EVANS & DIXON LLC
ATTORNEYS AT LAW

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HOW TO CLAIM A CREDIT UNDER SECTION 8(j) OF THE WORKERS' COMPENSATION ACT–

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To help Respondents limit liability on claims we always look out for ways to claim a credit on payments made to Petitioner when applicable. A recent Appellate court case highlights the requirements of what is needed under section 8(j) in order to be able to recover claimed credits before the Commission.

In the recent case of *City of Joliet v. IWCC 2023 IL. App (3d) 220175WC*, Petitioner had filed two claims against Respondent. During the first claim Petitioner was being paid TTD by the insurance carrier and received additional money under a term of her union contract or CBA under a "make whole" provision which paid her the remainder of her regular salary. The agreement required the Respondent to pay the same for the initial 6 months, and after which the Petitioner could continue to receive these additional payments by using her vacation and sick leave time. In this case Petitioner continued to receive additional benefits for 5 more months. She returned to work, but was again injured and received TTD and additional "make whole" benefits. At trial, Respondent attempted to claim a credit for the additional "make whole" benefits paid to Petitioner, as well as overpayments made to Petitioner under the CBA after TTD had been terminated. The credit request was denied, and several appeals followed up to the Appellate Court.

The initial credit sought by Respondent was for the initial payment of benefits under the CBA make whole provision, while TTD was also paid. The Court found that Respondent had voluntarily assumed its obligation under the CBA agreement and would not be entitled to this amount as it was not an overpayment of TTD but a separate payment under the CBA. The second credit sought was for payments made after the second injury and after the 6-month period of contractual "make whole" payments elapsed. The Court found Respondent had not met its burden of showing the payments were not made under her accrued vacation and sick leave. The third credit sought was benefits paid after TTD had been terminated by an IME. Again, the court found the evidence indicated the payments were made due to the expenditure of Petitioner's vacation and sick time, and upheld the denial of the credit. Lastly, Petitioner applied for benefits under the IMRF, and Respondent claimed a credit for those benefits. The court found that since Petitioner could apply for those benefits even if she had not had an accident, no credit was applicable.

The court highlighted that in presenting arguments for a credit on paid benefits Employers should remember the following;

1. The credit may only be for payment made if it is solely as the result of a work-related injury,
2. It is the burden of the employer to establish the right to a credit,
3. The right to receive a credit is an exception to liability under the Act and is narrowly construed,
4. Credits do not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under the Act.

This case is a reminder of the hurdles a Respondent faces when claiming a Section 8(j) credit. It is important to address all of these issues as far in advance of the trial date as possible.

DON'T WAIVE YOUR PRIVILEGE! – Paul Krauter

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Today, workers' compensation cases are more complex than ever before. When many of us "veteran practitioners" started out in workers' compensation law many years ago, few of us could have imagined how many different parties would become involved in the life of a claim. Multiple third-party vendors are now providing services as part of claim resolution for various reasons. This can include:

- Medicare vendors that prepare MSA's and submit them to CMS.
- IME vendors that schedule exams, draft physician letters, and send medical records to the physician.
- Utilization Review companies.
- Nurse case managers.
- Vocational rehabilitation experts.

The preferred method of communication is typically email. It is common for long email chains to include any one of these third-party vendors. Sometimes the quickest method of communication is forwarding an email or adding a party to an ongoing email chain. However, a hasty push of an email could potentially lead to the waiver of attorney-client privilege.

The attorney-client privilege protects communications from disclosure when they involve a client seeking legal advice from a professional legal advisor. The privilege encourages full and frank consultation between a client and counsel by removing the fear of compelled disclosure of information. *Ill. Emcasco Ins. Co. v. Nationwide Mut. Ins. Co.*, 393 Ill. App. 3d 782, 786, 913 N.E.2d 1102, 1105 (1st Dist. 2009). The privilege belongs to the client rather than the attorney, and the client may intentionally or impliedly wave it. Ill. Sup. Ct. R. 201(b)(2), *Ctr. Partners, Ltd. v. Growth Head GP, LLC, 2012 IL 113107, ¶ 66, 981 N.E.2d 345, 365*. When a client discloses to a third-party a privileged attorney-client communication, that particular communication is no longer privileged and is discoverable or admissible in litigation. *Id.*

You should not disclose emails discussing issues such as trial exposure, trial strategy, etc., to any third-party vendor. Since the attorney-client privilege does not normally extend to the vendor, the inadvertent forwarding of an email to a third-party vendor could potentially lead to that information being obtained by Petitioner's counsel.

