Lex and Verum

The National Association of Workers' Compensation Judiciary

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Book Review: *Living Abled and Healthy: Your Guide to Injury & Illness Recovery*

By Hon. David Torrey*

The physician and policy wonk Nortin Hadler, in his thought-provoking book, *Stabbed in the Back* (2009), harshly condemns workers' compensation for too often promoting a disability mindset among injured workers. To retain the benefits of the system, he complains, the worker must constantly be promoting himself as disabled. He even calls the system "evil."

Notably, Dr. Hadler's audience was (and is) probably for a general readership and especially – to wax narcissistic – for people who enjoy reading books about disability, insurance, and all things medical.

Chris Brigham, MD, the *AMA Guides* expert, has authored a new book that, among other things, sends the same message, but does so with a much softer touch. His primary audience, meanwhile, is *injured workers* – that is, *patients*. The secondary audience includes all other stakeholders, *e.g.*, lawyers, health care providers, claims professionals, fact finders, and employers. *Living Abled & Healthy* is in essence a book offering in the "wellness" category, intended specifically to encourage injured workers to focus on – well – being *abled* and not *disabled*.

As far as I know, Dr. Brigham's admirable and well-written book is quite unique in terms of subject and audience. It's also quite comprehensive, treating all aspects of the experience an injured worker will likely undergo in the wake of an injury that has, in turn, given rise to a workers' compensation insurance claim. The author's goal is to "get this in the hands of all injured workers so they may experience better outcomes."

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The author's holistic treatment extends, pertinently, to the role of lawyers in the system. Dr. Brigham in this realm has recruited two thoughtful comp lawyers active on the national stage, Bob Aurbach and David DePaolo, to assist him on advising injured workers on such issues as when an attorney is needed, how to choose an attorney, and what to realistically expect out of the experience.


Dr. Chris Brigham

The principal audience is injured worker patients, but as this recruitment of heavy-hitters suggests, *Living Abled & Healthy* is an education for all who labor in the workers' compensation community. A young lawyer, or *any* lawyer new to the field, will expedite his or her sophistication about comp by reading Dr. Brigham's book. In this regard, the author provides a major service in bringing together in one place a discussion of all of the issues and tensions surrounding our present-day disability systems, especially those of workers' compensation.

As I was privileged to be able to review an early version of the book, I can tell you that Dr. Brigham didn't intend *Living Abled & Healthy* to be a lawyer's manual. On the other hand, by facilitating the reader's exploration of all aspects of the disability experience, the workers' compensation specialist will surely gain sophistication from a careful reading. The thoughtful lawyer may even discover in his or her review some rich material for cross-examination.

The book, notably, is integrated with web-based resources at http://www.livingabled.com, including a useful bibliography http://www.livingabled.com/resources/bibliography/. Dr. Brigham's book is also available on Amazon, in paperback, and in Kindle formats. I agree with Dr. Brigham: "*Living Abled & Healthy* is a must read for everyone involved in workers' compensation, including patients and lawyers."

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Torrey-Greenberg Pennsylvania Workers' Compensation treatise, as published by Thomson-Reuters.

Fit Vs Faint: Assessing Work Causation in "Idiopathic Fall" Cases

Lorne Direnfeld, MD[A], David B.Torrey[B], Jim Black[C], LuAnn Haley[D], and Christopher R. Brigham, MD[E]

Introduction

A skilled physician raises a challenging question: when a patient falls due to a nonwork-related episode of dizziness and hits his or her head, sustaining concussion or even moderate to severe brain injury, do workers' compensation laws consider such injuries to be compensable?

Though a challenging issue, courts that interpret compensation laws have, in fact, dealt with the issue for decades. Bearing in mind that each state maintains its own law, the answer depends on two critical analyses. The first is what, specifically, caused the episode of dizziness (or loss of consciousness)? The second is what, specifically, happened in the fall that caused the patient to strike his or her head? Physicians who evaluate causation must understand both the medical (scientific) and the legal perspectives.

The first inquiry goes to *medical causation,* that is, scientific analysis of the facts to determine the cause of the problem. For example, did the patient have a seizure due to some nonwork-related medical condition, or did the patient merely faint—with some work activity as a material provoking factor? Thus, the "fit versus faint" of our title. With seizure, loss of consciousness is attributable to abnormal brain electrical activity. With fainting, loss of consciousness is attributable to a decrease in blood flow to the brain. Rarely are the answers to such basic questions obvious to the layperson; expert opinions supported by scientific analysis are usually required. By way of further examples, an episode of fainting can reflect a nonwork-related condition, and a seizure can represent a *work-related* condition such as one associated with a toxic exposure.

The second inquiry goes to what is called *legal causation.* Under what factual circumstances are injuries of this type potentially covered under the law? As will be seen, the majority rule limits compensation of injuries when brought about by a nonwork-related condition. In contrast, most laws will, for example, consider a seizure or faint and its consequences to be brought on, in whole or in part, by a *work activity* to be work related. Much nuance attends this analysis; however, as one can tell, a threshold requirement is a medical opinion to explain, as near as possible, the *genesis* of the fit or faint.

Here, we summarize what the law has defined as "idiopathic falls" cases. Importantly, idiopathic as used in this legal context simply means "unique to the individual" as opposed to "of unknown cause," which is the familiar medical use of the word.[1] We then set forth three detailed case studies to describe falls that have their genesis in episodes of loss of consciousness. Thereafter, we feature analyses by the lawyer or judge authors with regard to the likely compensability outcomes in their respective states. We then set forth additional practical considerations to ponder when assessing the issue of compensability in these cases. We conclude with reflections by the physician authors who address the medical versus legal analysis of the idiopathic fall cases.

