff to be vaccinated or submit to weekly testing.

The Los Angeles City Council on Oct. 6 voted to require proof of vaccination for people entering restaurants, gyms and other indoor settings starting Nov. 4. And the Los Angeles County health department has ordered individuals age 2 and up to wear masks in indoor public settings within its jurisdiction (including public gatherings and in public and private businesses). As of Aug. 19, the county extended the mask requirement to outdoor mega events, such as festivals and concerts. The city of Berkeley and seven Bay Area counties, including San Francisco, also reinstated a mask mandate. Individuals over age 2 must wear a mask in indoor public spaces, regardless of vaccination status. The health office of Marin County also ordered individuals to wear a face mask, regardless of vaccination status, in indoor public settings, at public gatherings and in workplaces, including restaurants, entertainment facilities and government buildings. Sacramento and Yolo counties also have mask mandates for indoor public places.

San Francisco Mayor London Breed announced that certain indoor businesses, such as restaurants and gyms, must obtain proof of full vaccination from customers and employees before allowing them to enter. Vaccination verification is also required for indoor events if crowds are larger than 1,000. The order took effect Aug. 20. Los Angeles County announced it plans to issue a similar mandate.

• **Colorado:** Fully reopened. Individuals 12 and up who are not fully vaccinated must wear a mask indoors in certain settings, such as health care facilities and prisons. Everyone 2 and older must wear a mask when using public transportation, regardless of vaccination status. On Aug. 30, the health board voted to pass a vaccine mandate for health care workers. Workers must be vaccinated by Oct. 31. Individuals can seek a medical or religious exemption. Beginning Sept. 20, all state government employees must either be fully vaccinated or receive COVID-19 tests twice per week.

• **Connecticut:** Gov. Ned Lamont (D) lifted most business restrictions on May 19. He extended through Sept. 30 an order that requires unvaccinated individuals to wear a mask in indoor public spaces. New Haven Mayor Justin Elicker mandated that individuals wear a mask in indoor public spaces, regardless of vaccination status. Masks are also required in private indoor businesses and places of employment where social distancing cannot be maintained. Hartford and other localities have implemented a similar mandate. On Aug. 19, Lamont signed an order that mandates COVID-19 vaccines for state employees. Workers must be vaccinated on or before Sept. 27. In some circumstances, individuals with a medical condition or sincerely held religious beliefs may be exempt.

• **Delaware:** Fully reopened. Gov. John Carney (D) announced that employees of the state, long-term care homes and health care facilities must show proof of vaccination by Sept. 30 or submit to weekly testing. Employees and visitors to state facilities must wear a mask.

• **District of Columbia:** Fully reopened. Mayor Muriel Bowser (D) reinstated a mask mandate, effective 5 a.m. July 31. Individuals over age 2 must wear a mask in public indoor spaces, regardless of vaccination status. On Aug. 16, Bowser announced that health care workers must receive one dose of the vaccine by Sept. 30. Previously, she announced state employees who work in agencies that report to her must be fully vaccinated by Sept. 19. Individuals may be exempt from the vaccine mandates due to religious beliefs or a medical condition.

• **Florida:** Fully reopened. On Sept. 22, Florida Surgeon General Joseph Ladapo dropped a requirement that public school students quarantine for at least four days after being exposed to COVID-19 before returning to campus. On July 30, Gov. Ron DeSantis (R) signed an order protecting parents' right to choose whether their children wear a mask in schools. In May, the governor signed a bill that prohibits vaccine passports.

Miami-Dade County Mayor Daniella Levine Cava announced individuals must wear a mask in county facilities, regardless of vaccination status.

• **Georgia:** Fully reopened. On Aug. 19, Gov. Brian Kemp (R) signed an order that prohibits local governments from mandating COVID-19 restrictions on private businesses, such as vaccination or mask requirements. Businesses can choose to follow local ordinances but aren't required to. Previously, Atlanta Mayor Keisha Lance Bottoms (D) ordered individuals age 10 and up to wear a mask in indoor public spaces. Savannah Mayor Van R. Johnson II (D) also signed an order requiring individuals over age 10 to wear a mask when inside Savannah government buildings, hospitals and early childhood centers, among other places.

• **Hawaii:** Gov. David Ige (D) signed an order reinstating gathering and capacity restrictions. Indoor social gatherings of more than 10 people and outdoor social gatherings of more than 25 people are prohibited. Restaurants, gyms and other establishments with high-risk indoor activities must limit capacity to 50 percent. Professional events of more than 50 people may be held, but the organizer must consult with the appropriate county agency. Previously, Ige dropped the quarantine requirements for fully vaccinated U.S. travelers. Visitors arriving in Hawaii from out of state who have been fully vaccinated for two weeks can bypass the requirements. Otherwise, visitors must either show a negative COVID-19 test result obtained within 72 hours of traveling or self-quarantine for 10 days. A statewide mandate requires individuals 5 and older to wear a face mask in indoor public settings. Masks are not required outdoors. In August, Ige signed an order that mandates state employees to show proof of vaccination or undergo regular testing. In September, he signed an order extending that to state contractors and visitors to state facilities.

• **Idaho:** Fully reopened. Individuals 2 and up must wear a mask in Boise when inside city buildings, including city hall and public libraries. On Oct. 5, Lt. Gov. Janice McGeachin (R) issued a ban on vaccine passports for schools and universities, but Gov. Brad Little (R) repealed the order the next day.

• **Illinois:** Fully reopened. On Aug. 26, Gov. J.B. Pritzker (D) issued an order requiring health care workers to be fully vaccinated within 30 days of the order or submit to regular testing. State employees at congregate facilities must be fully vaccinated by Oct. 4 unless they qualify for an exemption, such as a medical condition or religious belief. As of Aug. 30, individuals 2 and up must wear a mask in indoor public places, such as restaurants, gyms and grocery stores. The mandate applies regardless of vaccination status.

• **Indiana:** Fully reopened. Gov. Eric Holcomb (R) signed a bill banning state or local governments from requiring vaccine passports.

• **Iowa:** Fully reopened. Gov. Kim Reynolds signed legislation that prohibits schools and local governments from issuing a mask mandate. On Sept. 13, a federal judge issued a temporary restraining order that stops the Reynolds administration from enforcing that law until Sept. 27. The Reynolds administration has said it will appeal the decision if the judge extends the injunction.

• **Kansas:** Gov. Laura Kelly announced employees and visitors must wear a mask in indoor state buildings unless social distancing can be maintained. In 2020, Kelly announced that counties should come up with their own plans to reopen businesses. A statewide plan to restart the economy in phases offers guidance, but counties aren't required to follow it. The state Department of Health and Environment updated a travel mandate on Aug. 13. Unvaccinated individuals who have attended an out-of-state gathering of 500 people or more — and who didn't wear a mask and stay socially distanced — must quarantine upon return to Kansas. The length of quarantine varies depending on whether the individual has been tested. The mandate also applies to anyone who traveled on a cruise ship on or after March 15, 2020. Fully vaccinated people who have been asymptomatic since they traveled are not required to quarantine. The health department recommends individuals over age 2 wear a mask in public but doesn't require it.

• **Kentucky:** Fully reopened. Gov. Andy Beshear (D) encouraged workers in state health care facilities to get vaccinated by Oct. 1. Starting then, unvaccinated workers will be tested. On Sept. 9, Beshear vetoed a pair of bills banning statewide mask mandates and overriding a mask mandate in public schools. The state legislature overturned the vetoes, and the bills have become law.

• **Louisiana:** Fully reopened. Gov. John Bel Edwards (D) extended a mask mandate until Oct. 27. Individuals 5 and up must wear masks in indoor places other than their private residences. Exceptions include when eating or drinking, when participating in a sport and when a 6-foot distance from non-household members can be maintained. New Orleans Mayor LaToya Cantrell

announced individuals 12 and up must provide proof of vaccination or a negative PCR test for entry into indoor activities, such as dining, gyms and entertainment centers, as well as at outdoor events with more than 500 people.

• **Maine:** Fully reopened. Gov. Janet Mills (D) announced health workers must be fully vaccinated by Oct. 29.

• **Maryland:** Fully reopened. The Montgomery County Council voted to reimpose a mask mandate. Effective Aug. 7, residents over age 2 must wear a mask in indoor public spaces regardless of vaccination status. The county executive of Prince George's County ordered individuals over age 5 to wear a mask in indoor public places regardless of vaccination status. The mandate is in effect until Sept. 10. Baltimore Mayor Brandon Scott announced the health commissioner issued a mask mandate for Baltimore City. Individuals must wear a mask in indoor public spaces, regardless of vaccination status. The health department ordered state employees who work in congregate settings to be vaccinated by Sept. 1 or submit to regular testing. A similar mandate applies to nursing home and hospital employees.

• **Massachusetts:** Fully reopened. Gov. Charlie Baker (R) announced long-term care providers and home care workers are among those who must be vaccinated by Oct. 31. Exemptions are available for those with certain medical conditions or sincerely held religious beliefs. Boston Mayor Kim Janey announced an indoor mask mandate in public settings within the city of Boston. Effective at 8 a.m. on Aug. 27, it applies to all individuals older than 2, regardless of vaccination status. Other local communities, such as Provincetown, have also imposed a mask mandate in which employees and customers must wear a face mask in indoor public spaces, including fitness centers.

• **Michigan:** Fully reopened.

• **Minnesota:** Fully reopened. Gov. Tim Walz announced state agency employees must get vaccinated or submit to regular testing. Minneapolis Mayor Jacob Frey and St. Paul Mayor Melvin Carter issued a mask mandate for all employees and visitors (regardless of vaccination status) to city-owned buildings.

• **Mississippi:** Fully reopened. Under the direction of Gov. Tate Reeves (R), the health department ordered individuals diagnosed with COVID-19 to self-quarantine for 10 days from the onset of symptoms or the date of a positive test if asymptomatic. The order applies regardless of vaccination status. The individual should quarantine at home, refuse visitors, and, if possible, use a separate bathroom from others in the house. Failure to comply could result in a fine of up to $5,000, five years in prison or both.

• **Missouri:** Fully reopened. On Sept. 29, a circuit court judge blocked Attorney General Eric Schmitt's effort to use a class-action lawsuit to block school mask mandates across the state.

Effective July 26, the St. Louis city and county health departments require individuals age 5 and up to wear a mask in indoor public spaces and while using public transportation.

Kansas City Mayor Quinton Lucas (D) announced that effective Aug. 2, individuals 5 and older must wear a mask in indoor public spaces where social distancing cannot be maintained.

• **Montana:** Fully reopened. In April, Gov. Greg Gianforte (R) signed an executive order prohibiting vaccine passports in Montana.

• **Nebraska:** Fully reopened. The Lincoln-Lancaster County Health Department issued a mask mandate. Regardless of vaccination status, individuals 2 and older must wear a mask in indoor public spaces unless social distancing can be maintained. The health measure takes effect Aug. 26 and lasts until Sept. 30.

• **Nevada:** Fully reopened. Gov. Steve Sisolak (D) issued a directive mandating that individuals follow CDC mask guidance. Individuals in counties with substantial or high COVID-19 transmission must wear a mask in indoor public spaces, regardless of vaccination status. Sisolak announced that effective Aug. 15, all state employees who aren't fully vaccinated must submit to weekly testing. If a government workplace reaches 70 percent vaccination rate among employees, it can drop the testing protocol. On Aug. 16, Sisolak announced he'd signed a directive that allows large indoor event venues (seating capacity of 4,000 or more) to opt out of the mask requirement if all attendees are vaccinated.

• **New Hampshire:** Fully reopened.

• **New Jersey:** Fully reopened.

• **New Mexico:** Fully reopened. Gov. Michelle Lujan Grisham (D) announced the health department had issued a public health order that re-implements a mask mandate. Individuals 2 and older must wear a mask in indoor public places, regardless of vaccination status. The order took effect Aug. 20 and lasts until Sept. 15. The health department also issued an order that mandates vaccines in high-risk settings, such as hospitals and congregate care facilities. Those with a qualifying medical exemption, disability or sincerely held religious belief can receive an exemption. Exempt individuals must wear a mask and submit to weekly COVID-19 testing. School workers who are not fully vaccinated also must provide proof of a negative COVID-19 test weekly and wear a mask.

• **New York:** Fully reopened. Gov. Kathy Hochul (D) announced mask requirements for state-regulated child care, mental health and addiction facilities. Individuals 2 and up must wear a mask in those places regardless of vaccination status. On July 28, former Gov. Andrew Cuomo (D) announced that state employees must show proof of vaccination or submit to regular testing. The mandate was set to go into effect Sept. 6, but Hochul pushed that date to Oct. 12. On Aug. 4, New York City Mayor Bill de Blasio announced that individuals won't be allowed to enter indoor restaurants, gyms or entertainment facilities without proof that they have gotten at least one dose of a COVID-19 vaccine. De Blasio said enforcement will begin Sept. 13. Statewide, unvaccinated individuals must wear a mask in indoor and outdoor public spaces if a 6-foot distance between others cannot be maintained.

• **North Carolina:** Fully reopened. Gov. Roy Cooper (D) announced that cabinet agency workers who aren't vaccinated must wear a mask and submit to weekly testing. A mask mandate is in effect for the city of Raleigh. Individuals over 2 must wear a face covering when in contact with nonhousehold members in indoor public and private spaces. Cary and Knightdale counties also have mask mandates, and Charlotte Mayor Vi Lyles announced a mask mandate for Charlotte and Mecklenburg County, effective Aug. 18.

• **North Dakota:** Fully reopened.

• **Ohio:** Fully reopened. Columbus Mayor Andrew Ginther announced he is reissuing a mask order. Regardless of vaccination status, individuals must wear a mask in indoor places accessible to the public.

• **Oklahoma:** Fully reopened. Gov. Kevin Stitt (R) signed an order that prohibits state agencies from requiring a visitor to show proof of vaccination to enter public buildings. The order exempts agencies that conduct medical activities requiring patient interaction.

• **Oregon:** Fully reopened. Gov. Kate Brown (D) announced that effective Aug. 27, she's extending an indoor mask mandate to include outdoor spaces. Regardless of vaccination status, individuals 5 and up must wear a mask in outdoor public settings where social distancing among nonhousehold members cannot be maintained. Masks are not required for fleeting encounters, such as passing others on a trail, or at private outdoor gatherings. Masks continue to be required statewide in all indoor public spaces. Brown announced that heath care workers as well as school educators and staff must be vaccinated by Oct. 18 or six weeks after full FDA approval.

• **Pennsylvania:** Fully reopened. Gov. Tom Wolf (D) announced that state health care employees and workers in high-risk congregate care facilities must be vaccinated by Sept. 7 or undergo regular testing. Those hired after that date must be fully vaccinated. As of Aug. 12, the Philadelphia Board of Health requires individuals to wear a mask inside businesses and institutions. Businesses and institutions that require employees and patrons to be vaccinated are exempt from the mask mandate, but certain essential businesses, including grocery stores and doctor's offices, don't qualify for the exemption.

• **Rhode Island:** Fully reopened. Under the direction of Gov. Dan McKee (D), the health department ordered all health care workers to be vaccinated by Oct. 1 unless medically exempt. On Sept. 2, McKee signed an order mandating that anyone who has been diagnosed with COVID-19 must self-quarantine. Vaccinated individuals who come into known close contact with a person diagnosed with the coronavirus must submit to testing requirements or wear a mask for 14 days. If unvaccinated, the individual must submit to quarantine and testing requirements.

• **South Carolina:** Fully reopened.

• **South Dakota:** Fully reopened.

• **Tennessee:** Fully reopened. Gov. Bill Lee (R) signed an order in April prohibiting local authorities in the 89 counties directed by the health department from issuing a mask mandate. Lee requested the remaining six counties with independent health departments not to impose a mask mandate.

• **Texas:** Fully reopened. Gov. Greg Abbott (R) signed an order prohibiting state and local government entities from issuing vaccine mandates. Abbott made an exception for nursing homes, assisted living facilities and long-term care facilities. Houston Mayor Sylvester Turner (D) directed city employees to wear a mask while on city premises where social distancing is difficult to maintain.

• **Utah:** Fully reopened. Gov. Spencer Cox (R) signed a law blocking employers and colleges and universities from vaccine requirements. Salt Lake City Mayor Erin Mendenhall ordered individuals ages 3 and up (including employees and visitors) to wear a mask when inside city facilities. City employees acting within the scope of their employment must also wear a mask when outside a city facility. The order took effect July 28 and remains in place until rescinded.

• **Vermont:** Fully reopened. Gov. Phil Scott (R) announced that as of Sept. 15, executive branch state employees are required to get vaccinated or submit to weekly testing.

• **Virginia:** Fully reopened. Gov. Ralph Northam (D) issued an order that requires all state workers to get vaccinated or undergo weekly testing. The mandate started Sept. 1.

• **Washington:** Fully reopened. Gov. Jay Inslee (D) issued an order that mandates vaccines for state employees, including teachers, health care providers and contractors. The order goes into effect Oct. 18 and allows an exemption for those with a disability or sincerely held religious beliefs. The health department amended an order on mask mandates. Regardless of vaccination status, individuals 5 and older must wear a mask when inside public spaces or at large outdoor events with 500 people or more. Exemptions include while training or competing in a sport or at private indoor or outdoor gatherings with fewer than 500 people.

• **West Virginia:** Fully reopened.

• **Wisconsin:** Fully reopened. Dane County's health officer has issued a mask mandate, effective Aug. 19. Individuals ages 2 and up must wear a mask in indoor public spaces when with people outside their household. Masks are also required when using public transportation. The order lasts until Sept. 16.

• **Wyoming:** Fully reopened.

Section Six

Permanent Partial Impairment

Heidi A. Kendall-Sage
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

Section Six

Permanent Partial Impairment…….. Heidi A. Kendall-Sage

PowerPoint Presentation

PERMANENT PARTIAL IMPAIRMENT

How bad is it anyway?

By Heidi Kendall-Sage

Who is this lady up there talking?

- Been a lawyer for 27 years—graduated Hanover College and then IU Maurer in Bloomington
- Practice law in an office with 8 other lawyers in Madison and Columbus, Indiana.
- Married for 30 years to Chuck Sage, Two children (son, age 23, and daughter, age 20). Plus furbabies, Leo & Elsa.
- Love my job, love helping injured workers, Plaintiff's attorney to the core!

What is a PPI (permanent partial impairment) rating?