Do not be lulled into false confidence because there is no formal discovery process in the Illinois Workers' Compensation Act. Petitioner's counsel can still obtain this information via subpoena practice produced at the time of trial. Furthermore, it is not uncommon for nurse case managers and vocational rehabilitation vendors to have written agreements to provide copies of all communications to both Respondent and Petitioner.

Some tips to remember:

- Slow down! In a world of cascading and endless emails we often want respond quickly and keep the list from growing. However, take the time to fully read and digest all of the contents of the email. Perhaps there was a lengthy IME recommendation with a brief discussion on exposure. Do not forward that entire email to your IME vendor.
- Be selective in choosing whether to forward an email from your attorney to a non-client third party. If possible just start a new email to the third party.
- Sometimes it is easier to forward certain attorney recommendations to a third-party vendor. Consider using "cut and paste" to focus on the necessary content rather than the entire email.

THE APPELLATE COURT PROVIDES GUIDANCE ON SLIPS AND FALLS – *Paul Schumacher*

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In the case of *Western Springs Police Department v. Il Workers' Compensation Commission, 2023 Ill.App. (1st) 211574*, the Court addressed an interesting fact pattern regarding a slip and fall.

The Petitioner, a crossing guard for the Western Springs Police Department, alleged an accident, getting out of her car. Petitioner's duties required her to be at her specific location from 7:40 a.m. until 8:10 a.m. The Petitioner drove to work that day and parked her vehicle in an angle parking space directly across from the Village Hall, where she frequently parked. There were employee-designated parking lots behind the Village Hall, that are not for use by the general public. No one from the Village ever instructed claimant where to park. The angle space was for commuter train parking, limited to four hours in duration, however, the Village granted the Petitioner and several other Village employees the privilege of parking in the angle parking spaces in excess of the four-hour parking limitation.

The Arbitrator found the Petitioner's accident did not arise out of and in the course of the employment. The Commission reversed that Decision. The Circuit Court reversed the Decision of the Commission, holding that the Commission's Decision was erroneous as a matter of law and reversing the Decision. This matter was Appealed to the Appellate Court and the Circuit Court was reversed.

The Appellate Court held that the general premises rule applies which is when an employee slips and falls while walking to work at a point off the employer's premises, does not arise out of and in the course of the employment. There are two exceptions to the general premises rule: #1 – The employee is injured in a parking lot, provided by and under the control of the employer, which is known as the parking lot exception. #2 – The employee is injured in a place where she was required to be in the performance of her duties and is exposed to a risk common to the general public, to a greater degree than other persons. The Appellate Court relied upon the holding of *Walker Brothers Inc. vs. Illinois Workers' Compensation Commission*. The Court reasoned that the employer's control or dominion over a parking area is a significant factor in analysis of whether the parking lot exception is applicable. The claimant was on her way to work as a crossing guard when she parked her vehicle in one of the angle parking spaces. The claimant slipped on ice, which was hidden by a thin layer of snow suffering injury. The angle spot was owned and maintained by the Village, although the parking space was available for use by the general public. Claimant established that the parking by the general public was limited to four hours in duration, whereas the Village granted her and several other employees, the privilege of parking in excess of the four-hour limitation. Therefore, the evidence demonstrated that the Village owned the parking premises where the accident occurred, exercised control or dominion in the area and did confer special arrangements for the use of the angled spots by employees of the Village.

The holding by the Appellate Court in this case is similar to the Walker Brothers case. The key to a parking lot injury is that it must arise out of and in the course of the employment and furthermore, that the employer must have control over the space where Petitioner suffered the accident. Although this is not a parking lot accident, the space where the Petitioner parked was under the control and dominion of the Village and therefore, this accident did arise out of and in the course of the employment.

IS IT WAGE DIFFERENTIAL OR PPD?