Traditional Scholarship of Idiopathic Falls: Six Modern Precedents

The standard legal analysis of causal connection questions in the workers' compensation arena is found in the treatise penned by the late Arthur Larson. Professor Larson discusses at length what he long ago denominated the idiopathic fall situation.[2] The pivotal issue for Larson, and for the legal community that has followed his analysis, is whether injuries sustained in an idiopathic fall have *arisen* out of the worker's employment.

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This ubiquitous requirement of statutes requires that before compensability is established, a causal connection must be shown between the worker's injuries and the circumstances and obligations of work.

Of course, an injury must also occur in the course of employment (a time and place requirement), but the idiopathic fall cases typically raise the issue of causal connection—and *not* the question of some unusual hour of the day or marginal work site.[3] Indeed, in the three scenarios that follow,[4] each worker was, without question, in the course of employment.

Larson establishes that the idiopathic fall question has been raised since the very creation of workers' compensation laws in England at the beginning of the twentieth century. He posits that the universal rule is that if a worker has a personal condition that causes him or her to lose consciousness, through fit or faint, the resulting head or other injuries have arisen out of employment only if the work conditions contribute to those injuries in some material way. The classic examples are work requirements of laboring at some significant height, working around machinery or "sharp corners," and operating a moving vehicle. Both in the past and in the present, the pivotal issue for the court (or other decision maker) will be whether such material contribution in fact *exists*.

Notably, Larson first wrote in the 1950s. However, a review of the first major workers' compensation treatise from 1917, provides this view: "[I]njuries sustained from a fall due to a faint or epileptic seizure do not entitle a workman to compensation unless there is some peculiar hazard connected with the place of the fall."[5] So, too, does the leading law school textbook of the present day: "In most jurisdictions the victim of an idiopathic fall must show that the employment or its environment enhanced the risk of injury in some way, either in having accentuated the weakness of the personal condition, thereby contributing to the fall, or by having exposed the falling person to the risk of suffering a more dangerous collision than would be expected in a non-work setting."[6]

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Interesting Workers' Compensation Blogs

DePaolo's Work Comp World
http://daviddepaolo.blogspot.com/

New Jersey Workers' Compensation Blog
http://www.njworkerscompblog.com/

Florida Workers' Compensation Adjudication
http://flojcc.blogspot.com/

Managed Care Matters
http://www.joepaduda.com/

Workers' Comp Gazette
http://workerscompgazette.com/

Workers' Compensation
http://workers-compensation.blogspot.com/

Alabama Workers' Compensation Blawg
http://www.alabamaworkerscompblawg.com/

Maryland Workers' Compensation Blog http://www.coseklaw.com/blog/

Workers' Comp Insider
http://www.workerscompinsider.com/

CDC NIOSH Science Blog
http://blogs.cdc.gov/niosh-science-blog/2014/01/10/workers-comp/

Fit vs. Faint, from Page 5.

Larson pointed out that the more difficult cases for courts are those where the worker loses consciousness and, from no material extra height, falls to "level ground or bare floor." Here, too, a debate has long existed on the issue. For example, in an early English case, the court held that a worker who had sustained such a fall onto concrete had sustained an injury that arose out of his employment. "Here," the court declared, "M'Kendry had to work every day and all the day on the floor, the hardness of which did the mischief."[7]

Still, Larson posits that the majority view has always been that such falls do not arise out of the employment. Larson actually joins in the view, arguing that a *reductio ad absurdum* would exist were one to posit that work causation exists in such cases. The work connectedness of a hard floor is, in his view, simply too remote from the circumstances and obligations of work to draw such a conclusion. One's floor at home, at play, or otherwise in public is likely to be just as hard. Still, a minority view supports causation in such cases. Larson explains that courts that take this approach often reason that it is impossible to distinguish between "falls from small heights or onto relatively familiar objects, on the one hand, and falls onto the plain floor, on the other."

In the present day, idiopathic fall cases are often disputed and resolved in the appellate courts. A review of the reported cases from the last 10 years that cite the Larson treatise suggests that the general rules outlined in Larson's book are alive and well. One can discern from the analysis that follows that Oregon, Maryland, Oklahoma, and Kentucky all apply the Larson rule, whereas in Connecticut, a fall to a level floor is compensable. One learns, too, that even though Florida enacted a retractive reform that demands that work causation always be the major contributing cause of an injury, idiopathic falls are still compensable under the traditional analysis discussed above.

Dizziness in an Insulin-Dependent Diabetic: Not Compensable

In a 2008 Maryland case, the patient/claimant was employed as a computer-aided graphic designer.[8] He was an insulin-dependent diabetic. While at work, he started having a hypoglycemic attack, stood up, and went to the stairs that led to the kitchen where he was going to get something to eat. He became dizzy and fell down the stairs, sustaining orthopedic injuries. The trial and appellate court denied benefits. The trial judge could not say that the stairs in any way contributed: "Employees using the stairs is not unusual…. The diabetes-induced fall was not aggravated or triggered by some facet of [the employee's] employment …."

Unexplained (nonwork-related) Faint: Not Compensable

The same result followed in a 2013 Oregon case. There, the patient/claimant was employed as a cook/cashier in a college dining hall.[9] While at work standing in the kitchen, she fainted (no work contribution was alleged or apparent) and sustained damage to her face and teeth. She admitted that the fall was idiopathic. However, her theory of recovery was that the "hardness of the brick floor and employer's requirement that she stand at work contributed to her facial and dental injuries." The board and court disallowed benefits. Using the language of the Larson treatise, the court reconfirmed the Oregon law that "ground-level falls" are not conceived of as arising out of the employment.