Rating that is given by a doctor…

- Once the employee has reached maximum medical improvement, at the end of their medical treatment…
- That is a medical determination of "a loss, loss of use, or derangement of any body part, organ system, or organ function."
- Based commonly on the 5th Edition of the AMA Guides to the Evaluation of Permanent Impairment*

PPI ratings 101

Date of Injury	Degrees	Dollars per Degree
July 1, 2015-June 30, 2016	1-10 11-35 36-50 51-100	$1633 $1835 $3024 $3873
July 1, 2016-present*	1-10 11-35 36-50 51-100	$1750 $1952 $3186 $4060
*All examples will use 2016-present PPI rating $s		

Employer has 15 days to give you a physicians PPI statement

I.C. 22-3-3-10.5 requires employer to provide a physicians statement of the PPI rating within 15 days of the date listed on the physicians statement

The employer must also provide a 1043 form (Agreement to Compensation) and an Employee Waiver form (53913)

Simple Whole Person PPI ratings:

- 15% WPI (whole person impairment)=

10 X $1750 + 5 X $1952= $27,260

Whole Person Impairment comes from ratings to the:

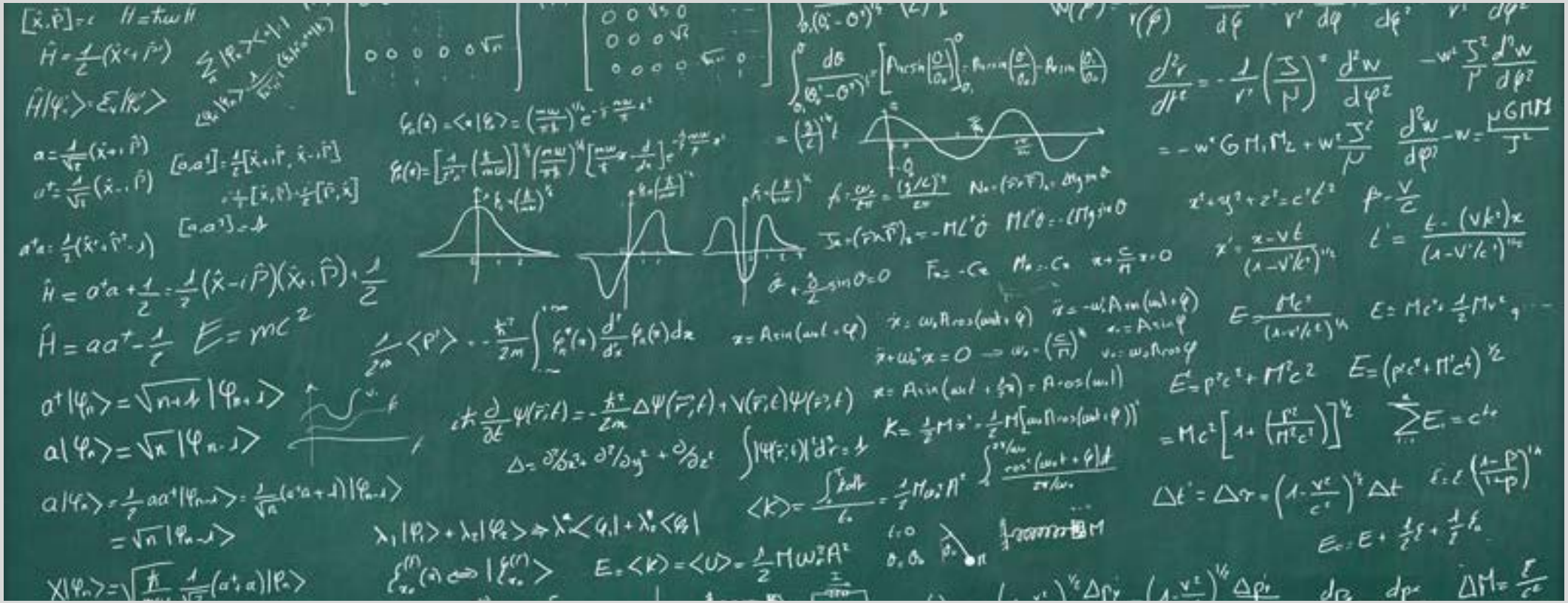
--Head --Neck

--Shoulder --Back

--Bilateral (rated both)

--Hip --Hernias & Skin

If you went to law school to avoid math....too bad....



Body part Impairment Ratings....

Are rated by degrees...For Example

- --Arm/Upper Extremity = 50 degrees
- --Index Finger = 8 degrees
- --Thumb = 12 degrees

- Leg/Lower Extremity=50 degrees
- --Great Toe = 12 degrees
- --Second Toe = 6 degree

- This is a change from a couple of years ago, there is no difference for below or above the elbow or above or below the knee!

Simple Body part PPI rating

Carpal tunnel one arm at 10% to the upper extremity =

10 x 50* = 5

5 x $1750 = **$8,750**

Some injuries are assigned an impairment based upon statute I.C. 22-3-3-10

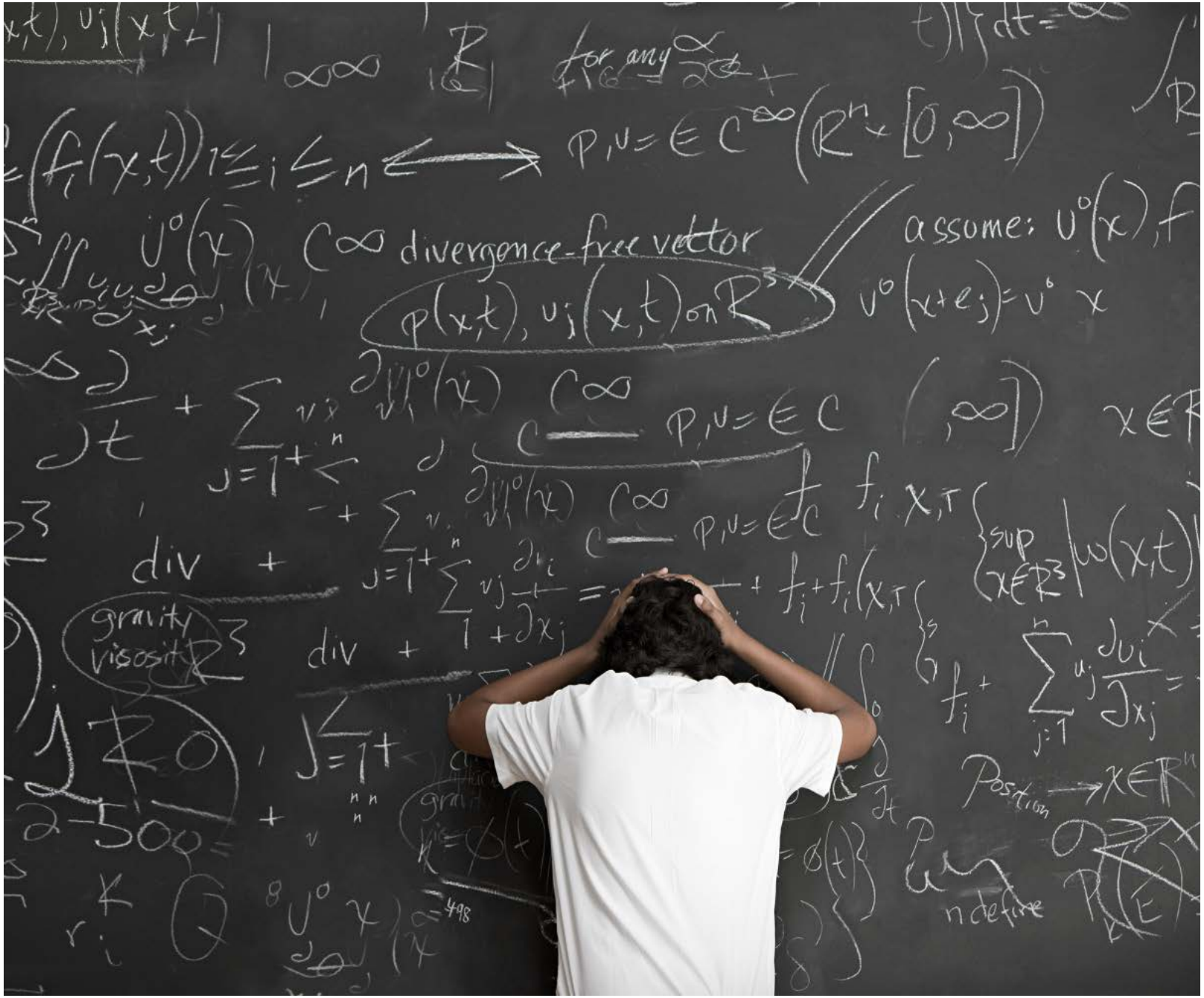
Examples:

- Loss of hearing in one ear 15 degrees of permanent impairment;
- For the loss of one testicle 10 degrees of permanent impairment
- Loss of total vision in both eyes, 100 degrees of impairment

Let's get more complicated...amputations....

- Doctors Report reads—Left Thumb total amputation
  - 100% x 12 degrees = 10 x $1750 + 2 x $1952 =
    $17,500 + $3,904 =21,404
  - $21,404 x 2 (amputation) = $42,808.00

- Board wants physicians report to include hand chart and amputation point marked.



Then.... amputation with or without bone loss

No bone loss example:

5% thumb x 12 * =.6 x $1750 = $1050

With Bone Loss example:

50% thumb x 12* = 6 X $1750 = $10,500 x 2 (amputation) = $21,000

Bone loss for thumb is either 50* or 100* for total amputation

If you really want to blow your mind…

- Multiple digit Hand Amputations (example total loss of index and 2nd finger)
- Value of Fingers = **$26,250**
- Hand – Index Finger -100% x 8 x $1750 = $14,000
- Second Finger = 100% x 7 x $1750 = $12,250

- Value of Hand Rating:
- For example, hand rating at 10% x 4* = 4 x $1750 = $7,000
- **$26,750 fingers + $7,000 hand = $33,250**
- By adding the amputated value to the hand value the hand counts as the doubling per the statute.

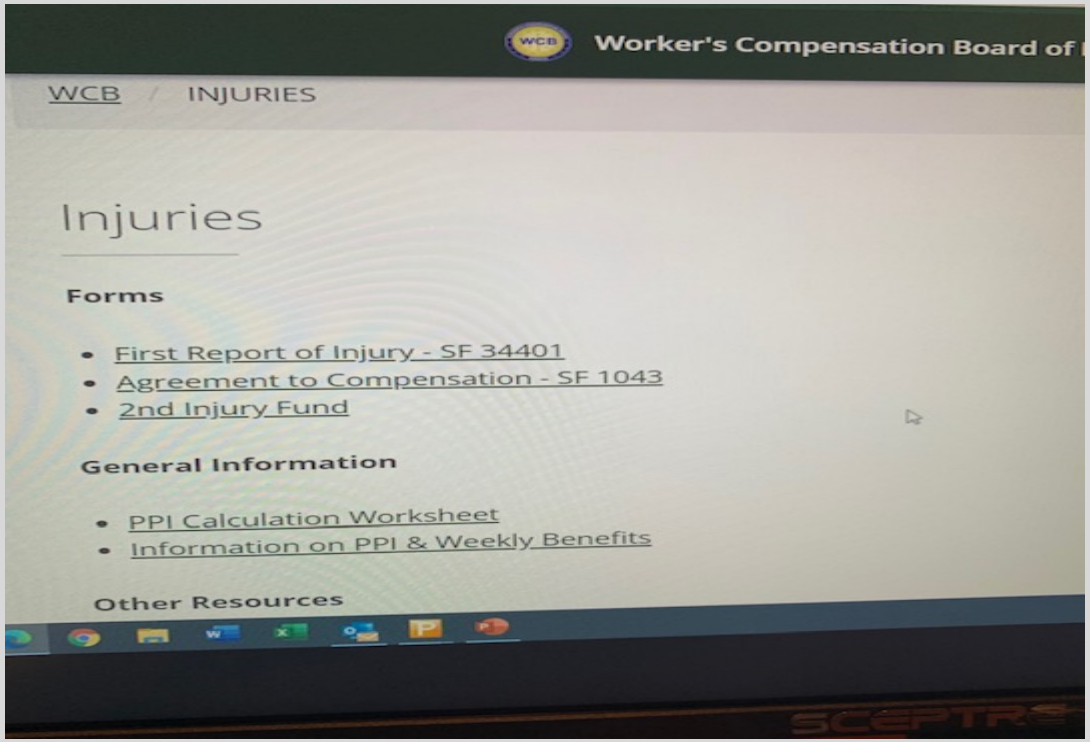
If the math gets harder than that…call the Board

(Kelly Marlow & Ashlie Franklin—PPI approval specialists)

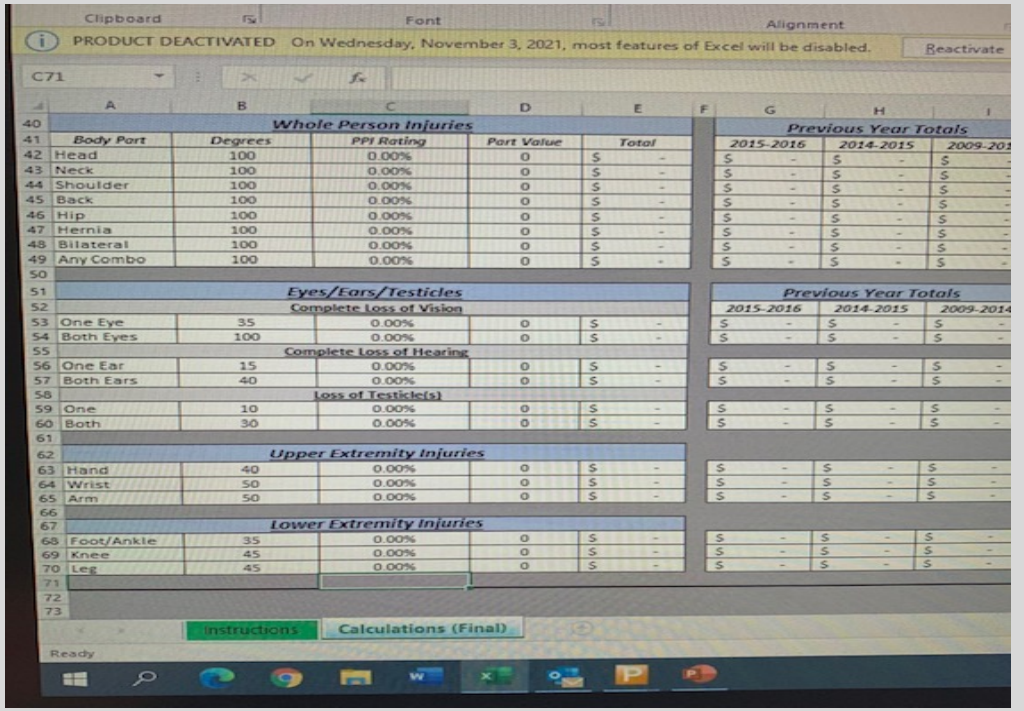
There is also a PPI calculator worksheet on the Board Website!

Please consider using the Board website PPI calculator!

Look here…..



This is what it looks like…..



What if two separate bilateral body parts are injured in the same accident?

- The rate should then reflect the whole body
- Physician must compute the PPI ratings to each body part into a whole-body PPI rating
- For example: Rt. Knee @ 8% WPI and Rt. Shoulder @ 7% WPI =15% WPI = 10 x $1750 + 5 x $1952 = $27,260
- However, a unilateral injury (to the rt. Index finger and right elbow) you would go with upper extremity rating

If you do not correctly figure the 2 body parts as whole person impairments...

You can end up resolving the case for less than what it is worth....not good!

Don’t forget there can also be psychological injuries that require PPI ratings…

- --Closed head injuries or traumatic brain injuries with various psychological symptoms
- --Post traumatic stress disorder
- --Depression
- --Anxiety

Common PPI rating problems.... What if the PPI rating seems too low?

- **<u>0% PPI rating but lots of permanent restrictions:</u>**
- Bob treats with Dr. Cure, authorized physician, who performs two surgeries on Bob.
- Bob is found at MMI and released with a 30-pound lifting restriction, no overhead reaching, and reduced range of motion
- Dr. Cure gives Bob a 0% PPI rating
- Can you have these permanent restrictions and a 0% PPI rating?

It seems that permanent restrictions do weigh in favor of a PPI rating….

- **Arington v. Eaton's Trucking (146 NE3d 358) …**Court of Appeals mentioned in assessing PPI rating that there was a comment by the treating physician that Employee was unlikely to achieve 100% improvement

- **Bowles v. Griffin** (798 NE2d 908)…the Court found that the aim of a PPI determination is to decide what parts of an employee's body have lost their proper function and to what extent.

- **I.C. 22-3-3-10** states that PPI benefits are awarded because of the partial or total loss of the function of a member or members of the body as a whole…aren't restrictions arguably loss of function?

- It is the authors opinion that it is certainly the DUTY of the Plaintiff's attorney to recover a full and accurate PPI rating payment for the injured employee…

Another PPI rating report problem…the super high PPI rating…

- The Judges don't seem to like these either….**Triplett v. USX Corp** 893 NE2d 1107, Court of Appeals seemed accepting of a doctor's report being excluded as not credible evidence regarding a PPI rating at 40% for vertigo.
- Where there are two PPI ratings at 5% and one PPI rating at 46%, the 5% PPI rating wins out (majority of doctors). **Van Scyoc v. Mid State Paving** , 787 NE 2d 499

What happens when an injured worker overuses one limb because the other limb has a permanent impairment?

Example: Bob hurt his left knee, had surgery, returned to work, and put all his pressure on his good right knee…now his right knee hurts….

Authors opinion: could mean now there is also treatment needed and a PPI rating on the right knee….

It has been said that workers comp benefits represent "limited compensation in exchange for a certain recovery. " **Spangler v. Indiana Insurance**, 729 NE2d 117.

What if….Employee used crutches for weeks/months and now their shoulders/hands hurt?

- Once again…
- Can be another work-related injury caused, in this case, by treatment for a work-related injury…
- May need more treatment, and yet another PPI rating!

Another problem….who has to pay for the PPI rating?

- The **employer has the obligation** under the Workers compensation Act to provide the initial PPI rating I.C. 22-3-3-4(a). The burden only lies with the employee where the employee disagrees with the initial PPI rating.
- **However, ..**.”the expense of a subsequent PPI rating that is obtained by an employee to refute the initial PPI shall be reimbursed to the employee if it is ultimately accepted by the Workers compensation board.”

Deciding between multiple PPI ratings that occur during treatment over time…

- The Judge/Board appears to take into account the passage of time, continued treatment, and the apparent limitations of the Employee. **Platinum Const. Group, LLC v. Collings**, 988 NE2d 1153.
- The Board/Judge appear to give greater weight to in-depth PPI rating reports, that "specifically outline the basis within the AMA Guidelines". **Platinum**

What about apportionment?

- Bob has a prior back injury from years of competitive frisbee golf as a teenager. Now Bob has worked for 30 years laying brick and hurts his back at work...
- Defense Counsel argues that the doctor must determine what portion of the PPI rating is related to the pre-existing condition versus the new back injury....(Defense must demonstrate prior injury resulted in an impairment) **Brown Tire v. Underwriters,** 573 NE2d 901

- What does the doctor and then the Judge take into consideration?
- Surgery prior? Surgery after?
- Working hard labor before this work injury without issue? **US Steel Corp v. Spencer**, 655 NE 2d 1243.
- Diagnostic findings (MRI) before vs. after?
- How remote was the prior injury?
- How long since last treatment for prior injury before this injury?

There is a distinction between impairment and disability...

- The issue of physical impairment rests upon medical evidence relating to the loss of body function.
- The disability determination concerns vocation factors relating to the ability of an individual to engage in reasonable forms of work activity.
- Not mutually exclusive or mutually dependent terms. See **Perez**, 359 NE2d 925, and **Byrd** 498 NE2d 1033

Does a high PPI rating mean the employee is permanently totally disabled?

- Not necessarily…a finding of permanent total disability is also based on factors such as vocational background, skills and education
- Rockwell v. Byrd, 498 NE2d 1033.
- The AMA Guides (5th Ed) specifically explain "impairment percentages derived from the Guides should not be used as direct estimates of disability…[this] requires individual analyses."

Does a PPI rating at less than 10% mean that the employee is NOT disabled?