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Facts: The Illinois court addressed the issue of wage differential awards in *Haepp v. Illinois Workers' Compensation Commission, 2022 I.App (1st) 210634WC*.

In 1999, Petitioner began working as a carpenter for Respondent. On 5/4/10, Petitioner sustained a meniscus tear in his left knee while working for Respondent. He underwent a left knee arthroscopy and returned to work full duty on 1/10/11.

On 1/26/11, he reinjured his left knee while working for Respondent. He underwent a second left knee arthroscopy. Due to his ongoing symptoms, he was placed on permanent restrictions of no kneeling. Respondent accommodated his restrictions and he returned to work on 12/1/11. He eventually had a total left knee replacement and was able to return to work with permanent restrictions of no kneeling in February 2016. Respondent continued to accommodate his restrictions.

Petitioner filed two separate Applications for Adjustment of Claim and the cases were consolidated.

Holdings: The Arbitrator found Petitioner sustained compensable injuries and awarded PPD benefits and medical expenses. The Arbitrator "merged" the permanency awards for both claims relating to Petitioner's left knee and awarded 25% loss of use of the left leg. The Arbitrator declined to award benefits under section 8(d)(1) of the Act for wage-differential benefits. The Arbitrator noted Petitioner's permanent restrictions partially incapacitated him from pursuing the duties of his usual and customary line of employment, but did not result in an impairment of earning capacity.

On appeal, the Commission modified the Arbitrator's decision, finding that the Arbitrator erred by merging the permanency awards for Petitioner's left knee

injuries. The Commission concluded Petitioner was entitled to two separate PPD awards because he sustained two separate injuries.

The Commission agreed with the Arbitrator's determination that Petitioner was partially incapacitated from pursuing his usual line of employment but did not suffer an impairment of earning capacity following the 1/26/11 injury. Specifically, the Commission found Petitioner continued working as a carpenter and earned the same wages as other carpenters.

Petitioner appealed to the Appellate Court of Illinois on the issue of wage-differential benefits.

To prove entitlement to a wage-differential award under section 8(d)1, a claimant must show that (1) he is partially incapacitated from pursuing his usual and customary line of employment and (2) there is difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

The Appellate Court agreed with the Commission and found Petitioner failed to establish an impairment of earning capacity. The Court noted the Commission considered the nature of Petitioner's post-injury employment and the decision to award PPD benefits in lieu of wage-differential benefits was not against the manifest weight of the evidence.

Takeaways:

1. When a Petitioner has sustained two separate and distinct injuries to the same body part and the claims are consolidated, it is important to consider all of the evidence to determine the nature and extent of his disability.

2. The purpose of a wage-differential award is to compensate an injured worker for his reduced earning capacity, and if the injury does not reduce his earning capacity, he is not entitled to such compensation.

WAIT . . . EVANS & DIXON DOES THAT TOO? – Keith Allen

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It might surprise you that I have been practicing law for 20 years but have never once defended a workers' compensation case. Instead, I am a commercial litigation attorney who resolves business disputes and contractual issues. I have a natural affinity for bringing parties together to find a way to settle matters and keep the business relationship alive. I aggressively pursue matters before a court or arbitration panel if an amicable resolution is impossible.

I am sure you know Evans & Dixon has been handling workers' compensation cases since 1945. What you might not know, however, is that, in the early 2000s, the firm transitioned into a full-service law firm that assists its clients in their day-to-day operations. We have won several awards for being the best value in business; we decided that we should no longer limit our services to one discipline.

My skills have assisted a wide array of the firm's clients. Last week, I helped a client organize a new business and created a shareholder agreement to restrict unwanted transfers of shares. I assisted a growing business in negotiating its first purchasing group contract. I handled a shareholder demand to inspect books and records for a company valued at more than $750MM. I also appeared before a Cook County judge to evict a commercial tenant and collect more than $2MM in rent. Next week, I am drafting a motion for a company whose principal absconded with $3MM in corporate funds. Not only is this work interesting, but it is also what keeps American businesses going in a world of unscrupulous actors.