Alcohol-Withdrawal Seizure: Compensable

In a 2005 Oklahoma case, however, an idiopathic fall case was held compensable. There, the patient/claimant was employed as a mechanic.[10] He was an alcoholic; however, at the time of the incident, was apparently abstaining from alcohol. While at work walking in the service bays, he experienced an alcohol withdrawal seizure. He fell, striking an automobile lift and injuring his head, face, eye, neck, and teeth. The workers' compensation authorities and court held that he had sustained an injury that arose out of his employment. The fall was due to an idiopathic condition that was exacerbated by an obstacle in the workplace, making the injury compensable. The car lift, the court held, "was peculiar to his occupation."

A special irony existed. Not unreasonably, the employer raised the "intoxication defense" as a bar to compensability. The court, however, responded by saying that the accident was caused not by intoxication but by the "*abstinence* from the use of alcohol."

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Hypoglycemic Attack: Compensable

An idiopathic fall injury was also held compensable in a 2013 Kentucky case. The controversy shows that reasonable legal minds can differ in this realm when conceptualizing work causation. In this case, the patient/claimant, an insulin-dependent diabetic, was employed as a heavy laborer on a bridge-construction crew. He had "unfortunately forgot[ten] to bring his insulin to the job site and was otherwise not following" his physician's directions "on how to control his diabetes." While on the bridge, he began to act strangely and was told by the foreman to go sit in a truck. (This episode followed an event earlier in the evening when he told his co-workers he needed to eat something sugary to increase his blood sugar. He then did so and stated that he was "feeling pretty good.") In any event, after sitting in the truck later in the evening, he experienced what was apparently yet another hypoglycemic episode that caused him to be completely disoriented. He mounted the side of the bridge and fell. Though he tried to grab the railing of the bridge, he ultimately fell 65 feet and sustained catastrophic injuries.

The workers' compensation authorities and an appellate court ruled that the injuries did not arise out of the employment, reasoning that the employee had no business up on the railing and that his decision to so imperil himself was entirely voluntary. The Supreme Court, however, reversed. The employee's work placed him in a position to sustain injuries that were especially severe. As far as the court was concerned, "the employee's work placed him in a position increasing the dangerous effects of the idiopathic fall."[11]

Grand Mal Seizure and Fall to Level Surface—With Complications: Compensable

In a 2006 Connecticut case, the court held that it did not hew to the Larson analysis—a mere fall to a level surface is potentially compensable. In this case, the employee's idiopathic fall did not result in any direct head or musculoskeletal injuries. However, his shoulders were dislocated when co-workers sought to restrain him, and this injury did arise out of his employment.

There, the patient/claimant, a factory worker, experienced a grand mal seizure while at work. He fell to the ground and lost consciousness near a large steel scale.

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IAIABC Awards Educational Grants

Madison, WI (WorkersCompensation.com) - The International Association of Industrial Accident Boards and Commissions (IAIABC) awarded educational grants to Chamila Adhihetty of Toronto, Ontario and Suzette Carlisle of St. Louis, Missouri. Each received a $3,000 grant toward studies to advance her workers' compensation career.

"As part of our centennial celebration, the organization wanted to support the development of workers' compensation leaders," said IAIABC's Executive Director Jennifer Wolf Horejsh. Grant applicants needed to pursue a career in workers' compensation or a related field, such as risk management, occupational health or public administration. A committee comprised of IAIABC members selected two recipients who turned out to be graduate students.

A senior scientist in the Occupational Disease Policy and Research Branch for the Ontario Workplace Safety and Insurance Board (WSIB), Adhihetty will use her grant to continue work on a PhD in Health Services Research at the University of Toronto. She is writing a dissertation on same-level falls and prevention initiatives in the workplace. She interned with WSIB while working on her master's degree and has worked for the board for 10 years.

Carlisle has worked in Missouri's workers' compensation system for 16 years, first as a legal advisor and then as an administrative law judge. She recently received her master's degree in Judicial Studies from the University of Nevada-Reno, where she will earn her PhD. "We're proud to support the professional development of women of this caliber," Horejsh said.

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As he began to regain consciousness, he began "flailing around, swinging his arms and kicking his legs." In response, several co-workers went to assist "in an attempt to prevent claimant from injuring himself, as well as others." The co-workers held him down and, as a result, he suffered the dislocation of both of his shoulders. Medical experts confirmed that the dislocations were from the restraint and not the seizure itself.

The workers' compensation authorities ruled that the injury did not arise out of the employment, but the court awarded benefits. "It is not a prerequisite to compensability," the court held, "that the risk of injury be greater to the employee than to a member of the public …." Still, the court found a further, more substantial basis to conceptualize the case as work connected: "It cannot be questioned that the plaintiff was more likely to be physically restrained by his co-workers than by strangers had he suffered the seizure in some neutral, public forum. The incentive to act in the employer's interest, the community of purpose among co-workers and the relationships engendered by that purpose would make intervention, and hence injury therefrom, more likely."[12]

Unexplained Blackout, a Truck Accident, and the Florida "Major Contributing Cause" Requirement: Compensable

A 2012 Florida case has confirmed that an idiopathic fall case is compensable, even in the light of retractive reform. In this case, the patient/claimant, a truck driver, had no known preexisting condition that might cause loss of consciousness. On the day in question, he "blacked out" (reason unclear) and, in a one-vehicle accident, crashed his truck. The Judge of Compensation Claims denied benefits because he could not say that in such a situation work was the "major contributing cause" of his injury. The court, however, reversed. Interpreting this restrictive aspect of the Florida reforms, the court stated, "Given the absence of a competing medical condition that caused his injuries, Claimant was not required to present additional evidence going to the issue of whether the work-related accident was the major contributing cause of the injuries."[13]

The court added that, in general, Florida hews to the majority rule as approved by Larson: "An accident caused by an idiopathic condition nonetheless 'arises out of' employment when the employment exposes the claimant to conditions which the claimant would not normally encounter in his non-employment life."