- Not necessarily…low education, illiteracy, minimal job skills, and limited vocational background, as well as advanced age can all lead to permanent total disability when combined with a permanent impairment and restrictions/limitations from a work injury.
- **Hill v. Worldmark Corp.**, 651 NE2d 1173 (discussion on this issue)

Its not over till its really over...Claims can be re-opened for additional PPI...

- Claims can be re-opened for additional PPI for two (2) years from the last date for which compensation was paid. I.C. 22-3-3-27(c)
- Could happen where employee was unable to return to previous job and may discover total inability to work and qualify for PTD benefits.
- Could happen where employee obtains a second orthopedic surgery, then chronic pain might be added to the PPI rating.

There is a maximum total compensation… including the PPI payment…

- I.C. 22-3-3-22 (t), for injuries that happened after June 2016 the maximum total compensation is $390,000.
- Note: the maximum weekly workers compensation benefits as of July 1, 2016, is $780 per week.

Which edition of the AMA Guides do you use? Can it be the 5th, 6th, or soon to arrive 7th?

- Pennsylvania Supreme Court said in a 6-1 decision that a claimant can select which AMA Guide to apply. Protz v. Workers Compensation Appeals Boards, 124 A.3d 406 (Pa. Cmwlth. 2015), however, asked the Court that the legislature select which Guide to apply. In October of 2018, the Pennyslvania legislature passed HB1840 which mandated use of the AMA 6th edition.

- In Indiana, "medical providers may use whichever edition of the AMA Guides to Evaluate a Permanent impairment that they think is most appropriate…for example, if the 6th edition would preclude recovery for an impairment, an earlier edition should be consulted".

- What do you think about this?

Most PPI rating disputes can be resolved…

- In interviewing several fellow attorneys in preparation for this speaking engagement, many Judges will strongly consider a split of two PPI ratings, particularly if they are not wildly different.
- Even wildly different PPI ratings can be discussed and worked through often with experienced, knowledgeable attorneys on both sides of the aisle.

Questions?

Section Seven

Post-COVID Syndrome: Beyond the Acute Illness

Dr. Robert C. Gregori, M.D.
Objective Medical, LLC
Indianapolis, Indiana

Dr. Sean Dillon, M.D.
Objective Medical, LLC
Indianapolis, Indiana

Section Seven

Post-COVID Syndrome:
Beyond the Acute Illness…….. Dr. Robert C. Gregori, M.D.
Dr. Sean Dillon, M.D.

PowerPoint Presentation – Post Covid Syndrome

POST-COVID SYNDROME

BEYOND THE ACUTE ILLNESS

ROBERT GREGORI M.D.

SEAN DILLON M.D.

OBJECTIVE MEDICAL

Dr. Gregori's Experience

- PM&R Residency at U of M 1984-1987
- Board Certified in PM&R 1988
- Board Certified in Pain Management 2004
- Board Certified in IME's 2017
- Practiced inpatient rehab and outpatient physical Medicine thru 2006
- Founded objective medical, a practice devoted to medical legal consulting/forensics

Dr. Gregori's Expertise

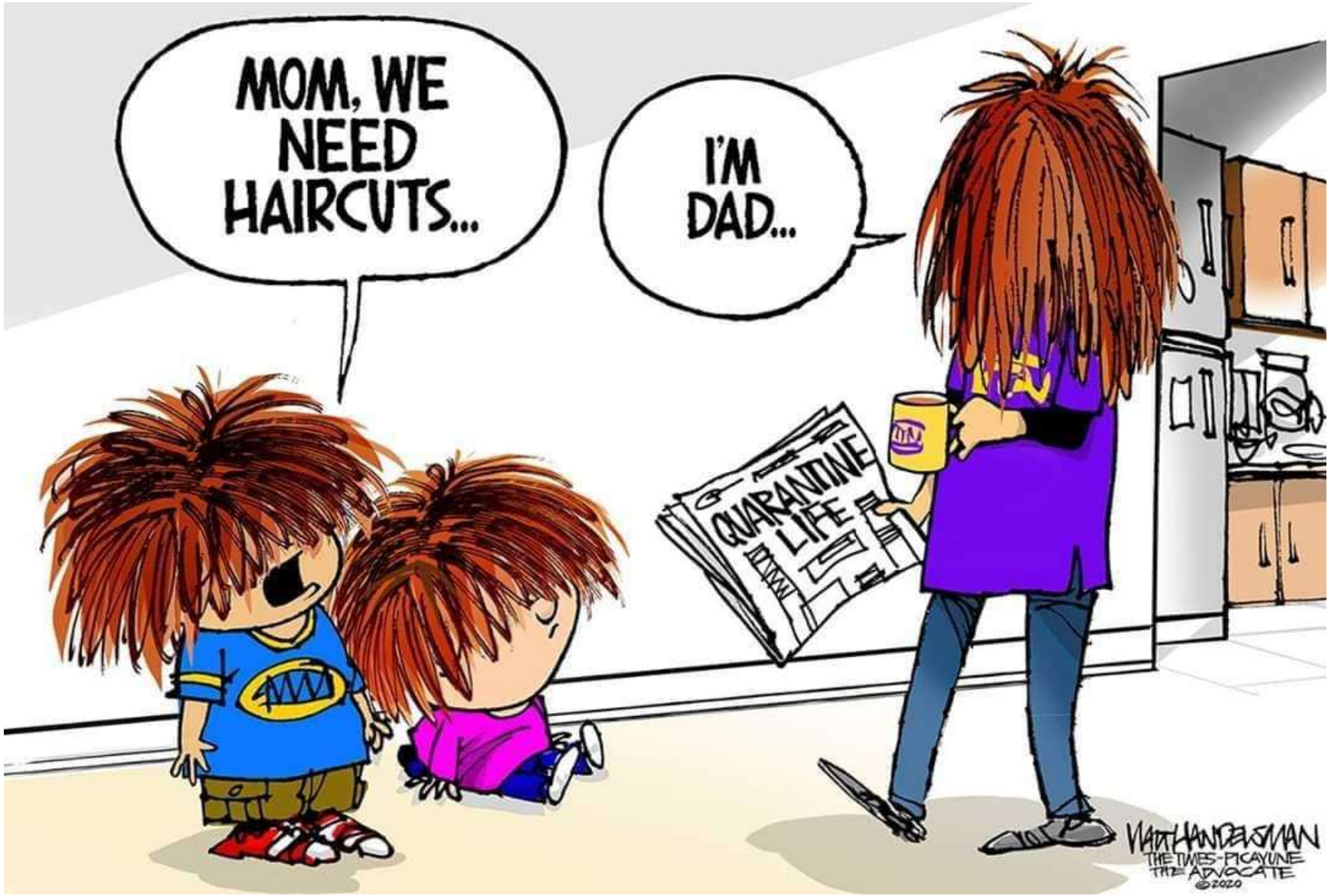
- Musculoskeletal injuries involving trunk, spine, and extremities
- Multiple trauma, brain, and spinal cord injuries
- Peripheral nerve injuries and CPRS
- EMG's
- Worker's compensation, MMI/PPI ratings, and disability evaluations

Dr. Dillon's Experience

- Family Medicine Residency at St. Elizabeth 2011 – 2014
- Board Certified in Family Medicine 2014
- Experience with inpatient, outpatient, urgent care, and nursing home settings
- Founded objective wellness, a primary care practice with a focus on lifestyle and a holistic approach

OBJECTIVE MEDICAL

- Dedicated to insurance and legal community
- Assist with questions pertaining to pre-existing conditions, causation, treatment, future costs and treatment of disability
- Perform IME's/second opinion exams
- Extensive experience testifying


MOM, WE NEED HAIRCUTS...
I'M DAD...
QUARANTINE LIFE
MATT HANDELSMAN
THE TIMES-PICAYUNE
THE ADVOCATE
©2020

COVID CLINIC

- Help navigate COVID workplace claims
- Help coordinate care
- Oversee rehabilitation and treatment needs
- Return to work
- MMI/PPI

OBJECTIVES

- Explain what is known about the pathophysiology of Post-COVID Syndrome
- Outline the main symptoms
- Learn how to objectively determine validity of Subjective Complaints
- Examine potential treatment options
- Understand how to determine MMI/PPI
- Examine post-covid syndrome cases

COVID-19

Enveloped, positive stranded RNA Virus

Binds to ACE 2 receptors for cell entry

ACE 2 receptors in the lungs, GI track, blood vessels, and cardiac cells

Also affects the nervous system and musculoskeletal system

Meanwhile, inside the fridge

COVID-19

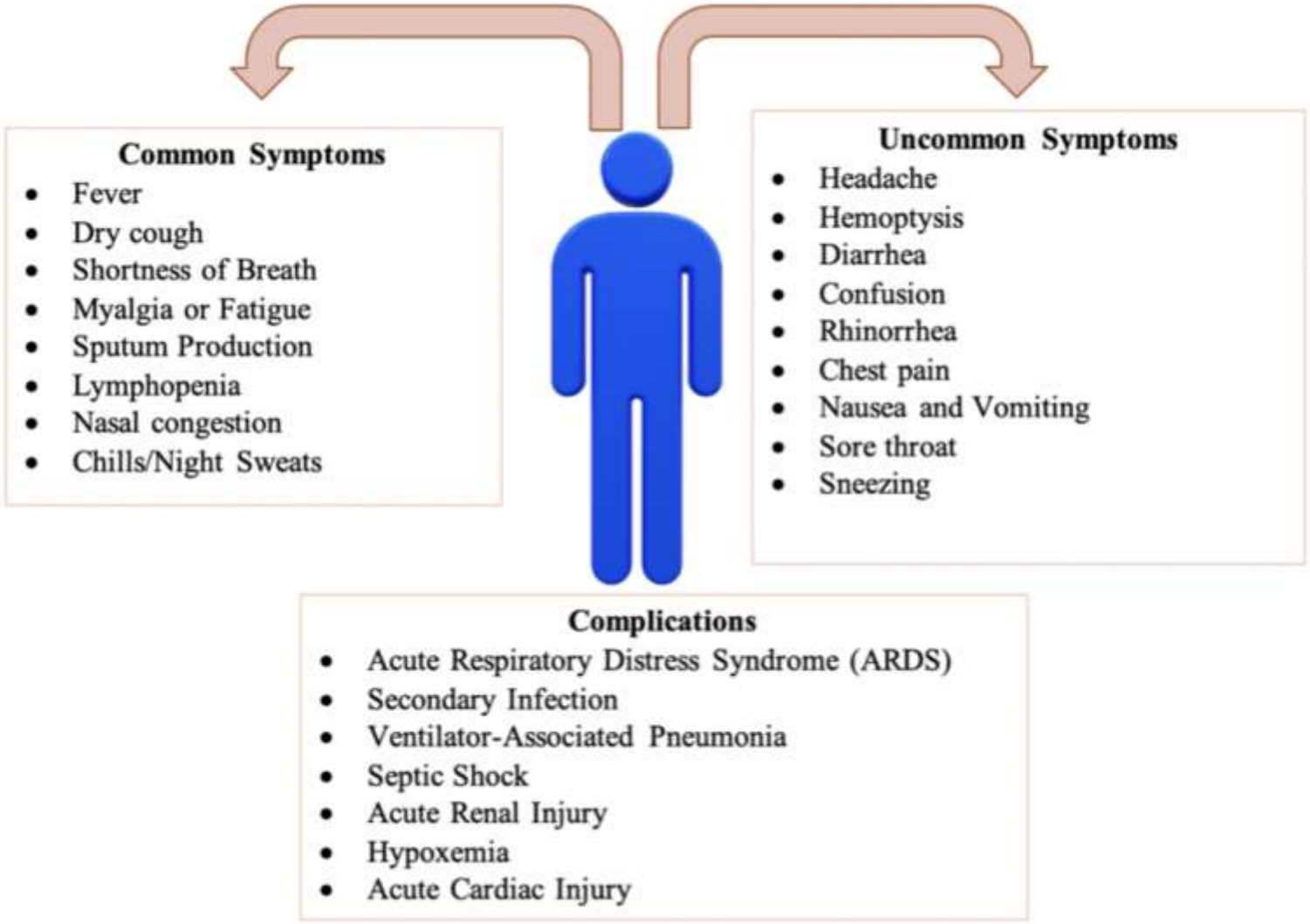
Spread via droplets released from the nose and mouth

Coughing, sneezing, contact with infected individuals and surfaces

Incubation is 1-14 days

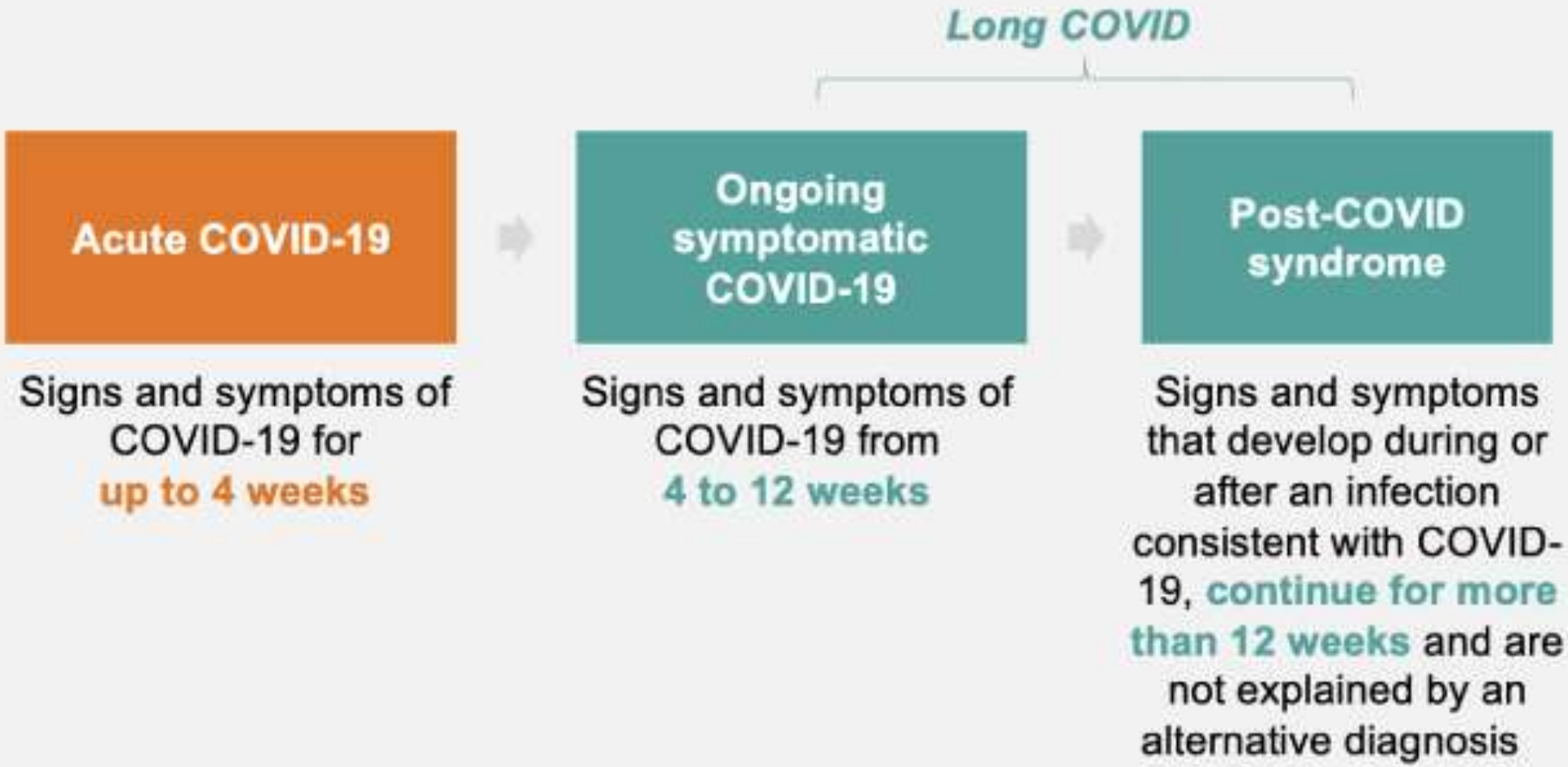
Fever, cough, fatigue, headache, diarrhea, and dyspnea

Most contagious in the first 1-10 days, often before symptoms



Acute Covid Symptoms (Journal of Medical Science)

Terminology and Definition of Long COVID



POST COVID SYNDROME

Often referred to as “long-COVID”

Multisystem disease often occurring after mild, moderate, or severe illness

Serious sequelae (thromboembolic complications, cardiac complications)

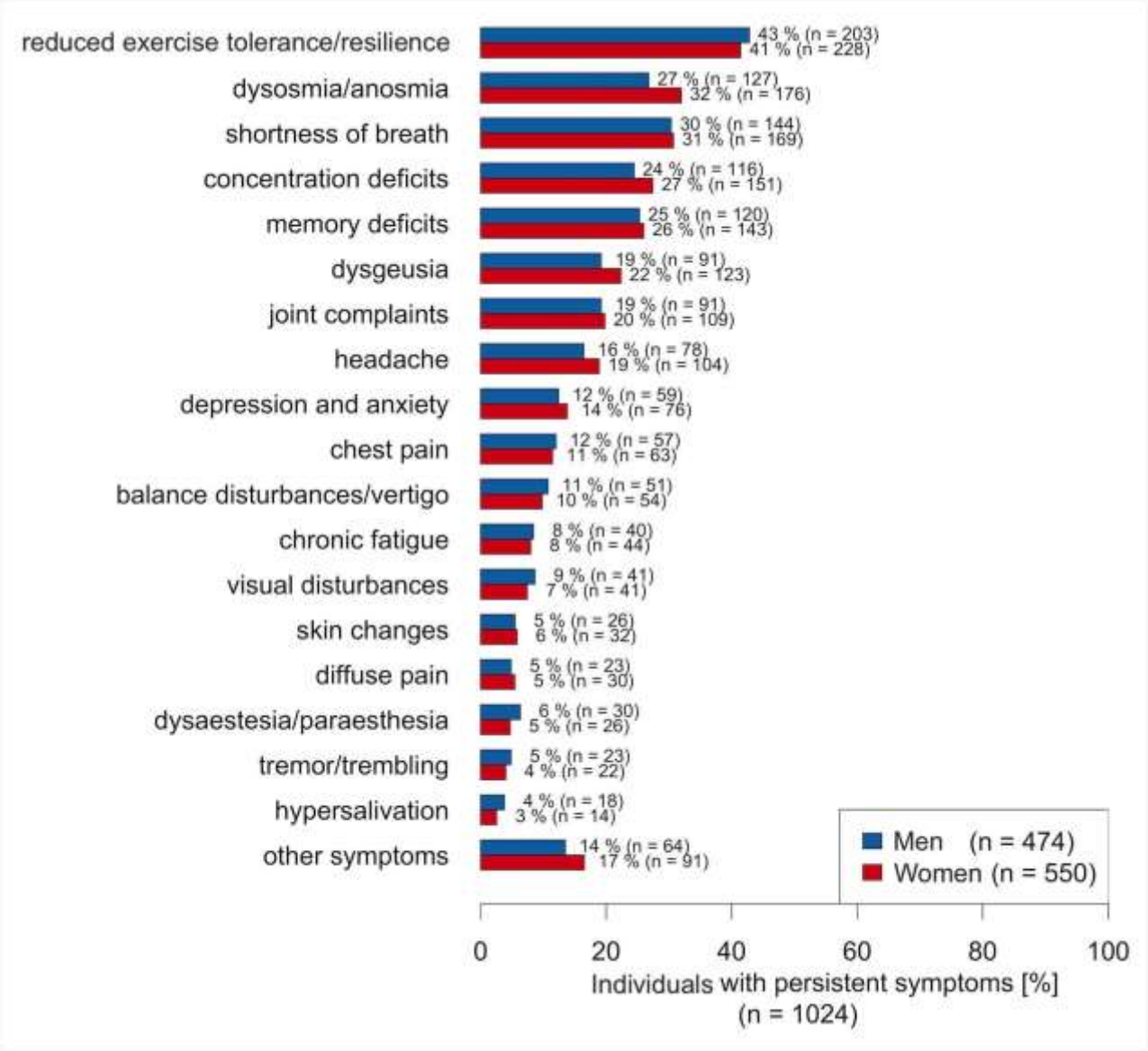
Less serious and non-specific sequelae

SERIOUS COMPLICATIONS

- Stroke
- Pulmonary embolus
- Renal infarct
- Heart attack
- Atrial fibrillation
- Myocarditis
- Pericarditis