I am hardly the only Evans & Dixon attorney performing this type of work. Our Business Law Group is full of attorneys who protect our clients' interests inside and outside of the courtroom. Please think of us if you or a colleague needs a trusted adviser in the following areas:

1. Commercial Litigation (Initiating or Defending Against a Lawsuit)

2. Corporate Formation and Corporate Document Review
3. Purchasing or Selling a Business
4. Drafting, Negotiating, and Updating Your Business Contracts
5. Business Disputes
6. Options for Raising Capital to Fund Your Business
7. Analyzing and Negotiating Your Investment in a Business
8. Workout Negotiations with Lenders
9. Employment, Noncompete, and Nondisclosure Agreements
10. Minority Shareholder Oppression Claims
11. Collection Matters
12. Corporate Mismanagement or Breach of Fiduciary Duty Claims
13. Real Estate Deals
14. Premises Liability
15. Transportation Industry

This list is only a sampling of the firm's practice areas. In the rare instances where we cannot provide advice, we use our industry contacts to recommend possible solutions. This is consistent with our first core business value of Client Service Quality – to foster open communication with our clients that enhances the potential of a favorable client outcome.

We wish you the best and thank you for considering our firm for all of your legal needs.

INDIANA UPDATES THEIR WORKERS' COMPENSATION LAW–

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A new bill has been signed into law regarding workers' compensation making changes that have not been made in several years. Most of the changes have to do with the rates for TTD, PPI calculation and maximum compensation and medical fees and providers. Below are the highlights of the changes in the bill.

1. **Section 22-3-3-3, Effective July 1, 2022**.

The statute has been modified to include what has been laid out in case law regarding the statute of limitations. The statute of limitations is two years from the date of the accident or two years from date of death. For radiation exposure, it is two years from the date of knowledge of the incident or through reasonable diligence should have known of the injury and its causal relationship to work. What has been added is that if TTD, pursuant to Section 7, or TPD pursuant to Section 9 have been paid, the statute of limitations is two years from the last date for which compensation was paid under TTD or TPD.

Thoughts – Essentially, this just codifies what has been in case law for the last several years. Please keep in mind that the payment of medical does not constitute compensation.

Side Effect – this now specifically defines compensation as TTD or TPD as has been done by the Court for statute of limitations cases previously. There have been issues raised with regard to affirmative defenses and what constitutes compensation in light of what plaintiffs are entitled to as a result of a denied claim. My belief is that the affirmative defenses discuss benefits/compensation as a whole in light of the fact that the defenses, in my opinion, remove the claimant from the course and scope of the employment and, therefore, cannot arise out of the employment. Plaintiff attorneys argue that even in a denied claim medical is due as that has not been determined to be compensation.

2. **Section 22-3-3-5.2, Effective January 1, 2023**

This section modifies the bill review and liability amounts for medical bills incurred as a result of a workers' compensation injury. As most people have been aware, medical service facilities have seemed to have been carved out as an exception to the bill review regarding 200 percent of Medicare if no agreement is reached otherwise.

Indiana House Bill 1153 was recently passed.

Looking at the new statute, it appears to be applying the medical service provider standards to medical service facilities.

Thoughts – It appears to me that, after a bill review, if no agreement is reached between the parties as indicated and laid out in the statute itself, that the 200 percent of Medicare also applies to the medical care service facility as it had applied to medical service providers.

3. **Section 22-3-10, Effective July 1, 2023**

This section has several changes, but essentially what it is changing is the amount applicable to each degree of disability when calculating a PPI rating. There is a large section taken out, but it appears to have eliminated all of the previous calculations under the old system when weeks were used for permanent partial impairment versus degrees. It essentially has taken out anything before July 1, 1990 going forward, when degrees were applied.

The change begins on July 1, 2023. Beginning on that date and for the following year, the value per degree has been changed as follows:

Degrees 1 to 10	$1,803.00
Degrees 11 through 35	$2,011.00
Degrees 36 through 50	$3,282.00
Degrees greater than 50	$4,182.00

Beginning July 1, 2024:

Degrees 1 to 10	$1,857.00
Degrees 11 to 35	$2,071.00
Degrees 36 to 50	$3,380.00
Degrees greater than 50	$4,307.00

Beginning July 1, 2025:

Degrees 1 to 10	$1,913.00
Degrees 11 to 35	$2,133.00
Degrees 36 to 50	$3,481.00
Degrees greater than 50	$4,436.00

Beginning July 1, 2026:

Degrees 1 to 10	$1,970.00
Degrees 11 to 35	$2,197.00
Degrees 36 to 50	$3,585.00
Degrees greater than 50	$4,569.00

Thoughts – These will all be included in our new chart, which will be forwarded to you next year so that you can have these at your fingertips.