Three Case Studies

With these principles and examples established, we offer the following workers' compensation claim case studies for reflection and analysis.

Case 1: Facts and Medical Investigation

A 48-year-old woman experienced a generalized seizure while walking at work. She had a history of chronic alcoholism. She drank approximately 12 beers per day. She had a history of alcohol withdrawal seizures. This was her first day on a new job. She had abruptly stopped drinking 12 beers per day the day before. The seizure was witnessed. The patient was transported by ambulance to an emergency room. She was examined and diagnosed with alcohol withdrawal seizures. She was also found to have post-traumatic subarachnoid hemorrhage, fractures of the right posterior 11th and 12th ribs, and fractures of the right transverse processes of L1 through L3. She was treated for alcohol withdrawal, hypomagnesemia, hyponatremia, and alcoholic hepatitis.

The patient reported that she filed a workers' compensation claim because the incident occurred at work. At the time of independent medical examination, findings on examination included sensory abnormalities consistent with peripheral neuropathy. Diagnoses included alcoholism/chronic alcohol abuse and complications of alcoholism/chronic alcohol abuse and alcohol withdrawal including, but not limited to, alcohol withdrawal seizure.

Regarding causation, based on the history and the information contained in the extensive medical records submitted for review and current science, the seizure and the patient's subsequent clinical course were attributed to preexisting nonwork-related medical conditions including chronic alcohol abuse and alcohol withdrawal. The seizure, which happened to occur at work, was medically not attributed to work-related factors. The seizure could have occurred anywhere.

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Case 2: Facts and Medical Investigation

A 31-year-old woman was stocking lower shelves in a store at about 10:00 a.m. Upon standing from the crouched position, she felt dizzy and fell backward, sustaining a 6-cm laceration to the back of her head. A co-worker heard the fall and observed the patient having some seizure-like movements. Within minutes, the patient regained consciousness and awareness and remained clinically intact neurologically. The patient had a history of bipolar disorder and chronic back pain and was on multiple medications including sertraline, lamotrigine, tramadol, zolpidem, lorazepam, and cyclobenzaprine.

An examination of the patient was unremarkable. The results of laboratory and imaging studies were, likewise, negative. The differential diagnoses of her episode of loss of consciousness and subsequent fall were noted to include seizure and faint. Additional diagnoses included possible mild concussion and right parieto-occipital scalp laceration that later healed. The incident occurred in the mid-morning. The patient had little, if anything, to eat before going to work. She reported difficulty sleeping the night before and reported having been in a crouched position when she stood up and felt lightheaded.

Did the patient faint and then have seizure-like movements or was loss of consciousness primarily due to a seizure? Convulsive movements can be seen briefly in some patients who faint. With fainting, loss of consciousness is attributable to a decrease in blood flow to the brain. With seizure, loss of consciousness is attributable to abnormal brain electrical activity.

The patient had a history of depression and anxiety. She had been on medications including sertraline and lamotrigine. Convulsions have been reported to occur uncommonly to rarely in patients who take sertraline. Lamotrigine had been prescribed as a mood stabilizer; it is also an anticonvulsant. It would not be expected to cause seizure, except perhaps in the context of abrupt withdrawal, particularly in a person who had a tendency to have seizures.

Another medication that can potentially increase the risk of a seizure in this patient's case was tramadol, which is a synthetic opioid similar in potency to codeine. Tramadol has serotonergic and noradrenergic potentiating effects. It is theoretically possible that the combination of tramadol and sertraline enhanced the risk of experiencing a convulsion. However, this would be a much less common occurrence or explanation than the likelihood of faint leading to fall with seizure-like activity.

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An additional confounding factor in the case was that at the time of the incident, the patient fell back from a standing position, striking her head on the floor, and sustaining a 6-cm right parieto-occipital scalp laceration. The presence of this would raise a question of possible secondary concussion at the time of the fall.

If the patient had a concussion (mild traumatic brain injury), considering that the patient regained consciousness by the time first responders arrived, had a Glasgow Coma Scale (GCS) of 15, had consistently been clinically intact neurologically, and imaging study results did not show evidence of an intracranial abnormality, the outlook would be favorable. The patient had no history of seizures. There was no family history of seizures. There was no incontinence or tongue biting. Loss of consciousness occurred immediately after experiencing a feeling of lightheadedness when changing from a crouched to standing position.

This scenario suggests the possibility of orthostatic hypotension leading to a faint followed by a fall in which the patient hit her head and at the same time experienced some convulsive movements. Considering these data and the science, it was thought more likely that a faint followed by brief seizure-like activity, rather than a primary seizure, accounted for her loss of consciousness.