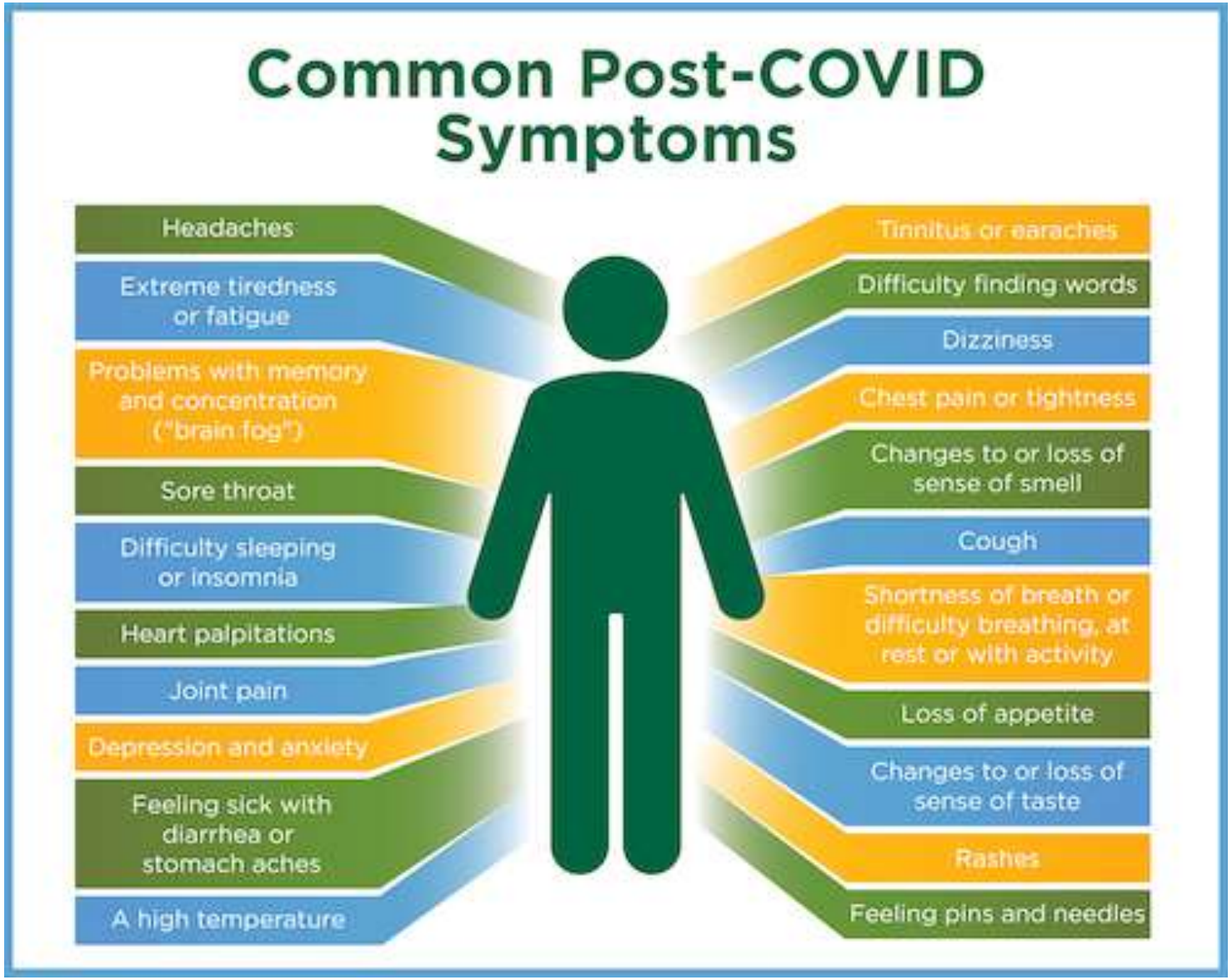
LESS SERIOUS COMPLICATIONS

- Fatigue
- Brain fog
- Dyspnea on exertion
- Tachycardia on exertion
- Joint pain
- Headache
- Hair loss
- Depression anxiety
- Skin rashes



Post-COVID Syndrome Symptoms (Journal of Medical Science)

Common Post-COVID Symptoms



Post-COVID Functionality Assessment

Please mark at what difficulty level you are currently able to complete the tsks below.

Task	Without Difficulty	With Some Difficulty	With Much Difficulty	Unable To Do
Dress yourself (Including Shoes)				
Comb your hair				
Wash and dry yourself				
Take a bath				
Cut your food				
Lift a full cup/glass to your mouth				
Open a new milk carton				
Make a meal				
Write a note				
Type a message on the computer				
See a TV screen				
Use your phone				
Speak clearly				
Walk outdoors on flat ground				
Climb up 1 flight of steps				
Stand				
Sit				
Recline				
Rise from a chair				
Run errands				
Light housework				
Feel what you touch				
Smell the food you eat				
Taste the food you eat				
Open car doors				
Open previously opened jars				
Turn faucets on				
Sleep				
Engage in sexual activity				
Shop				
Get in and out of a car				

POST COVID SYNDROME

Multifactorial pathogenesis	Prolonged inflammation	Sequelae of organ damage	Prolonged hospitalization and social isolation
• Multisystem inflammation	• Dysregulation of immune and autonomic nervous system	• Cardiac irritation, pulmonary fibrosis	• Dysregulation of oxygen supply to muscles

POST COVID SYNDROME

- NAD+ deficiency following infection
  - Key player in cellular metabolism (energy)
- decreased serotonin
- Increased histamine release
- Comparison with other post-viral syndromes/chronic fatigue syndrome
  - Beta-adrenergic receptor antibodies, M3 acetylcholine receptor antibodies


the Big
Red Ho
6
VIVA
TRENDIZISST

OBJECTIVE MEDICAL'S EVALUATION

Observe behavior

oxygen saturation, pulmonary exam, cardiovascular exam

EKG

Repetitive motion exam

6 minute walk test

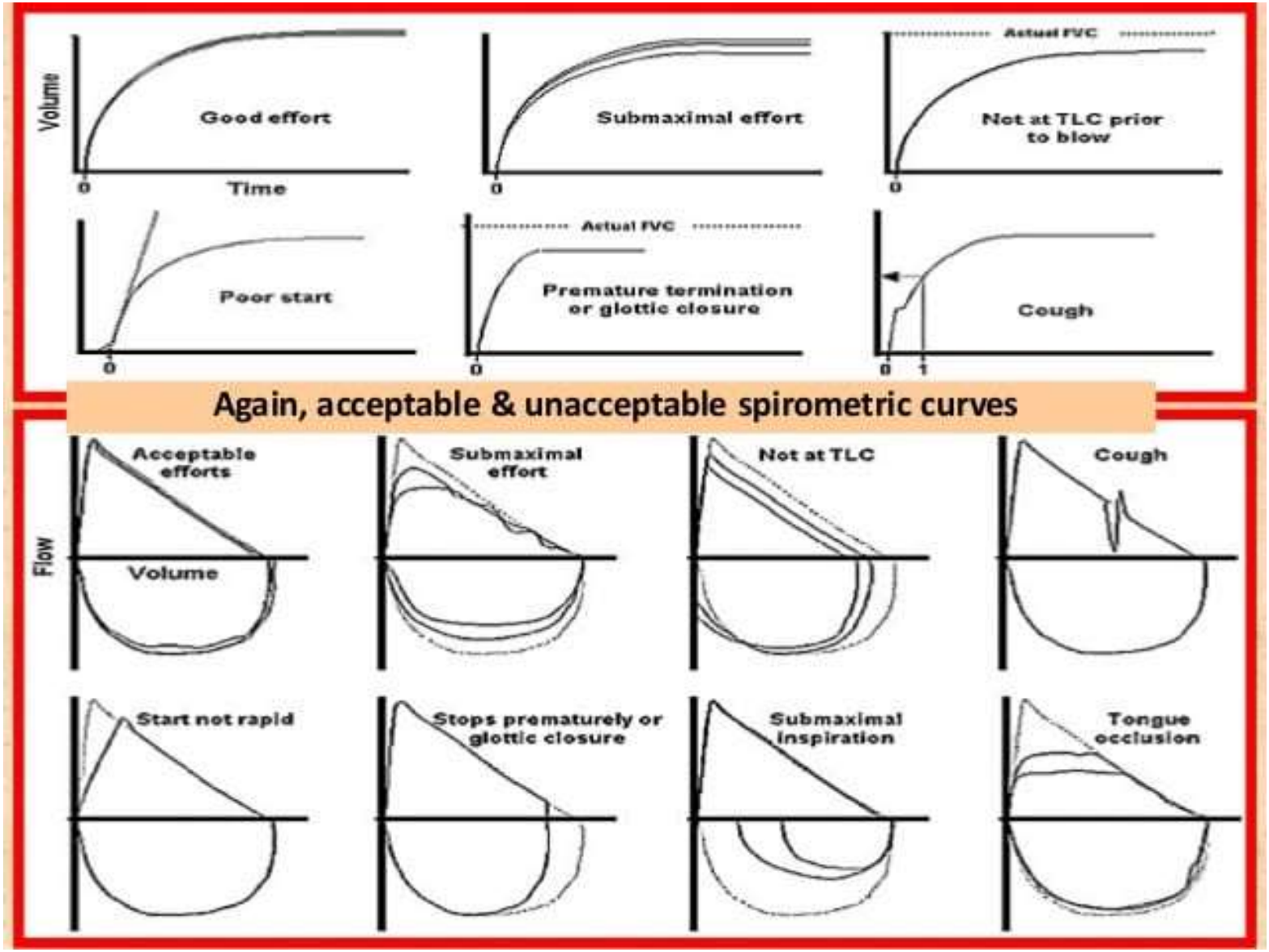
Cardiac event monitor

Cardiac MRI

Echocardiogram/stress test

OBJECTIVE MEDICAL'S EVALUATION

- Blood work
- Chest CT scan
- Pulmonary function testing
- Physical therapy evaluation
- Physical ability testing
- Functional capacity evaluation
- Neuropsychiatric testing


Volume
Time
Good effort
Submaximal effort
Actual FVC
Not at TLC prior to blow
Poor start
Actual FVC
Premature termination or glottic closure
Cough
0
1
Again, acceptable & unacceptable spirometric curves
Flow
Volume
Acceptable efforts
Submaximal effort
Not at TLC
Cough
Start not rapid
Stops prematurely or glottic closure
Submaximal inspiration
Tongue occlusion

TREATMENT CONSIDERATIONS

- No official guidelines on treatment
- Calcium, vitamin D, Zinc
- NAD supplements
- COVID-19 vaccine
- Magnesium
- Physical therapy
- Physical activity
- Breathing techniques
- Neuropsychiatric evaluation
- Counseling

TREATMENT CONSIDERATIONS

AS STATED, NO ESTABLISHED TREATMENT FOR POST-COVID SYDNROME

Maximum Medical Improvement (MMI)

- Determine when a patient has reached MMI
- Patients have reached a status that is as good as they are going to be from the medical and surgical treatment available to them
- Further deterioration is not expected
- With COVID – often expect some ongoing improvement with time

Permanent Partial Impairment (PPI)

- AMA Guides to the evaluation of permanent impairment 6th edition
- Percentage of the body that is permanently damaged as a result of COVID
- Often due to cardiac or pulmonary dysfunction

TABLE 4-9 Criteria for Rating Impairment due to Dysrhythmias[a]

G Dysrhythmias

CLASS	CLASS 0	CLASS 1	CLASS 2[b]	CLASS 3[c]	CLASS 4[c]
WHOLE PERSON IMPAIRMENT RATING (%)	0	2%–10%	11%–23%	24%–40%	45%–65%
SEVERITY GRADE (%)		2 4 6 8 10 (A B C D E) (Minimal)	11 14 17 20 23 (A B C D E) (Mild)	24 28 32 36 40 (A B C D E) (Moderate)	45 50 55 60 65 (A B C D E) (Severe)
HISTORY	Asymptomatic No medication	Asymptomatic or occasional palpitations or isolated syncopal episode NYHA class I	Asymptomatic during daily actions, palpitations or isolated syncope, but requires drug therapy or pacemaker NYHA class II	Symptoms[c] despite drug therapy or pacemaker with minimal activity or intermittent, severe symptoms NYHA class III	Symptoms[c] despite therapy at rest, especially recurrent syncope NYHA class IV
PHYSICAL FINDINGS	Normal physical exam	Normal physical exam or occasional extra systole on auscultation	Auscultation of irregularity unless pacer dependent	Auscultation of irregularity unless pacer dependent	Auscultation of irregularity unless pacer dependent
OBJECTIVE TEST RESULTS[d]	Normal echocardiography Normal ECG or occasional PACs or PVCs	Normal echocardiography *and* ECG documentation of dysrhythmia but no ECG or Holter documentation of ≥ 3 consecutive ectopic beats or pauses > 2 s Atrial and ventricular rate 50-100 beats per minute Post-ablation or pacemaker with above criteria Medications may be required	Abnormal echocardiography with small ASD or VSD, mildly impaired LV or RV function, diastolic dysfunction, mild chamber enlargement, or mild valvular stenosis or regurgitation *or* ECG or Holter documentation of malignant dysrhythmia Post-ablation, pacemaker, or AICD with above criteria	Abnormal echocardiography with moderate ASD or VSD, moderately impaired LV or RV function, diastolic dysfunction, moderate chamber enlargement, or moderate valvular stenosis or regurgitation *or* ECG or Holter documentation of malignant dysrhythmia Post-ablation, pacemaker, or AICD with above criteria	Abnormal echocardiography documenting large ASD or VSD, severely impaired LV or RV function, diastolic dysfunction, severe chamber enlargement, or severe valvular stenosis or regurgitation *or* ECG or Holter documentation of malignant dysrhythmia Post-ablation, pacemaker, or AICD with above criteria

[a] NYHA indicates New York Heart Association; ECG, electrocardiogram; PAC, ; PVC, ; ASD, ; VSD, LV, left ventricular; RV, right ventricular; and AICD, automatic implantable cardiac defibrillator.

[b] For classes 2, 3, and 4, use the same criteria under objective test results as identified in Tables 4-6, 4-7, or 4-8 for each respective class to look for evidence of organic heart disease.

[c] For recurrent, severe palpitations, syncope, or near syncope.

[d] Key factor.

TABLE 5-4 Criteria for Rating Permanent Impairment due to Pulmonary Dysfunction*

Pulmonary Dysfunction					
CLASS	CLASS 0	CLASS 1	CLASS 2	CLASS 3	CLASS 4
WHOLE PERSON IMPAIRMENT RATING (%)	0	2%-10%	11%-23%	24%-40%	45%-65%
SEVERITY GRADE (%)		2 4 6 8 10 (A B C D E) (Minimal)	11 14 17 20 23 (A B C D E) (Mild)	24 28 32 36 40 (A B C D E) (Moderate)	45 50 55 60 65 (A B C D E) (Severe)
HISTORY	No current symptoms **and/or** intermittent Dyspnea that does not require treatment	Dyspnea controlled with intermittent or continuous treatment **or** intermittent, mild Dyspnea despite continuous treatment	Constant mild Dyspnea despite continuous treatment **or** intermittent, moderate Dyspnea despite continuous treatment	Constant moderate Dyspnea despite continuous treatment **or** intermittent, severe Dyspnea despite continuous treatment	Constant severe Dyspnea despite continuous treatment **or** intermittent, extreme Dyspnea despite continuous treatment
PHYSICAL FINDINGS	No current signs of disease	Physical findings not present with continuous treatment **or** intermittent, mild physical findings	Constant mild physical findings despite continuous treatment **or** intermittent, moderate findings	Constant moderate physical findings despite continuous treatment **or** intermittent, severe findings	Constant severe physical findings despite continuous treatment **or** intermittent, extreme findings
OBJECTIVE TESTS					
FVC	FVC ≥80% of predicted	FVC between 70% and 79% of predicted	FVC between 60% and 69% of predicted	FVC between 51% and 59% of predicted	FVC between 50% and 45% of predicted
	and	**or**	**or**	**or**	**or**
FEV_1	FEV_1 ≥80% of predicted	FEV_1 between 65% and 79% of predicted	FEV_1 between 64% and 55% of predicted	FEV_1 between 45% and 54% of predicted	FEV_1 below 45% of predicted
	and				
FEV_1/FVC (%)	FEV_1/FVC (%) lower limits of normal (>75% of predicted)				
	and	**or**	**or**	**or**	**or**
DLco	DLco ≥75% of predicted	DLco between 65% and 74% of predicted	DLco between 55% and 64% of predicted	DLco between 45% and 54% of predicted	DLco below 45% of predicted
	or	**or**	**or**	**or**	**or**
VO_2 max	>25mL/(kg·min) or >7.1 METs	between 22 and 25 mL/(kg·min)	between 21 and 18 mL/(kg·min)	between 17 and 15 mL/(kg·min)	<15mL/(kg·min)
		or	**or**	**or**	**or**
		6.3–7.1 METs	5.1–6.0 METs	4.3–5.0 METs	<4.3 METs

* FVC (forced vital capacity), FEV_1 (forced expiratory volume in the first second), DLco (diffusion capacity for carbon monoxide), VO_2 max (maximum oxygen consumption) and METs (metabolic equivalents (multiples of resting oxygen uptake).