This same section also changes the maximum average weekly wage, and therefore, the maximum TTD rate.

The maximum average weekly wage will be as follows:

Beginning July 21, 2023	$1,205.00;
Beginning July 1, 2024	$1,241.00;
Beginning July 1, 2025	$1,278.00;
Beginning July 1, 2026	$1,316.00.

1. **Section 22-3-3-22, Effective July 1, 2023**

This section changes the maximum TTD rate and the maximum compensation payable other than medical bills. It begins on July 1, 2023, and the maximum TTD rate are as follows:

Beginning July 1, 2023	$803.33;
Beginning July 1, 2024	$827.33;
Beginning July 1, 2025	$852.00;
Beginning July 1, 2026	$877.33.

Notes – Please keep in mind that the TTD cannot exceed the actual average weekly wage.

The maximum compensation payable other than medical bills thus also changes, based on the maximum TTD rate at the 500 weeks' maximum compensation. The maximum compensation payable is as follows:

Beginning July 1, 2023	$402,000.00;
Beginning July 1, 2024	$414,000.00;
Beginning July 1, 2025	$426,000.00;
Beginning July 1, 2026	$439,000.00.

Section 22-3-6-1, Effective January 1, 2023

This paragraph is important in that it adds ambulatory outpatient surgical centers to the definition of medical service facility. Previously, they had been opted out and were always entitled to 80 percent of the charges in the area versus the 200 percent of Medicare payments.

The other important part of this is that under paragraph 4, the definition that was used under medical service facilities to exclude them, which would now include ambulatory outpatient surgical centers, was a definition that a professional corporation was excluded.

Thoughts – This paragraph prevents physicians from forming a professional corporation and using it as an ambulatory outpatient surgical center, and avoiding the fee schedule in negotiations, as laid out back in 22-3-3-5.2.

2. **Section 222-3-7.2, Effective January 1, 2023**

This addition is a new chapter that has been added. This chapter probably represents the newest change to handling of medical bills in a workers' compensation

claim. The chapter is called Payments of Claim. What this chapter does is defines clean claims and puts the onus on the payor, either the carrier or the bill service billing review company, or the defendant, in terms of denying and paying medical bills. The section adds payment of interest on **clean claims** that were not denied or paid properly within a period of time.

The section defines a **clean claim** submitted by a medical service provider, which includes medical service facilities that use UB-04 or HCFA-1500 forms, as one that has no defect, impropriety or particular circumstance which requires additional information for payment. The problem with this statement is that there is no definition in the section what constitutes a defect, an impropriety or a particular circumstance.

Thoughts – At this early stage without any further definitions, I would presume a defect means there is a code missing, a description missing, or, I believe, even the medical records to support that claim. Impropriety could be defined, in my opinion, as a charge that seems excessive in light of prior experience, and particular circumstance may mean a type of treatment or any other definition you can think of that would cause you pause in paying a bill.

The timeframe for which payment must be made or denial must be made is laid out in paragraph 6 of the statute. If the bill was submitted electronically, it has to be paid or denied in less than 30 days. If it was submitted in paper form, it must be paid or denied in less than 45 days. The consequences, if you do not pay or deny during that time period and later pay the claim, is that you will owe interest, which starts on day 31 or day 46, until the bill is paid. The paragraph and chapter do note that medical providers can only use UB-04 or HCFA-1500 forms to submit their bills. I would direct you back to defect, impropriety or particular circumstance to be used if neither of those forms are used.

Additionally, you should advise them of notice of defect, but you also have to give them the remediation necessary. The time periods are the same with being less than 30 days for electronic filing of a claim and less than 45 days for a paper filing. Failure to notify them of the defect would automatically make this a **clean claim** which, if it is not denied or paid within the time frames listed above, interest would be owed.