Risk factors for faint followed by fall with possible closed head injury and convulsive movements included the abrupt change from a crouched to standing position that resulted in a temporary drop in blood pressure (orthostasis) and not having much to eat or drink in the morning prior to the incident. The patient also reported having been somewhat sleep deprived.

Considering all the data from a medical perspective, the incident was thought to be primarily attributable to personal medical/physiological factors and was not regarded as being primarily work related. However, if crouching down and getting up was regarded as a work-related activity, as opposed to an activity of daily living, then, from that perspective, the incident would be viewed as work related.

Case 3: Facts and Medical Investigation

A 40-year-old woman reported experiencing a seizure while on the job. She had a history of occasional seizures since childhood. On the day of the seizure in question, the patient awoke at 5:00 a.m. to fly to an out-of-town meeting with a client. She had been preparing for the meeting for several weeks. She had experienced some level of stress and sleep deprivation. She had not eaten on the morning of the seizure. After her short flight, she was waiting for a taxi at the airport when she experienced a seizure. No injuries were sustained related to the seizure. She had experienced a seizure two years earlier under similar conditions. She was not on anticonvulsant medication. Subsequent to this seizure, she was started on anticonvulsants.

The patient was clinically intact neurologically. Imaging studies were unremarkable. The patient's history, physical examination, and reports of ancillary studies were most consistent with the diagnosis of idiopathic epilepsy.

Idiopathic epilepsy represented a lifelong personal medical condition. The seizure on the date in question was typical of the seizures experienced by the patient in the past and was also typical in terms of the circumstances under which the seizure occurred. The seizure occurred in a premenstrual timeframe. The patient had been under a lot of work-related stress and was somewhat sleep deprived. To the extent that work-related factors contributed to psychological stress and potential sleep deprivation, those factors were viewed as increasing the risk of seizure the patient experienced on the injury date.

Legal Analyses from Specific States

States often differ in how they define compensability. Therefore, physicians and other stakeholders need to understand how statutes and case precedents are interpreted in their state. This effort can be challenging for both treating and evaluating physicians. Treating physicians need clarity in order to determine who will hopefully pay their bills, and evaluating physicians need to provide information for appropriate claims management. Here, we review three scenarios from the perspective of three states: Arizona, California, and Pennsylvania.

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Arizona

Under Arizona workers' compensation law, a finding of compensability requires proof of both legal and medical causation. Medical causation is established by showing that an accident caused an injury and legal causation exists when it is established that an accident arose out of and in the course of employment. In Arizona, as in most jurisdictions, if work activities caused or contributed to the fit, faint, or fall, causation will be established.

Regarding claims involving "fits or faints," the Arizona Appellate Court has carved out differing burdens of proof for an unexplained fall as opposed to an idiopathic fall that occurs at work. There is no favorable presumption afforded to idiopathic falls, that is, those falls that arise from a condition personal to the worker, such as a prior illness or condition. The Arizona case that is most often cited in claims involving unexplained falls is *Circle K Store v ICA*,[14] where the court first recognized a distinction in the burdens of proof for idiopathic, neutral, and unexplained falls. Although the worker at the Circle K Store fell while at work and on the premises, the court found her claim to be noncompensable as nothing from the employment or premises could be determined to be the cause of the fall. The court classified the fall as a neutral injury and rejected the contention that just by being on the premises when a fall or faint occurs satisfies the "arising" requirement of compensability.

Fifteen years later, however, the same court provided a favorable presumption for those workers who are injured or die in accidents involving unexplained falls. The court held that in cases involving unexplained falls, that is, ones that do not have an identified cause, there shall be a rebuttable presumption that the injury arises out of the course of employment. That case is *Hypl v Industrial Commission.*[15]

In that case, the claimant was driving erratically on an interstate highway. He was taken to the hospital, where it was found that he had a skull fracture. Despite having no recollection of a head injury, Mr. Hypl was awarded benefits based on the positional risk presumption. After 2005, the Arizona courts followed the direction in *Hypl* to find that with unexplained falls, the positional risk doctrine provides a presumption that unexplained falls arise in the course of employment. Accordingly, such claims will be found compensable as the injured worker would not have been at the place of injury but for the duties of his or her employment. Also, to benefit from the presumption, due to the faint, the injured worker must be unable to explain how the injury occurred, unlike the injured worker in the *Circle K* case.

Despite the various directives of the appellate courts in these cases, the importance of the facts of the claim as well as the role of the fact finder must also be considered when analyzing the compensability of fits, faints, and falls that occur at work. Often, the outcome of the case may depend on the skill with which the evidence is presented as well as the credibility of the testimony of the injured worker and various witnesses. Therefore, the likely Arizona outcomes, as presented above, may be different depending on the development of the evidence during litigation of each case.

Likely Arizona Outcome

In Arizona, the presiding administrative law judge (ALJ) would probably find the first claim noncompensable and the second claim compensable. However, in the third scenario, the ALJ would likely find the injury to be compensable but with limitations on the extent of liability. The Arizona case law that supports these predicted outcomes appears in the preceding section.

In the first scenario, the fall was caused by the worker's unrelated medical condition, an alcohol withdrawal–induced seizure, without apparent contribution by job activities. Had the worker's job activities or an unusual risk associated with the premises contributed to the injuries, there may be a different result. However, in this case, the employee's fall was the result of a personal medical condition, and there was no evidence that the worksite was especially risky or contributed to the seizure.

In the second scenario, there would be a finding of compensability providing there is persuasive medical evidence that the activity of standing after crouching to stock shelves contributed to the faint. If so, the employer is responsible for the injuries resulting from the head injury.