POST COVID SYNDROME CASE #1

- 48 year old male – LPN at a Nursing Home
- No Past Medical History
- Diagnosed March 27, 2020
- 1 month Inpatient ICU Stay
  - Intubated on a ventilator
  - Pneumonia, Pleural effusions, Pneumothorax
  - Chest tubes
  - Heart attack
  - Renal infarct
  - Superficial Thrombophlebitis
- 1 month rehab stay

POST COVID SYNDROME CASE #1

- First Visit with Objective - 7 months after rehab
- Neuropathic pain, bilateral carpal tunnel, peroneal neuropathy
- Heart palpitations, tachycardia with minimal exertion
- Fatigue
- Dyspnea on exertion
- Muscle weakness
- Insomnia

POST COVID SYNDROME CASE #1

- NEUROLOGY, CARDIOLOGY, PULMONOLOGY, HAND SURGERY
- NORMAL PULMONARY FUNCTION TESTING
- ABNORMAL CARDIAC MONITOR – BASELINE TACHYCARDIA, HR FLUCTUATION BETWEEN 110'S TO 170'S
- NORMAL ECHOCARDIOGRAM, CARDIAC MRI
- 6 MINUTE WALK TEST FATIGUE, ELEVATED HEART RATE, DECREASED DISTANCE, NORMAL OXYGEN SATURATION
- CARPAL TUNNEL SURGERY
- TREATED WITH LOPRESSOR, ASPIRIN, LASIX, ATORVASTATIN, CYMBALTA, MOBIC, CAPSAICIN, CALCIUM, VITAMIN D, ZINC

POST COVID SYNDROME CASE #1

- 14 months Post infection
- Carpal tunnel improved but did not resolve
- Peroneal Neuropathy Improved but did not Resolve
- Renal and Pulmonary Issues Resolved
- Significant Tachycardia Persisted
- Fatigue, Insomnia Persisted
- Unable to participate in Physical Therapy due to his persistent tachycardia
- Not cleared to Drive, Light Duty work only
- Cardiac impairment – 20%, Neuropathy – 4%, Chronic Pain – 1%, Pulmonary – 0%, Renal – 0%
- 24% whole Person PPI

POST COVID SYNDROME CASE #2

55 year old female - RN at a Nursing Home

No Past Medical History

Diagnosed November 30, 2020

Outpatient Treatment Only

CT with classic Ground Glass Appearance

POST COVID SYNDROME CASE #2

Persistent Fatigue, Shortness of Breath, Cough, Dyspnea on Exertion, Tachycardia with minimal exertion, Mild Brain Fog

Cardiology, pulmonology, Physical Therapy

Normal EKG, Cardiac Monitor, PFT, blood work, pulmonary function testing, echocardiogram, Cardiac MRI

6 minute walk test above normal distance (former collegiate athlete), normal oxygen saturation, but significant tachycardia

Treated with Dulera, Xopenex, Aspirin, Vitamin D, Calcium, Zinc

POST COVID SYNDROME CASE #2

6 months post infection

Fatigue, Shortness of Breath, Cough, Dyspnea on Exertion resolved

Persistent but improved tachycardia and Exertional fatigue

Terminated by her Employer

Found a new job

Completed all Goals of Therapy

0% impairment

POST COVID SYNDROME CASE #3

- 42 year old female – LPN at a nursing home
- Past Medical History of Iron Deficiency Anemia – GI losses
- Diagnosed December 29, 2020
- Outpatient Only, though borderline admission
- Hypoxia, CT with classic Ground Glass Appearance

POST COVID SYNDROME CASE #3

- Persistent fatigue, shortness of breath, difficulty breathing, cough, dyspnea on exertion, headaches, and difficulty sleeping
- Pulmonology, Physical Therapy
- Normal EKG, Cardiac Monitor, Blood work, and Echocardiogram
- Moderate distance on 6 minute walk test – difficulty with coughing throughout testing
- Severe Restrictive Pattern seen on PFT
- Treated with Herbal Supplements, Calcium, Vitamin D, Zinc, Advair, Albuterol, Physical Therapy

POST COVID SYNDROME CASE #3

- 7 months post Infection
- Failed to attend appointments for 2 months
- Terminated from work, evicted from Apartment, acute worsening of her chronic anemia (HgB – 7.3), motor vehicle accident with concussion and post-concussion syndrome
- Repeat PFT with mild restrictive pattern – Pulmonology advised continued Advair for 6 more months, with expected resolution
- Significant overlap with Anemia and Concussion
- Persistent Fatigue, Dyspnea on Exertion, Headaches, difficulty sleeping
- 8% Impairment due to Pulmonary dysfunction
- Back to school to complete RN degree – only 5 months remaining

POST COVID SYNDROME CASE #4

- 64 year old female – Activities Coordinator at Nursing Home
- PMH – Obesity, Asthma, Esophageal Reflux, HTN, HLD, Depression, and Osteoarthritis
- Diagnosed December 30, 2020
- Outpatient Treatment Only
- CT with Classic Ground glass Appearance

POST COVID SYNDROME CASE #4

- Persistent Cough, shortness of breath, fatigue, nausea, loss of appetite, belching, abdominal bloating, heart palpitations, difficulty sleeping, worsening depression/anxiety, ear pain, dry mouth, diarrhea
- Normal cardiac event monitor, echocardiogram, stress test
- Mild obstruction on PFT
- Physical Therapy
- Blood work with abnormal elevation of inflammatory markers and Auto-immune Antibodies
- Hiatal hernia on EGD
- Poor tolerance on 6 minute walk test due to fatigue, Heart Rate and Oxygen Saturation remained normal
- Treated with multiple stomach medications, Advair, Albuterol, Zoloft, Aspirin, Remeron

POST COVID SYNDROME CASE #4

- 8 months post infection
- Terminated from work
- Struggled to remain active
- Persistent Fatigue, dyspepsia, nausea, diarrhea, dry mouth, cough, difficulty sleeping, Tachycardia with exertion, Brain fog
- All symptoms steadily improving
- Functional Capacity Evaluation – Medium Duty but with Frequent Short Breaks
- Mild impairment on PFT with intermittent dyspnea – 8% whole person impairment


THIS IS THE
LONGEST SOMETHING
MADE IN CHINA
HAS EVER LASTED.

Section Eight

Understanding Psychological Evidence in Worker's Compensation Cases

Dr. Gregory T. Hale, Ph.D.
Psychologist
Indianapolis, Indiana

Section Eight

Understanding Psychological Evidence in Worker's Compensation Cases…….……Dr. Gregory T. Hale, PH.D.

PowerPoint Presentation

UNDERSTANDING PSYCHOLOGICAL EVIDENCE IN WORKER'S COMPENSATION CASES

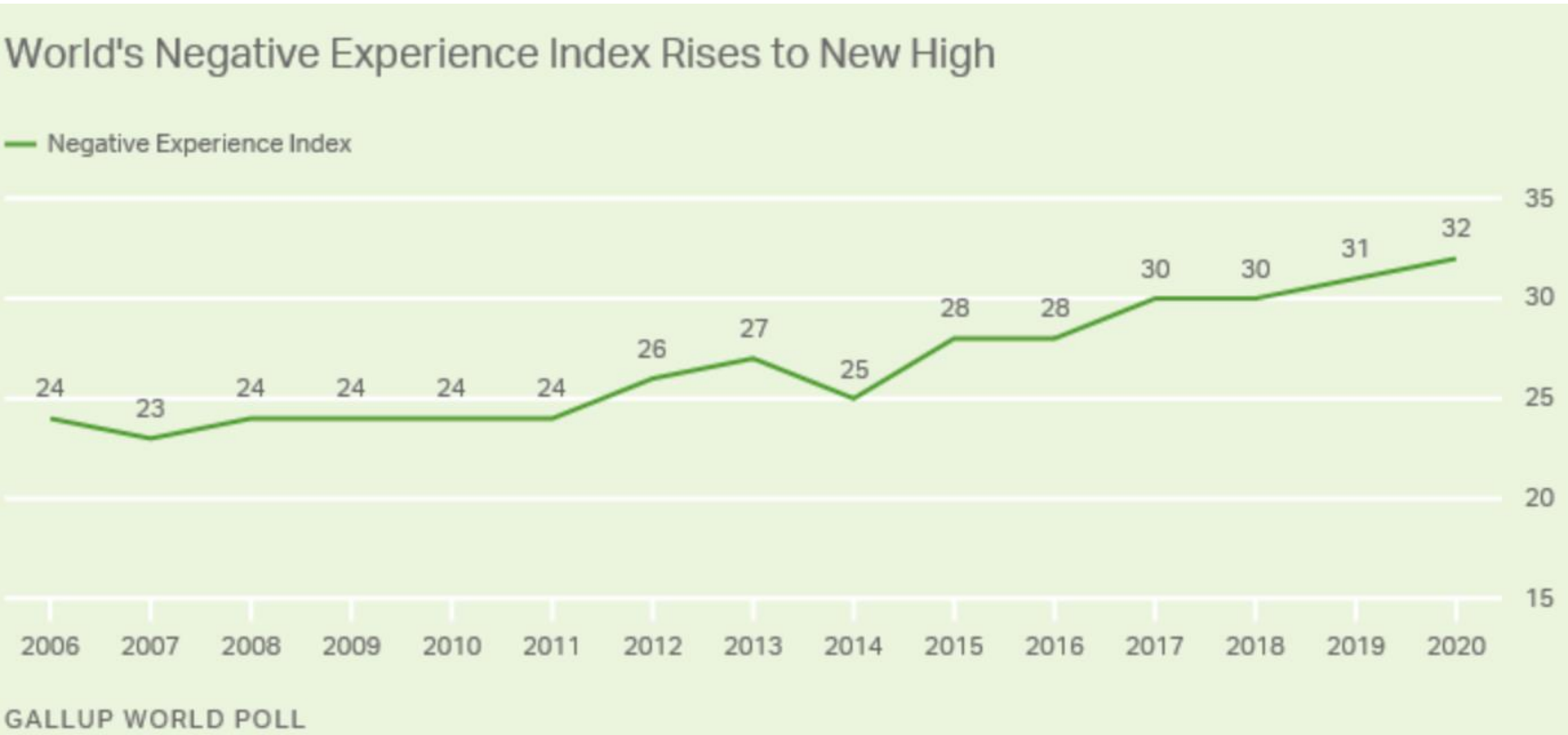
Gregory T. Hale, Ph.D.
Psychologist
Indianapolis, Indiana

GOSHEN FACTORY SHOOTING

2 dead, others hurt in rampage at plant

COSTS……

- Legitimate and expected changes in the quality of life for injured workers are real -- loss of psychological benefits related to working and being productive
- About 95% of WC claims involve a real accident at work
- About 6-7 billion of the estimated 60 billion spent on WC claims is related to fraud


World's Negative Experience Index Rises to New High
Negative Experience Index
35
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2006
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2018
2019
2020
GALLUP WORLD POLL

MENTAL HEALTH PROFESSIONALS

- Psychologists
- Psychiatrists
- Social Workers
- Marriage and Family Therapists
- Mental Health Technicians
- School Psychologists
- Psychometrists
- Primary Care Physician

CONTEXT MATTERS

- We are often examining and treating people in a context that is not neutral……people have expectations
- Sometimes we evaluate because we want to know who we are dealing with (i.e., influence of preexisting psychological disorder, establish prognosis, treatment planning)
- Research findings – litigating patients v. controls – higher functioning and more satisfied with their lives pre-injury than the controls/also report lower functioning post-accident than controls

CRITICAL ISSUES FOR EMPLOYERS, CLAIMS EXAMINERS, CASE MANAGERS, AND LAWYERS

- Diversity of human behavior
- Tend to underestimate the influence of psychological factors, including pre-existing psychological conditions
- Many claimants are motivated by factors that are unidentified
- People personalize stress – "what happened to me is different and worse than anything you have ever experienced."
- Weak relationship between distress and pathology
- **"Who is injured is often more important than the injury"**

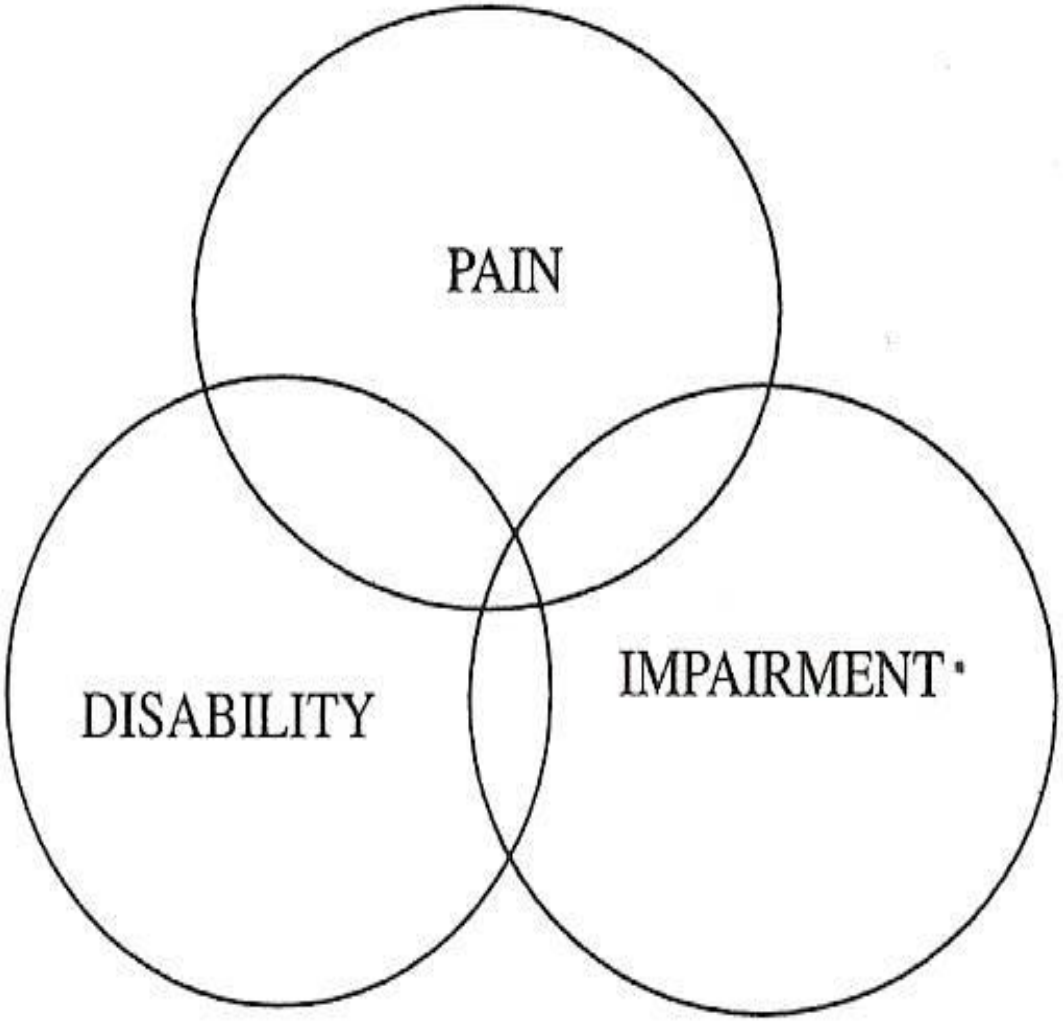
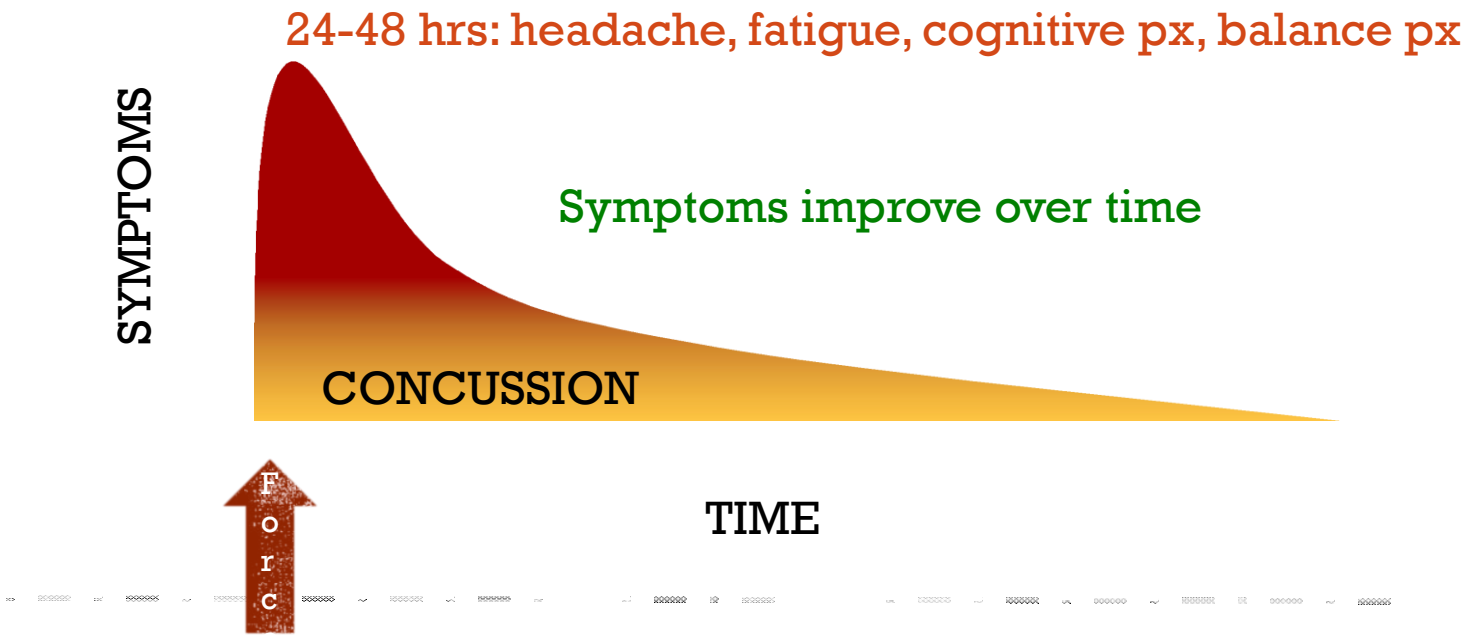


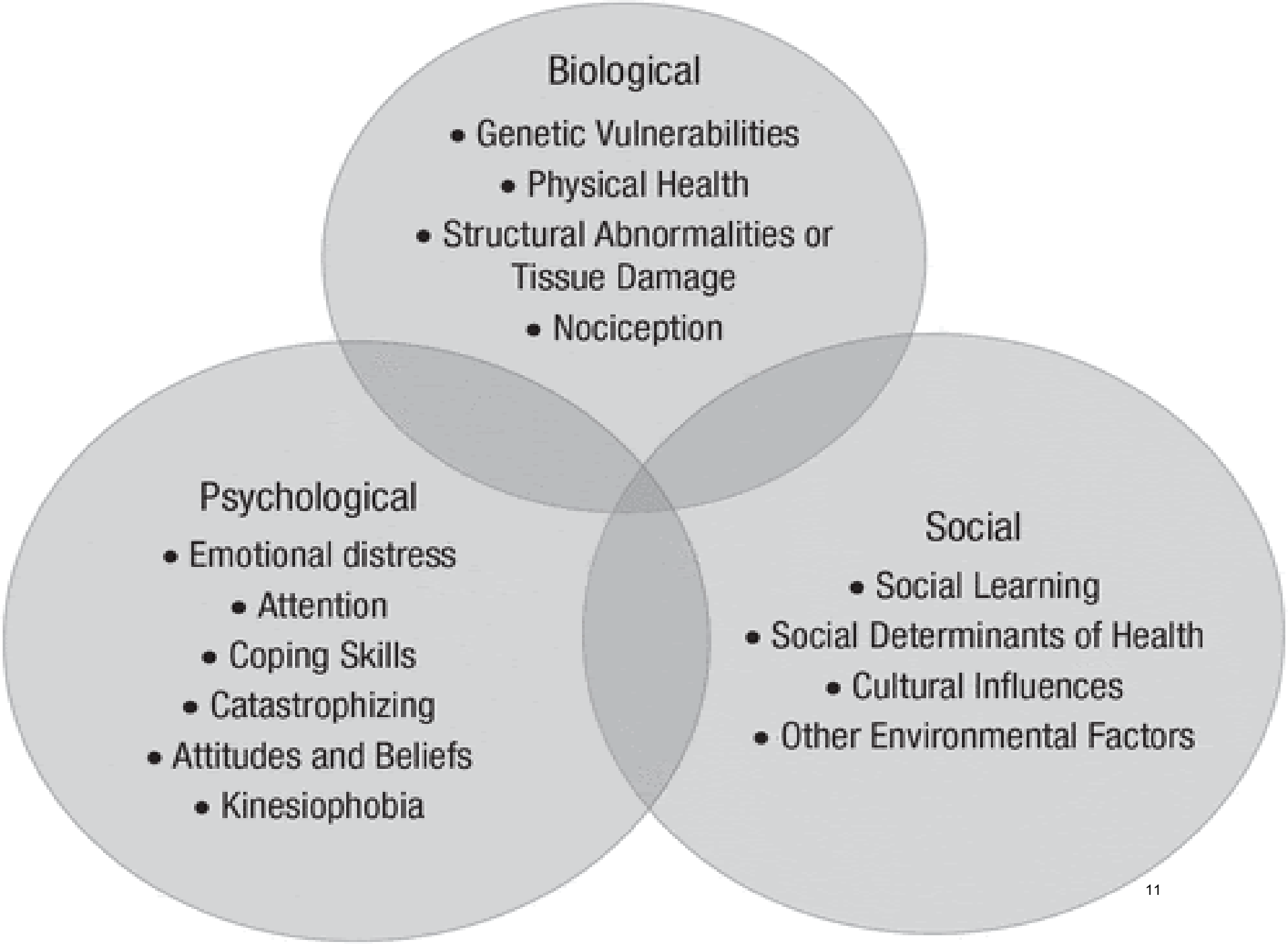
Figure 2.2. Discordance among levels of pain, impairment, and disability.