Thoughts – I would suggest that bill review, bill intake, medical only handlers, all be advised by you to specifically check the deficiencies and the documents being submitted and notify the provider immediately upon receipt. Also, I am not certain that it isn't advisable to just deny payment of the bill within the timeframes as listed. The statute does not contain any penalty at this point for denying the bill. A denial of the bill or payment of the bill within the timeframes listed above means no interest would be due. Also, keep in mind that a denial of a bill would immediately start the statute of limitations running for the provider to file a provider fee claim, which is two years from the date of notice of denial in writing.

I don't want to suggest flat out denials of every medical bill, since that could lead to bad faith petitions. My suggestion would be that, if there is some doubt between a deficiency and denial, I would go with the denial. There is nothing in the statute that says if you give them notice of deficiency in the remediation time, that specifically extends the payment or denial time period. My interpretation would be that it should since giving them notice of deficiency means it is not a **clean claim**. Therefore, in my mind and interpretation, only **clean claims** start the denial or payment timeline. That having been said, if there is a question of deficiency, I suggest a provisional denial stating that the bill is denied based on the deficiency. In this manner you would have satisfied the deadline while avoiding misinterpretation of the statute but I believe without acting in bad faith by allowing the opportunity for them to correct the deficiency.

NOTES, EVENTS & VOLUNTEERS

- New workers' compensation rates have been posted for Illinois and Nebraska. **CLICK HERE** for a digital version of Evans & Dixon's rate charts or reply to this email to request laminated copies be mailed to you or your team.

- Attorney Paul Krauter will be speaking at the Illinois Institute for Continuing Legal Education on 3/2/23. This event is their annual Illinois WC seminar. He will

be covering choice of medical treatment and the specific topics of PPP's and union panels.

- Attorney James M. Gallen contributed to the article "In A World Where Millions Work From Home, What Does It Mean To Be Injured On The Job?" You can read it **HERE**.

- Evans & Dixon will be at the following events, conferences, and seminars coming up:

  - **Iowa Ortho Workers' Compensation Conference** in Altoona, IA | 3/2
  - **Kids' Chance of Indiana Happy Hour** in Indianapolis, IN | 3/15
  - **MO/KS Annual PRIMA Conference** in Lake of the Ozarks, MO | 4/12-13
  - **Iowa Workers' Compensation Symposium** in Des Moines, IA | 6/22-23
  - **WCI** in Orlando, FL | 8/20-23
  - **National Workers' Compensation & Disability Conference** in Las Vegas, NV | 9/20-22

  If you will be attending any of these conferences, please let us know! Email Amy at ahaller@evans-dixon.com

- We are pleased to announce the appointment of Elizabeth S. Shocklee to the position of Managing Partner of Evans & Dixon, LLC. Shocklee is the first woman Managing Partner in the firm's 78-year history, and will oversee the leadership, direction, growth, profitability, and culture throughout the firm's 8 offices. She succeeds Tim Tierney who held the role since 2013.

  Shocklee has been with Evans & Dixon her entire professional career starting as an Associate Attorney in 1996, and later named partner in 2006. Not only has she been instrumental in the rapid growth of the firm, she has been very influential in promoting inclusivity, enabling opportunities, and sharing experiences that empower others.

  Shocklee will take the reins in an era of growth and expansion for Evans & Dixon, and the firm is excited to have her lead Evans & Dixon's 100+ team of attorneys through the opportunities and challenges that lie ahead in the coming years.

GETTING TO KNOW: Elizabeth Shocklee



WHAT'S THE TOP DESTINATION ON YOUR MUST-VISIT LIST?

- Italy

DO YOU COLLECT ANYTHING?

- Old Books

WHAT IS YOUR GO-TO KARAOKE SONG?

- Me and Bobby McGee

TELL US ABOUT YOUR FAMILY!

- Big immediate family - I am #6 of 8 siblings, and have 5 nieces and 13 nephews along with 2 great nephews, 1 great niece and another on the way.

DO YOU HAVE A MENTOR?

- Betsy Levitt until her untimely passing; I'd also say my brother, Tim, is a strong influence on me.

IF YOU COULD ONLY EAT 1 MEAL FOR THE REST OF YOUR LIFE, WHAT WOULD IT BE?

- Tacos…Thanksgiving dinner is a close second.