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In Memoriam

Judge Virginia Dietrich

Judge of Workers' Compensation Virginia M. Dietrich, 62, passed Oct. 15, 2014.

Judge Dietrich was a lifelong resident of Mercer County, New Jersey. She earned Bachelors and Juris Doctor degrees at The Catholic University of America.

Judge Dietrich practiced 25 years, specialized in workers' compensation, matrimonial, and real estate law. She was appointed Judge of Workers' Compensation in 2002 by Governor DiFrancesco.

She served as an administrative supervisory judge and at the time of her death she was the chief administrative supervisory judge, reporting to the director of Workers' Compensation.

Judge Dietrich possessed a sharp intellect. She would often read as many as seven books in a week. She was a two-time "Jeopardy!" champion. Judge Dietrich taught law courses as an adjunct professor in the School of Business of The College of New Jersey.

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Similarly, in the third scenario, if the injured worker presents sufficient medical evidence that the work-related stress caused or contributed to the seizure that occurred while on her business trip, the claim would be found compensable. The employer, therefore, would be responsible for the medical treatment needed as a result of the seizure as well as for her anticonvulsant medications. Once the worker returned to her pre-injury condition, presumably the employer's liability would end, providing there was no permanent aggravation of her pre-injury seizure condition.

California

It has been settled in California that an injury suffered from a fall on an employer's premises during the course of employment from a height or on or against some object arises out of the employment and is compensable, even though the fall was caused by an idiopathic condition of the employee.[16] The reasoning is that the injury for which compensation is sought was caused by the impact of the employee's body with an object or surface of the employer's premises and hence arose out of the employment. Such injury was an incident thereof, even though the fall may also have been a causal factor that had no connection with the employment. That reasoning is equally applicable when the fall is merely to the floor or ground during the course of the employment and death or injury results from striking the floor or ground. It has been held that such injury arises out of the employment and is compensable, even though the fall was caused by a disease of the employee and had no relation to the employment. The 1953 precedent, *Employers Mutual v Industrial Accident Comm'n (Gideon),*[17] remains the controlling case in California on injuries caused by falls resulting from an idiopathic condition.

Injuries in the course of employment as the result of an unexplained or idiopathic seizure are not compensable absent evidence linking the collapse to the employment or of additional injury unrelated to the seizure.[18] The injuries in seizure cases usually involve the employee's body striking the floor or some other part of the workplace, thereby establishing the causal connection. The issue is whether the injury is solely the result of the internal effects of the disease or condition or also the result of the employment, and not whether the injury could be anticipated by the employer or that it could have occurred anywhere.[19,20] A causal connection between the employment and the injury need not be the sole cause; it is sufficient if it is a contributory cause.[21] If the employment contributes to the impairment, the consequences are compensable. The courts have held that compensation is allowed only for the additional harm caused by the employment, not for the consequences purely related to the employee's internal condition causing the seizure.

Continued, Page 13.

Fit vs. Faint, from Page 12.

Likely California Outcome

In the first scenario, the California Workers' Compensation Appeals Board (WCAB) would likely find this incident to have resulted in a compensable injury. Although the fall appears to have been solely the result of the worker's nonindustrial factors (chronic alcohol abuse and alcohol withdrawal), the orthopedic injuries to her body were the result of her coming into contact with the floor subsequent to the fall. The employer would likely be liable for treatment and resulting disability as a result of the orthopedic injuries. However, it is unlikely that the employer would have any liability for the internal issues.

The facts in this case study are similar to those in *Gideon* in that the worker suffered an idiopathic seizure while at work that caused her to fall to the ground and suffer injuries to the body from the impact. The WCAB would likely follow the court in *Gideon*, which held that the injury was compensable even though the employee might have had a fall (resulting in bodily injury) caused by an idiopathic condition but occurring at home, on the street, or elsewhere when he was tending to his private affairs. The fact remains that she injured herself while at work on her employer's premises; the injury resulted from the striking of her head against the floor, a condition incident to her employment. Her condition may have been a contributory cause but it was not the sole cause of her injury. It would not be doubted that if an employee fell to the ground or floor in the course of his employment and, as a result, was injured, the injury would be compensable whether the cause of the fall was a slippery or defective floor or was due to nothing more than his innate awkwardness or even carelessness. Certainly, resolving all doubts in favor of the commission's finding that the injury arose out of the employment compels an affirmance of the award.

In the second scenario, the cause of the fainting spell that led to the fall that resulted in the injury was likely the sudden change from crouching position to standing position. This activity is arguably part of the job duties of the worker, and, based on the facts disclosed, the injury would likely be compensable. Once again, the court would look to *Gideon* for guidance. In this case, the fall may or may not have been caused by work activity, but the resulting injury was caused, at least in part, by the impact with the floor. As such, the resulting orthopedic injury would be industrial in nature.

In the third scenario, the worker suffered a seizure, but there was no resulting injury. Unlike *Gideon*, there was no fall to the ground that resulted in broken bones or other orthopedic injury. As such, the potential claim would be for medical treatment related to the seizure and future medical care to control or treat subsequent seizures. The worker would likely argue that job-related stress caused her to develop epilepsy or it aggravated an underlying and otherwise asymptomatic condition that may now require ongoing treatment.

In California, an employer must compensate not only for a disability caused solely by an industrial injury but also for that resulting from an aggravation or "lighting up" of a nondisabling disease that existed before the industrial injury.[22] If the worker can establish a connection between job stress and the development of seizures, the employer may assume liability for medical treatment and disability that results from the seizures.