CONCUSSION



What is the typical recovery time in healthy young adult with no risk factors for protracted recovery?

10 to 14 days


Biological
• Genetic Vulnerabilities
• Physical Health
• Structural Abnormalities or Tissue Damage
• Nociception
Psychological
• Emotional distress
• Attention
• Coping Skills
• Catastrophizing
• Attitudes and Beliefs
• Kinesiophobia
Social
• Social Learning
• Social Determinants of Health
• Cultural Influences
• Other Environmental Factors

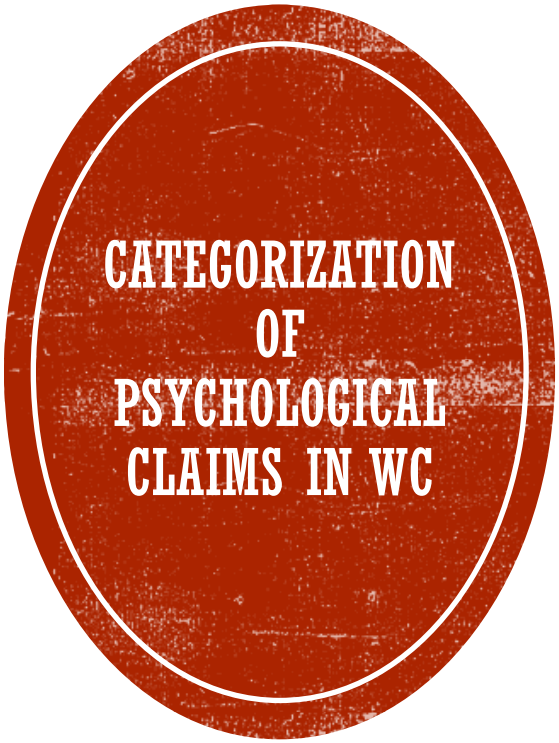
COMMON PSYCHOLOGICAL DISORDERS IN WC CASES

- Keep this in mind -- Harvard Medical School study
- Depression and anxiety disorders
- Substance abuse
- Posttraumatic stress disorder
- Adjustment disorders
- Pain disorders
- Rarely see more serious psychological disorders

- Biological predispositions and early life experiences
- The meaningfulness of social supports
- The role of enduring personality traits

STANDARDS RELATED TO CAUSATION

- Indiana and psychological injury claims
- Variability between states – KY, IL



Physical disorders contributing to a psychological disorder

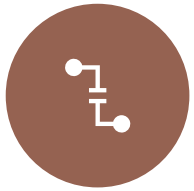
Psychophysiological reactions in which psychological factors or disorder contribute to a physical illness

Psychological disorders resulting from a mental injury

SO WHERE DO PSYCHOLOGISTS FIT IN A WC CLAIM?

CLARIFICATION OF BEHAVIORAL ASPECTS OF THE CASE

MEDICAL AND BEHAVIORAL INTERVENTIONS CAN BE DESIGNED TO ADDRESS PSYCHOLOGICAL FACTORS

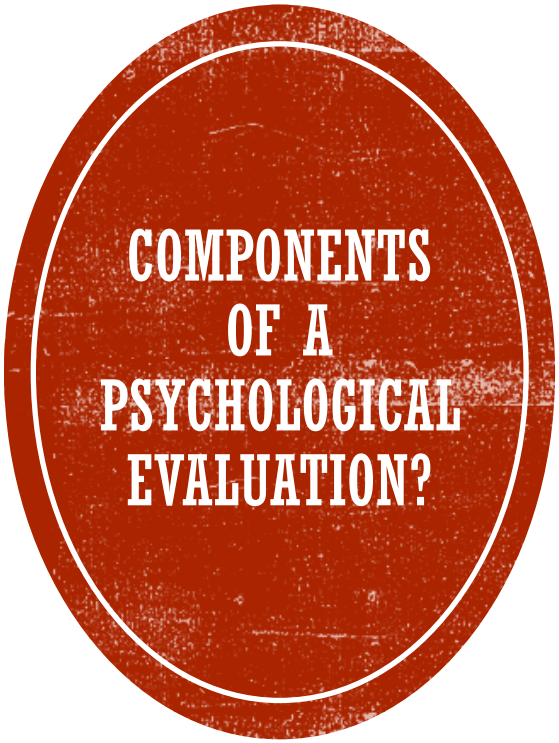


DETERMINING WHICH ASPECTS OF THE BEHAVIOR ARE WORK-RELATED OR PRE-EXISTING

THE PSYCHOLOGICAL EVALUATION OF THE SURGERY PATIENT

- Varying outcomes utilizing invasive procedures
- Relevant psychological factors often ignored
- Presence of psychological disorders help to identify post-operative behavior
- Consulting with the orthopedic surgeon can improve patient satisfaction/expectations
- Psychological consultations can help minimize the negative impact of unidentified psychological variables

THE PSYCHOLOGICAL IME



- Interview (avoid only using self-report)
- Psychological testing
- Record review
- Mental status observation
- Comparison of data from multiple sources

ADMINISTRATION AND INTERPRETATION OF PSYCHOLOGICAL TESTING

- Utilize properly trained evaluators
- Tests need to be administered in a professional manner
- Issues of reliability and validity are extremely important in litigated cases
- Use of multiple tests can enhance the strength of the testing data
- Can help evaluate progress in treatment and impairment
- Test battery:
  - Personality inventories
  - Cognitive tests
  - Symptom checklists
  - Specialized inventories

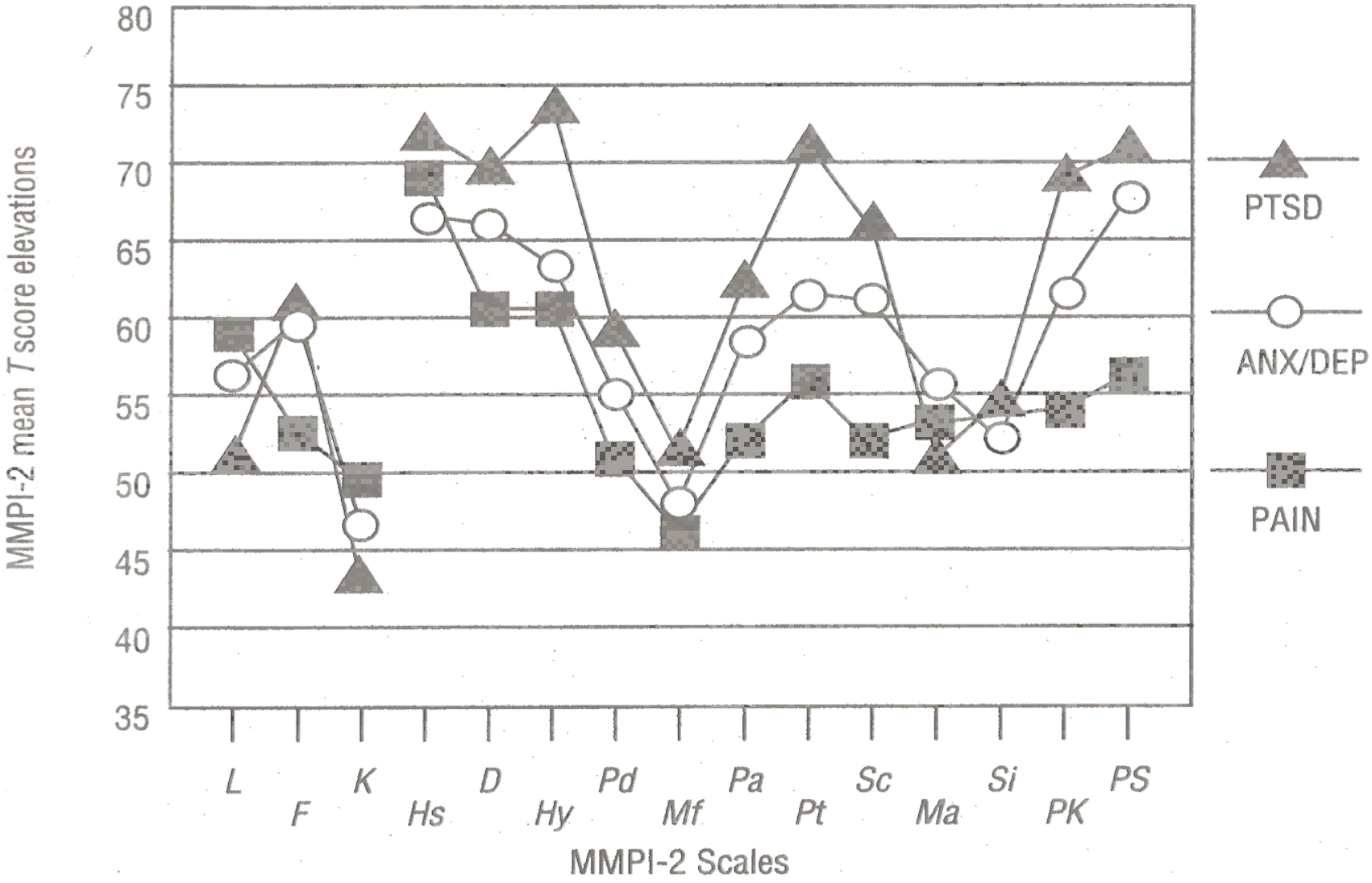


FIGURE I-40. Mean MMPI-2 clinical profiles for PTSD, anxiety/depression, and chronic pain samples. (Source: Palmer & Birch, 1992. Adapted by permission.)

QUESTIONS OF CAUSATION

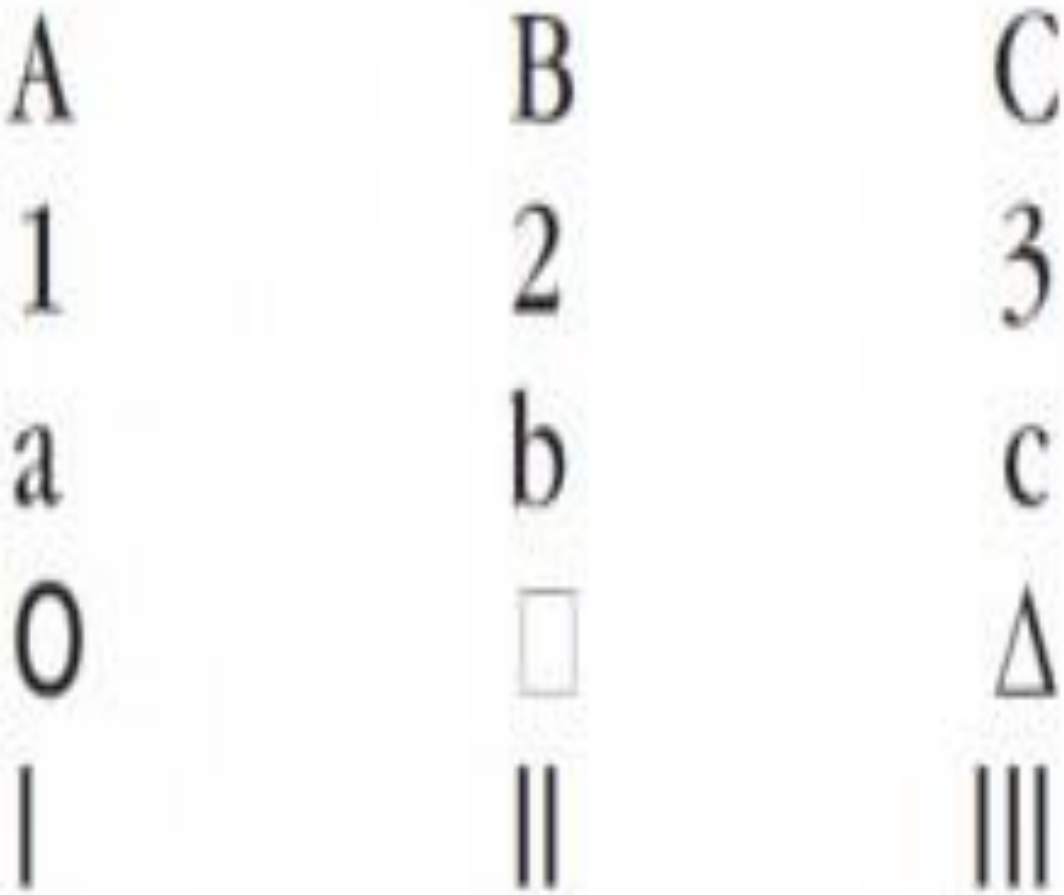
- Understanding base rate data for psychological disorders
- Did the injury arise out of and in the course of employment, personal injury, or ordinary life events?
- Did the injury aggravate or accelerate the course and severity of the existing condition?
- Is there a relationship between the understood pre-existing condition and the current symptoms?

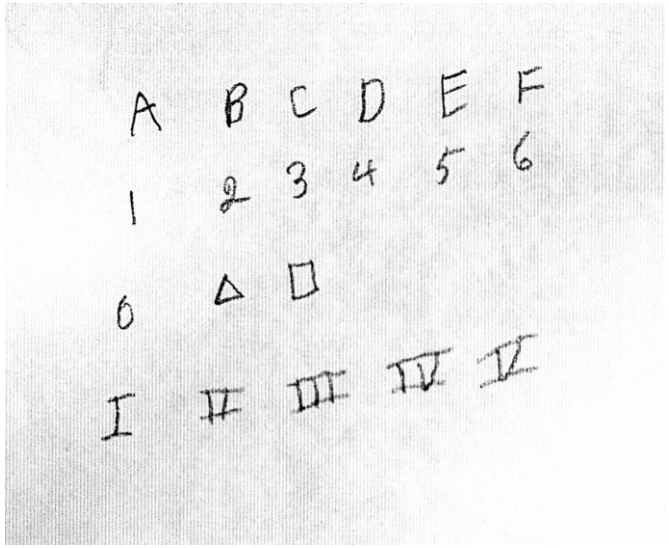
APPROACHES TO THE EXAMINATION

- Malingering
- Defensiveness
- Irrelevant or Random Responding
- Honest Responding
- Hybrid Responding

- Responses maybe adaptive to an adversarial evaluation and when the stakes for the claimant are high

Rey's Fifteen Item Test

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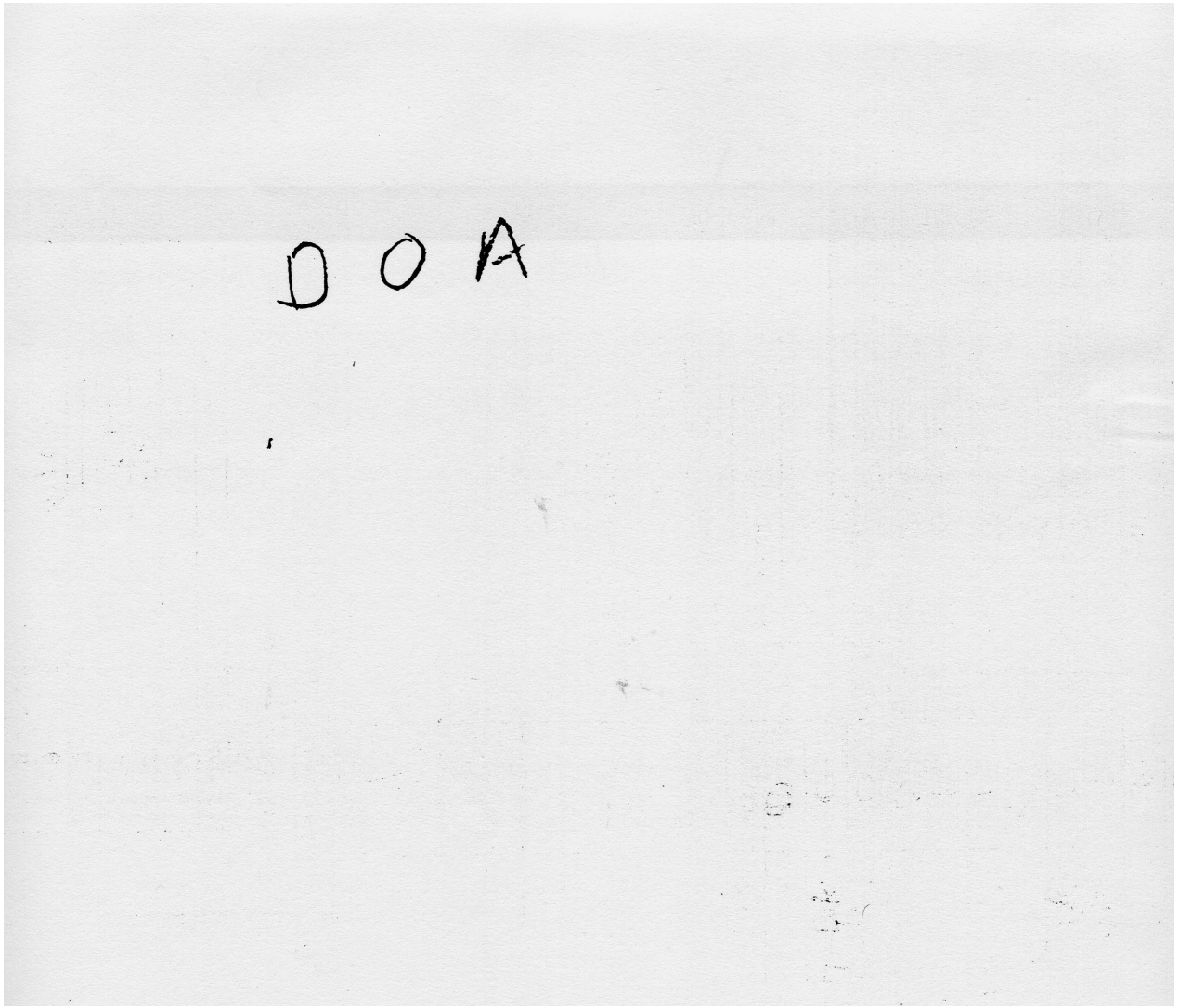