Liability only attaches when an injury is proximately caused by the employment (Cal. Lab. Code § 3600(c)). If the disability in question results solely from the natural and normal progress of a preexisting condition, it is not a disability attributable to industry and should not be saddled thereon. Where the proximate and immediate cause of the injury is from disability arising solely from an idiopathic or subjective condition, the weight of authority, including the decisions of this state, are against recovery, though the injury clearly occurs in the course of employment.[23]

Pennsylvania

Under the Pennsylvania Act, injuries that arise in the course of employment and are (medically) related thereto are considered work related and are covered. The statute, however, specifically provides, *in addition*, that when the employee is on the premises and has reason for being so, an injury sustained even when he or she is *not* furthering the employer's interests is work related. This is so, importantly, when the "condition of the premises" causes the injury.[24]

Continued, Page 15.

SAWCA Returns!

All Committee Conference

November 11-14, 2014

Hilton Head Island, SC

The Southern Association of Workers' Compensation Administrators is a group of 19 jurisdictions. It is focused on making available and present instruction by means of forums, lectures, meetings, and written material regarding the administration of workers' laws and to provide an avenue by which those interested in workers' compensation may interact with one another to share information and address issues common to the jurisdictions that are members of the association.

Each fall, SAWCA gathers for its All Committee Conference. This fall, the gathering is in Hilton Head, South Carolina. The program is packed with substantive information critical to the administration of effective workers' compensation programs:

Tuesday, November 11

Executive Committee Meeting 2:00pm - 5:00pm
Executive Committee Reception & Dinner 6:30pm -9:00pm

Wednesday, November 12

General Session: 9:00am - Noon
- Join Distinguished Panels of Workers' Comp Professionals and Special Guest Speakers For In-Depth Analyzes of the Challenges & Issues Faced By Regulators & Industry

Committee Meetings: 2:00pm - 5:00pm
- Administration & Procedures Committee
- Self-Insurance & Insurance Committee

President's Reception 6:00pm - 8:00pm

Thursday, November 13

Committee Meetings: 9:00am - Noon
- Medical Rehabilitation Committee
- Claims Administration Committee

Convention Lunch
Committee Meetings: 2:00pm - 5:00pm
- Management Information Systems Committee
- Adjudicator's Committee - Open Roundtable

Coffee, Cordials & Confections 8:30pm - 10:00pm

Friday, November 14

Farewell Breakfast 8:00am
General Session Convention Wrap-up

Fit vs. Faint, from Page 13.

The prevailing idiopathic fall precedent in Pennsylvania, dating from 1977, was decided by reference to this statute. In that case, the patient/decedent was a steelworker who experienced an epileptic seizure in the factory parking lot immediately before work.[25] As a result of the seizure, he lost control of his automobile and crashed into a concrete abutment. The court in that case ruled that he did sustain an injury arising during the course of employment. The court ruled that the concrete abutment constituted a condition of the premises. In an editorial comment, the court noted that had the deceased simply been sitting at his desk and somehow expired from the seizure, causation would not have been shown. Under the statute, the injury must have been shown to have been causally connected to the employment by a showing of the effects of the condition of the premises.

This precedent was pivotal in informing the result of a 1989 case. There, the patient/claimant was a partially retarded young woman employed in a sheltered workshop.[26] She experienced an unwitnessed and unexplained fall, hitting her head and sustaining a catastrophic seizure disorder. Notably, the case involved what is referred to above as a level-ground fall. The court held that the employee's injury had arisen in the course of employment. Following its 1977 precedent, the court ruled that simply falling and hitting one's head was sufficient to give rise to compensability. The 1977 precedent "contains no hint that the abutment into which the employee in that case crashed was a more 'unnatural' condition of the premises than any other structure, or part of a structure, such as a floor."

One may discern from this case that Pennsylvania hews to the minority rule. That is, idiopathic fall injuries are compensable, and this is so even though the workplace does not feature some identifiable special hazard such as those implicated above—a car lift into which to fall, a bridge with a significant height from which to tumble, a moving truck in which to crash.

The statute referenced above stems from a 1972 change to the law intended overall to expand compensability of injuries. Under Pennsylvania law, however, injuries from idiopathic falls had, long before, been held compensable. This is so, in critical part, because the Pennsylvania Act, in an oddity of drafting, never required injuries to have "arisen" out of the employment in the first place. Except for frank abandonments of work, under the original formulation of the law, an injury merely need have occurred in the course of employment.

The leading idiopathic fall precedent is a 1928 case. There, the patient/claimant was employed as a factory worker.[27] While at work, he suddenly collapsed and, among other things, broke his nose. While in the hospital recuperating from his injuries, he tried to stand up, which was against doctor's orders. He collapsed once again and hit his head and suffered a fatal brain injury. The expert medical evidence established that the deceased suffered his episode of unconsciousness from a syphilitic brain tumor (called a "gumma"). The court held that the fatal injuries were from a compensable idiopathic fall: "It is not necessary that the fall result from an accident, as the fall is the accident; nor is it material that the employee fell because he became dizzy or unconscious. An injury sustained by an accidental fall is compensable although the fall resulted from some disease with which the employee was afflicted." This holding is still an applicable precedent in Pennsylvania.[28]

Likely Pennsylvania Outcome

A Pennsylvania judge would find all of the injuries described in the case studies to be compensable, at least in part. The law that informs these outcomes is detailed in the preceding section.