D O A

DECEPTION AND MALINGERING

- Excessive symptom report
- Overly favorable presentation in the context of significant symptom report
- Reporting unusual combinations of symptoms or experiencing all symptoms
- Invalid response patterns on psychometric testing
- Profile not fitting normative groups

WHAT ARE THE NUMBERS? PROBABLE SYMPTOM EXAGGERATION AND MALINGERING

- 29% Personal Injury
- 30% SSA disability
- 8% Medical cases

IMPAIRMENT AND DISABILITY

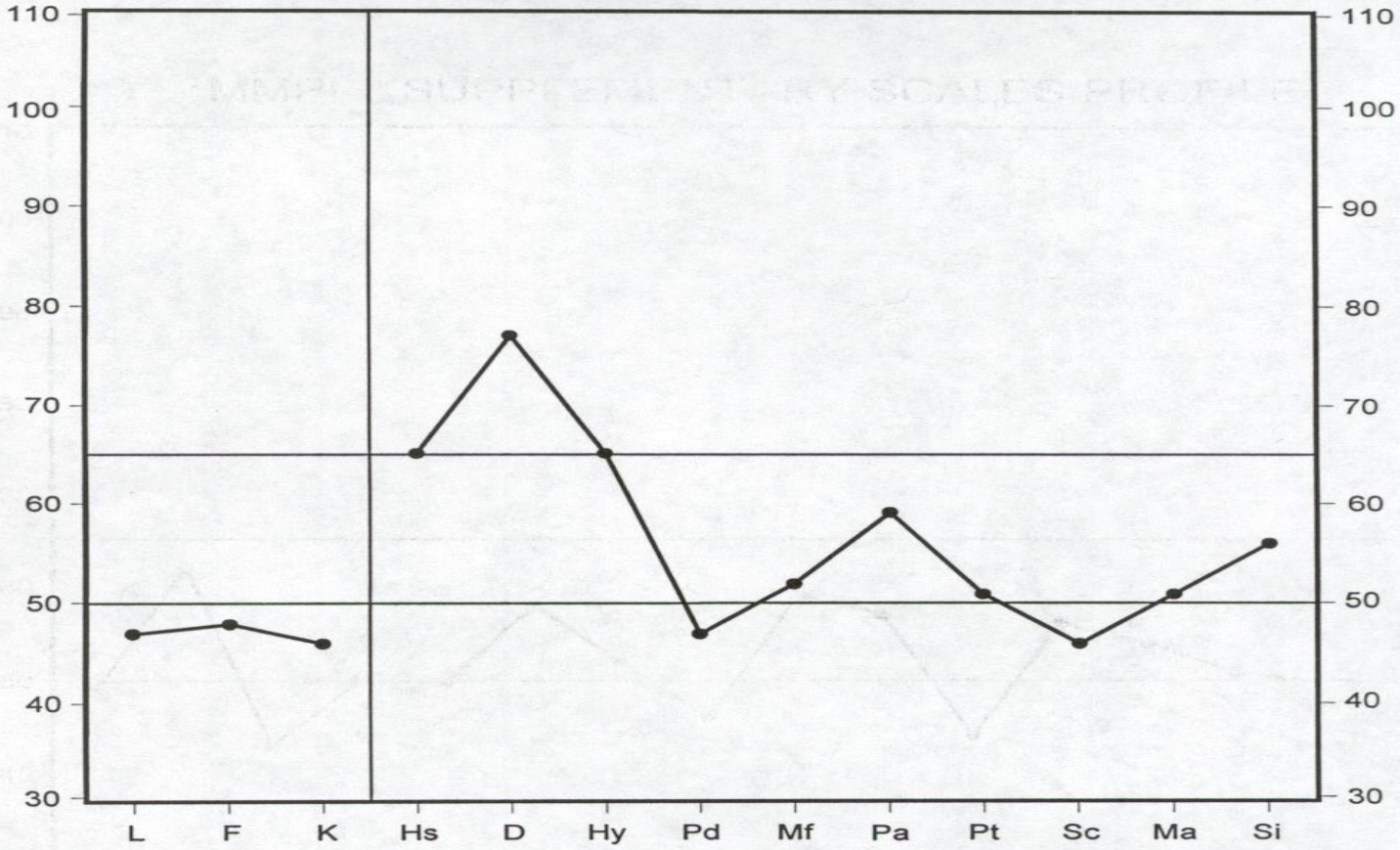
- Relationship between physical impairments, pain, and disability is modest
- Disability and impairment is affected by factors other than structural pathology
- Physical pathology has a minor role in predicting disability

CASE EXAMPLES

POSTTRAUMATIC STRESS DISORDER

- Fatal shooting of coworker
- Physical injuries
- No prior mental health treatment
- Positive work history
- Intact support systems

MMPI-2 BASIC SCALES PROFILE

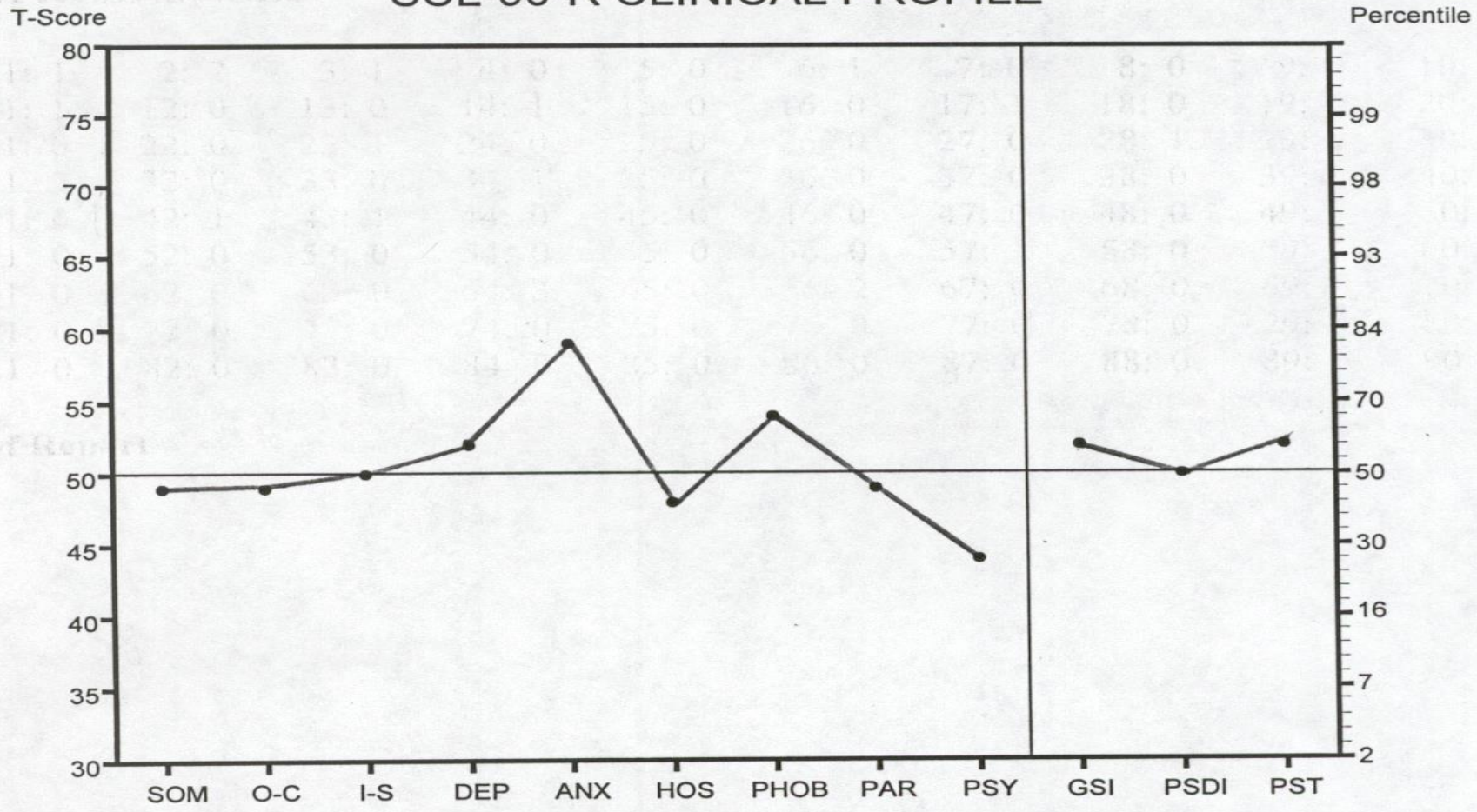


	L	F	K	Hs	D	Hy	Pd	Mf	Pa	Pt	Sc	Ma	Si
Raw Score:	3	3	13	13	33	29	16	35	13	15	11	17	33
K Correction:				7			5			13	13	3	
T-Score:	47	48	46	65	77	65	47	52	59	51	46	51	56
Response %:	100	100	100	100	100	100	100	100	100	100	100	100	100

Cannot Say (Raw): 0
Welsh Code (new): 2'13+-60579/48: FLK:
Welsh Code (old): 2'3610-9478/5: FK/L?:

F-K (Raw): -10
Percent True: 37
Percent False: 63
Profile Elevation: 57.0

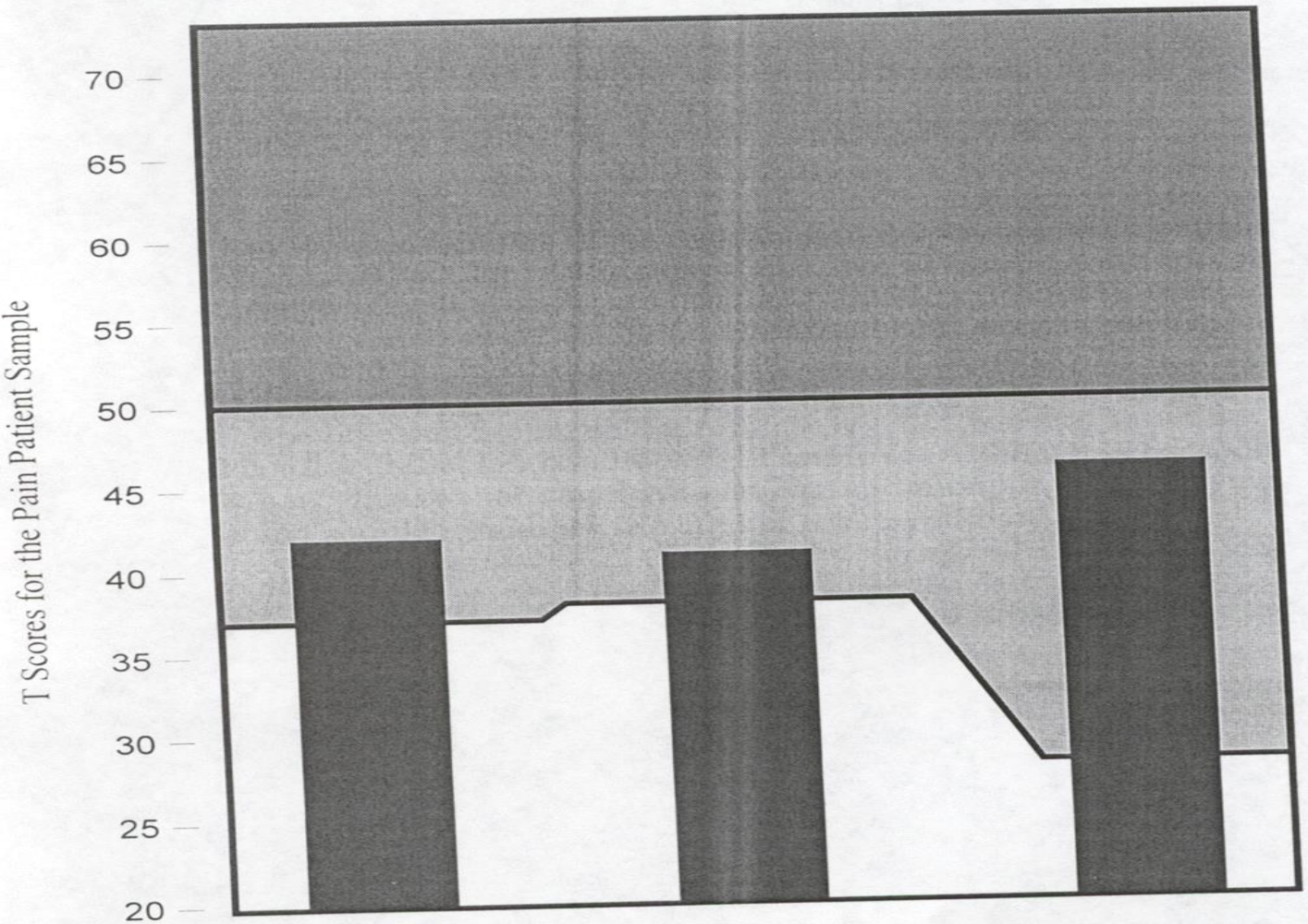
SCL-90-R CLINICAL PROFILE



	SOM	O-C	I-S	DEP	ANX	HOS	PHOB	PAR	PSY	GSI	PSDI	PST
T-Score: (Nonpatient)	49	49	50	52	59	48	54	49	44	52	50	52
Raw Score:	0.25	0.20	0.22	0.38	0.60	0.17	0.14	0.17	0.00	0.30	1.23	22.00
T-Score 2: (Outpatient)	41	33	35	34	39	39	43	39	30	33	32	35
T-Score 3: (Inpatient)	41	36	37	36	41	42	42	38	31	35	36	37

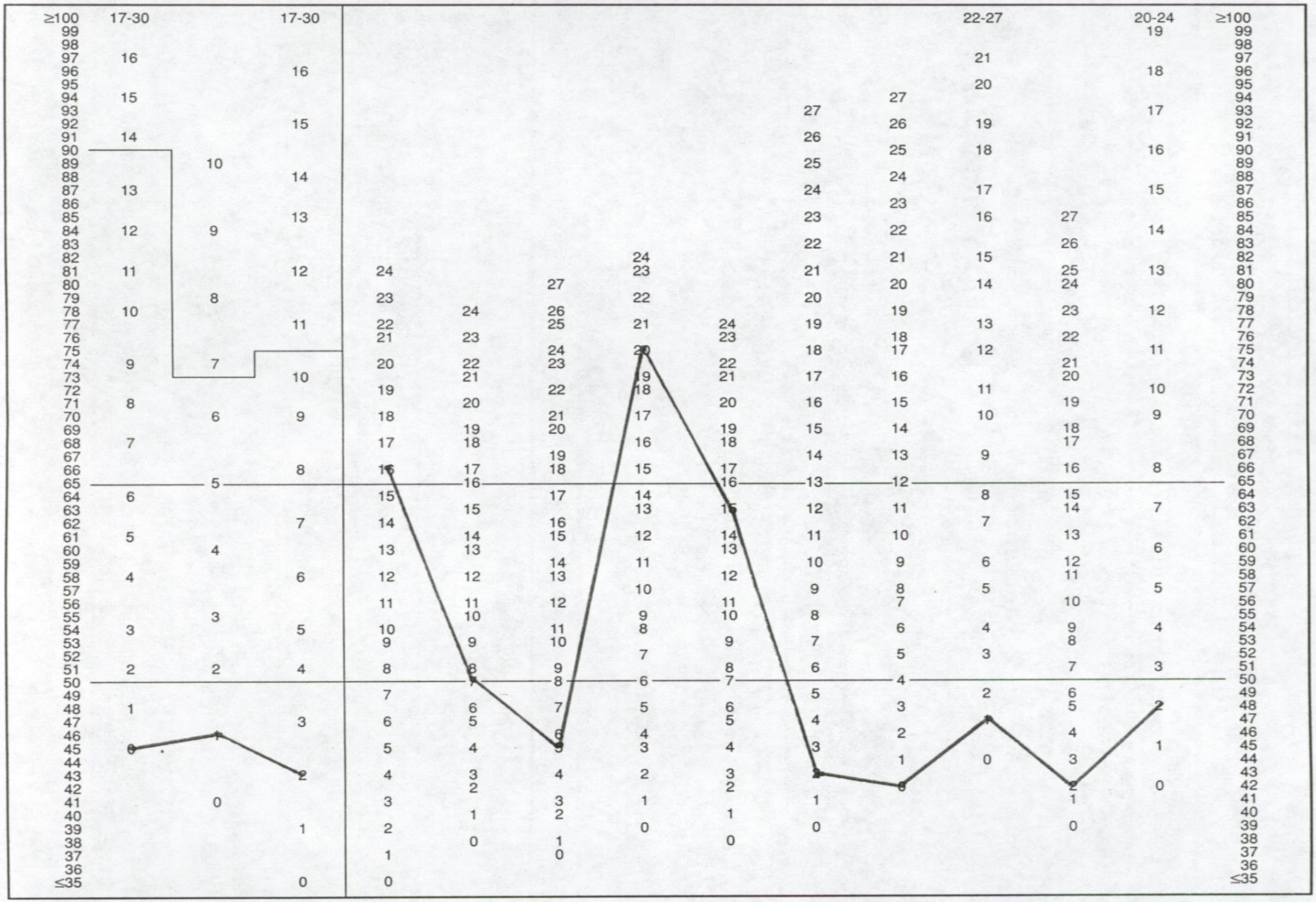
Pain Patient Profile

The Individual Compared to the Patient Sample



	DEP	ANX	SOM
Raw Score:	22	18	26
Patient T Score:	42	41	46

Validity Index (raw): 7

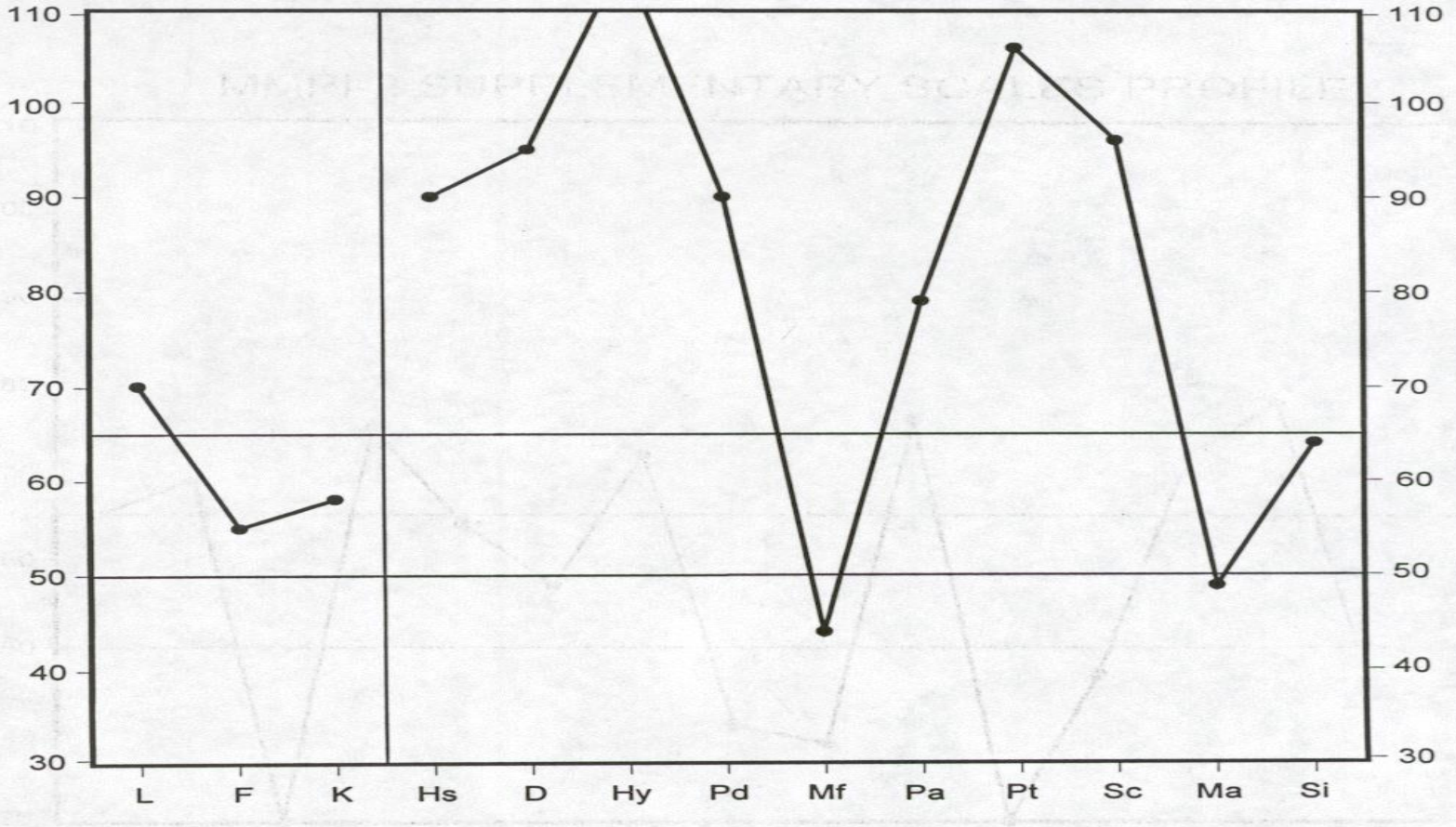


	ATR	RL	INC	AA	D	AI	IE	DA	DIS	SC	DSB	ISR	TRB	
Raw	0	1	2	16	7	5	20	15	2	0	1	2	2	Raw
T	45	46	43	66	50	45	75	63	43	42	47	42	48	T

FACTITIOUS DISORDER, DECEPTION, AND MALINGERING

- Excessive symptom report
- Overly favorable presentation in the context of significant symptom report
- Reporting unusual combinations of symptoms or experiencing all symptoms
- Invalid response patterns on psychometric testing
- Profile not fitting normative groups
- Case: truck driver, S/F, reported cognitive injury, chronic pain, PTSD

MMPI-2 BASIC SCALES PROFILE

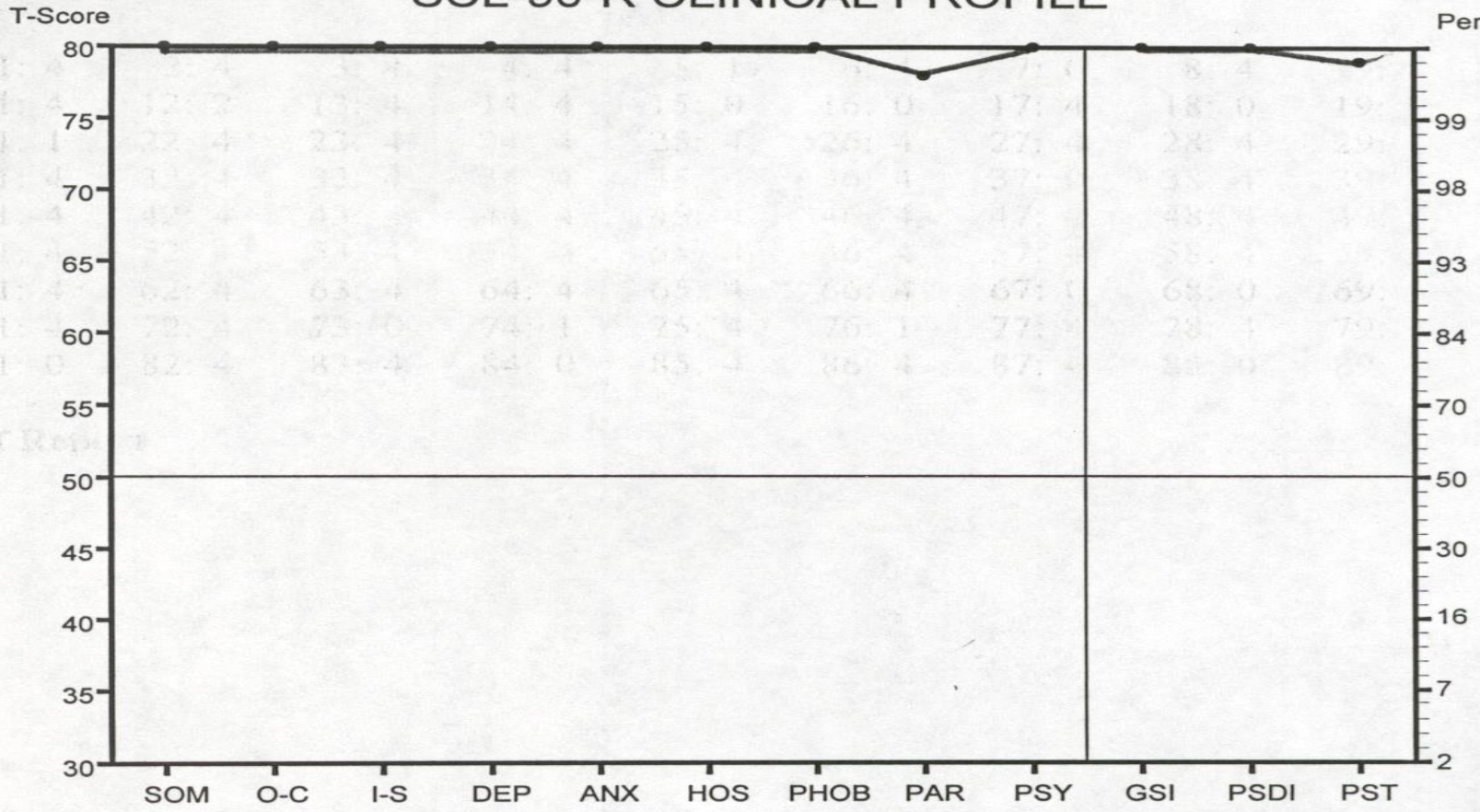


	L	F	K	Hs	D	Hy	Pd	Mf	Pa	Pt	Sc	Ma	Si
Raw Score:	8	6	19	20	41	48	31	23	18	34	34	16	37
K Correction:				10			8			19	19	4	
T-Score:	70	55	58	90	95	116	90	44	79	106	96	49	64
Response %:	100	100	100	100	100	100	100	100	100	100	100	100	100

Cannot Say (Raw): 0
Welsh Code (new): 37**82 14*"6'+0-/95: L'+-KF/
Welsh Code (old): 2783**14*"6'0-95/ LKF-/?:

F-K (Raw): -13
Percent True: 37
Percent False: 63
Profile Elevation: 90.10

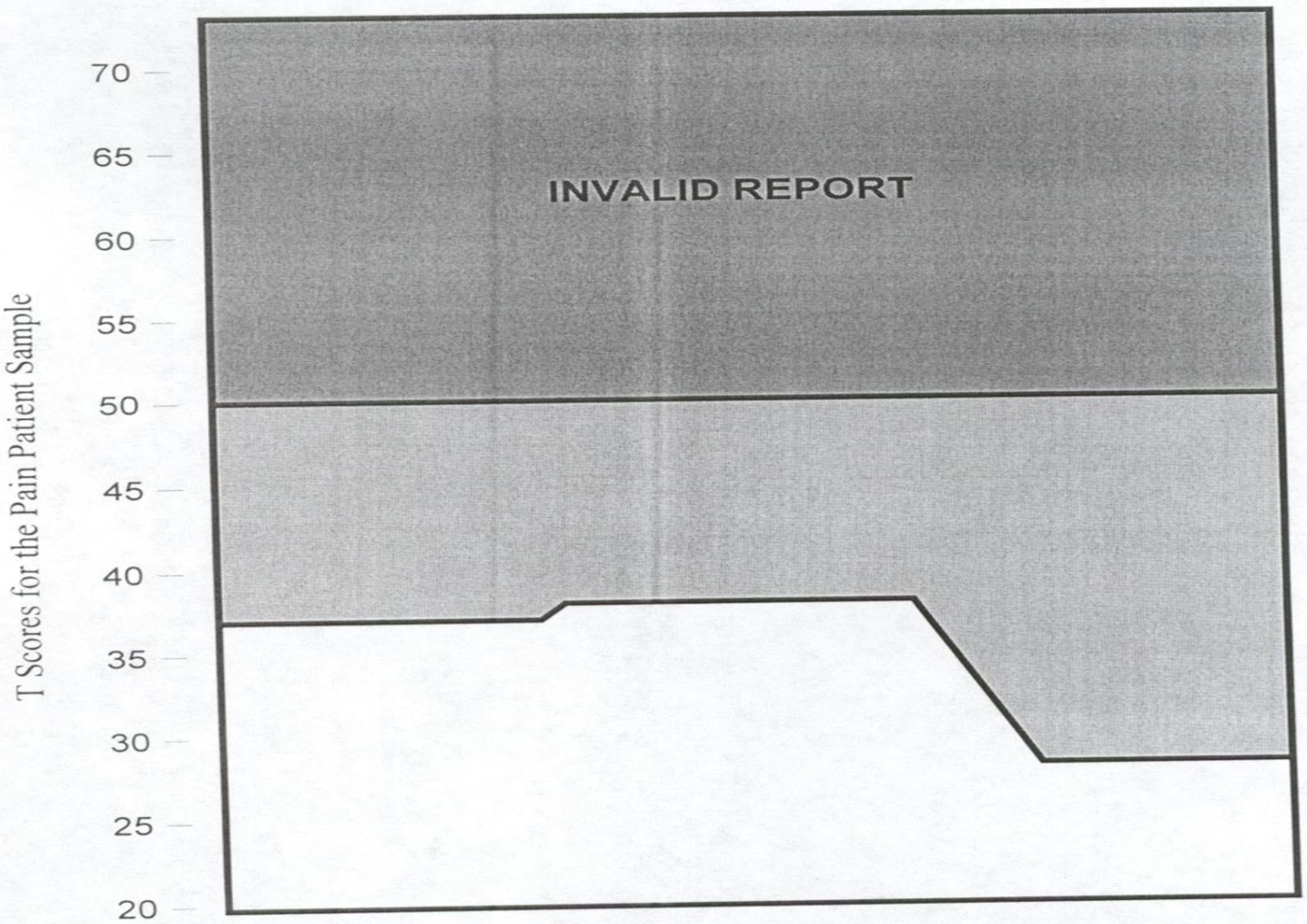
SCL-90-R CLINICAL PROFILE



T-Score: (Nonpatient)	81	81	81	81	81	80	81	78	80	81	81	79
Raw Score:	3.75	3.90	2.78	3.46	4.00	2.17	4.00	2.17	2.00	3.22	3.77	77.00
T-Score 2: (Outpatient)	78	77	64	70	80	62	78	61	65	78	77	67
T-Score 3: (Inpatient)	76	76	68	67	76	66	76	61	62	76	74	64

Pain Patient Profile

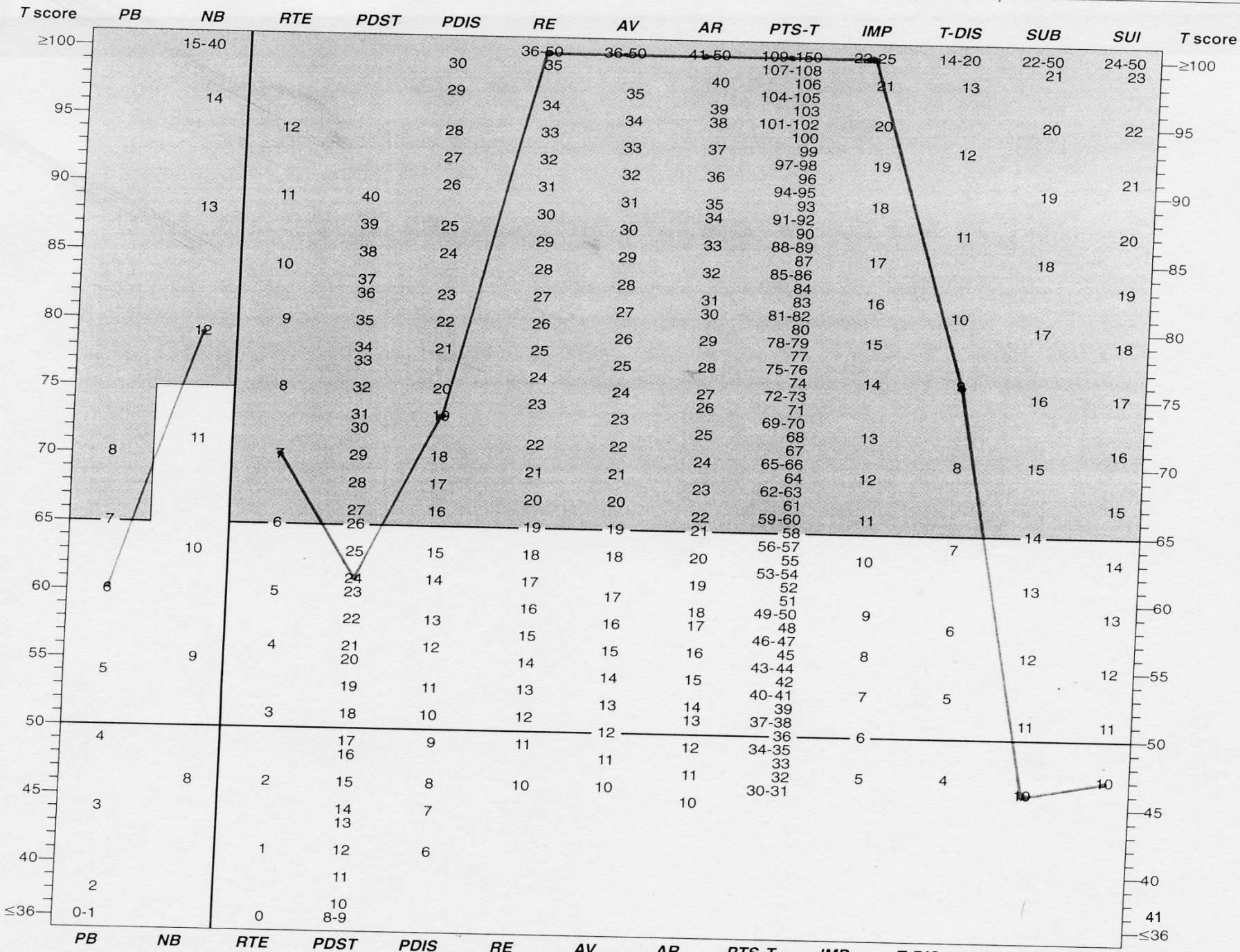
The Individual Compared to the Patient Sample

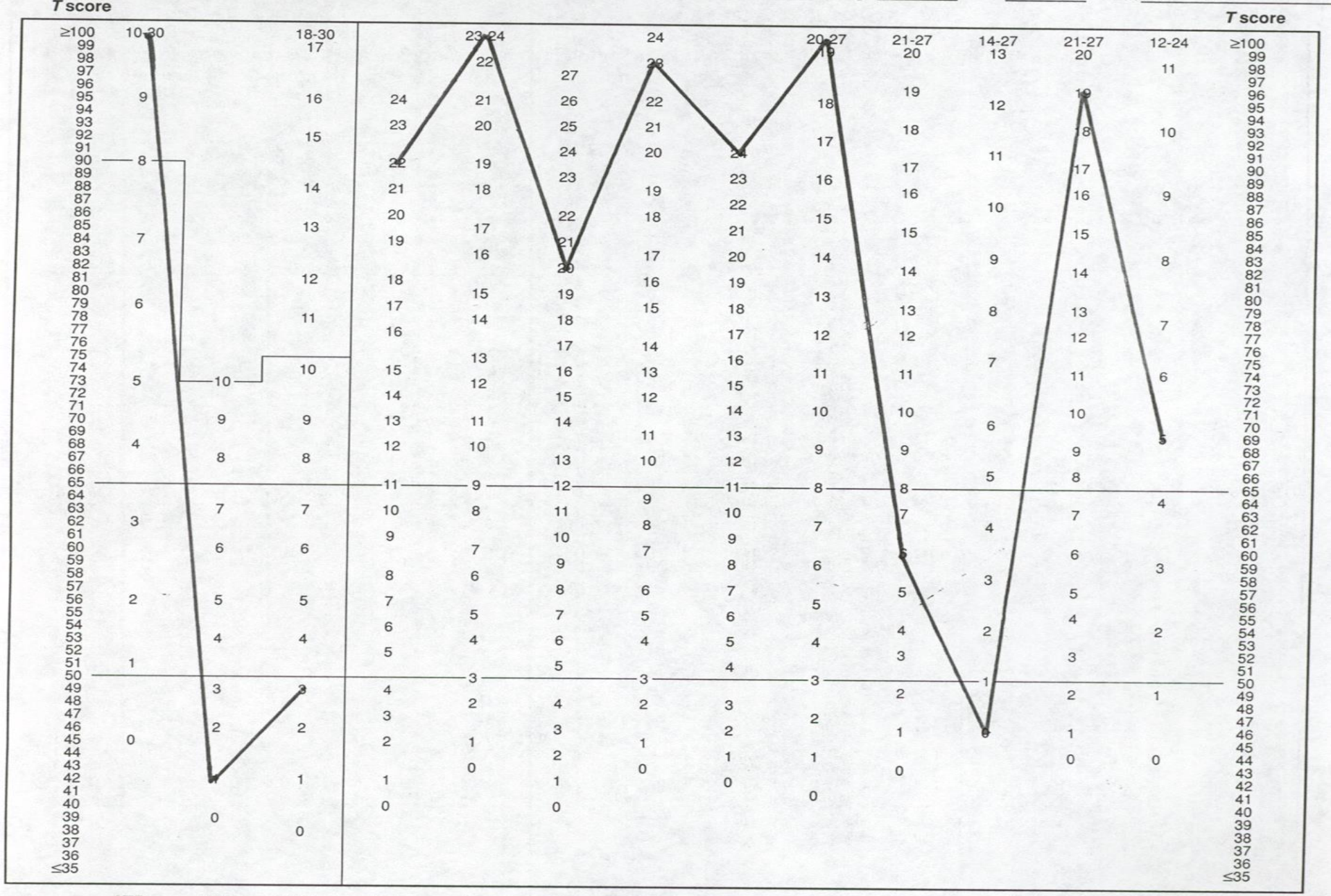


	DEP	ANX	SOM
Raw Score:	36	32	37
Patient T Score:	62	65	65

Validity Index (raw): 12

ID No. _____ Age 58 Sex _____ Race/Ethnicity _____





	ATR	RL	INC	AA	D	AI	IE	DA	DIS	SC	DSB	ISR	TRB	
Raw	12	1	3	22	23	20	23	24	25	6	0	19	5	Raw
T	100+	42	49	90	100+	82	98	91	100+	60	46	96	69	T

Notes:

DOA

1

T

x

THANK-YOU!!