In the first scenario, no evidence exists that some peculiar aspect of the premises contributed to the patient's head injury. As noted above, however, the impact of the floor is enough under the Pennsylvania analysis to give rise to compensability. This is so as the floor is considered a condition of the premises. The employer would not be responsible for the seizure condition itself, but it would be responsible for the disability and medical treatment aspects of her consequential head injury.

In the second scenario, if the persuasive medical proofs are that the patient's effort of getting up suddenly from the crouched position caused the dizziness, the consequential head injury from the fall would likewise be the employer's responsibility. This is so under the familiar reasoning that a work activity provoked the faint that, in turn, caused the fall.

Continued, Page 16.

Fit vs. Faint, from Page 15

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In the final scenario, if the persuasive medical proof is that the patient's seizure was brought on by work stress, both the seizure and any consequential injuries would be the employer's responsibility. This is under the familiar reasoning that work stress provoked the seizure that, in turn, caused the fall. The employer's liability would, however, likely be limited. Once the seizure condition returned to some baseline condition, the employer's liability would presumably end. The condition here seems to be "episodic" in nature and not reflective of some permanent work-induced condition.

Further Practical Considerations

Workers' Compensation Laws Vary in Application

As foreshadowed at the outset, while general principles exist, workers' compensation laws vary among states. Legal professionals in each state must be attentive to the precise statute that defines the compensability of injuries. Further, case law, that is, the precedents, must be consulted in order to discern how the courts of the state have treated particular issues. As the reader can tell from the above discussion, it is certainly crucial to resort to precedent when analyzing idiopathic fall situations.

Importance of Burden of Proof

In seeking to predict how a case may be treated, the general issue of burden of proof must be considered. Most state workers' compensation laws require the injured worker to prove that the injury arose out of and in the course of employment. However, a number of states including Hawaii, the District of Columbia, and New York as well as the Longshore & Harbor Workers' Compensation Act provide that if an injury occurs in the course of employment, a *presumption* exists that said injury arose out of the employment as well.

In these jurisdictions, the employer bears the burden of proving that the injury, in our discussion here, those from the idiopathic fall, did not arise out of the employment. In a New York case, for example, the patient/claimant was employed as a billing clerk. She suffered from a preexisting condition of dizzy spells induced by high blood pressure. As she stood up to leave her desk, she suddenly fell to the floor, injuring her left arm and shoulder. A co-worker observed the fall but was unable to offer any explanation for the incident. The workers' compensation authorities and court found the injuries compensable, relying on the statutory presumption of causation.[29]

Cases Where Work Contributes to Fit or Faint

Directly germane to the issue, it is likely that in any jurisdiction where work duties or conditions *prompted*, in material part, the fit or faint, medical and legal causation will be found. In most states, the rule endures that the employer takes the employee as it finds him or her. As Larson explains, "Preexisting disease or infirmity of the employee does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated the disease or infirmity to produce the death or disability for which compensation is sought. This is sometimes expressed by saying that the employer takes the employee as it finds that employee."[30]

Continued, Page 17.

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Fit vs. Faint, from Page 16.

In a 2005 Pennsylvania case, for example, an airline baggage handler suffered from preexisting, symptomatic high blood pressure. During a tumultuous verbal altercation with his supervisor, he experienced a stroke and was taken away in an ambulance. The persuasive medical proofs were that the work conditions aggravated his condition and caused the stroke. The patient's/claimant's claim was found compensable under this theory.[31] Thus, when dizziness, blacking out, or seizure is caused or contributed to in material part by work, the law considers the episode to have arisen out of the employment.

In such cases, the expert opinion of a physician will usually be critical. This point is illustrated in a 1993 Vermont case. There, the patient/claimant was a police officer.[32] He had a nonwork-related brain tumor, a symptom of which was occasional seizures. While under stress, testifying at a disciplinary hearing, he sustained a seizure that, in turn, heralded his total disability and need for increased medications. The court acknowledged that if the claimant's condition was aggravated or accelerated by stress at work, an injury would have been found. However, the court denied the claim based on his treating physician's opinion that even without the stress, the condition would have worsened and that while stress might hasten the occurrence of seizures, the progression of the underlying condition made it likely that seizures would, in any event, have continued.

In jurisdictions that have sought to limit compensability by requiring work to be a major contributing cause of the injury (a trend among states), the analysis may well be different. In such states, employers are likely to argue that the patient/claimant must show that the work aggravation was the predominant factor, not merely a substantial, contributing factor in aggravating an underlying condition to prompt a seizure or fainting episode.

Unexplained Falls and Presumptions of Causation

Some states may employ the rule that if a worker is otherwise in the course of his employment and is discovered seemingly to have fallen, the injury or death is presumed to have arisen out of the employment. This rule may capture a number of explained fall cases, conceivably including idiopathic fall situations. In a New York case, for example, a worker was last seen on a ladder, 8½ feet up, performing his work. Some 10 minutes later, he was found at the base of the ladder with a fatal head injury. The New York court accorded a presumption of causation to the injury and awarded benefits to the widow.[33]

Subjective Aspects of Fact Finding

Also to be considered in seeking to predict how a case may be treated are the decisional proclivities of the administrative law judge, board, or court that decides the case. In a disputed compensation case, as in any other, the adjudication often does not reflect ascertainment of the facts with scientific certainty. After all, a case is in litigation presumably because competing, plausible versions of the truth are at play.

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Thanks to our NAWCJ Judicial Program Speakers Austin, Texas September 2014

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Fit vs. Faint, from Page 17.

The adjudicator, usually a layperson, may be influenced in the decision-making process not only by the medico-scientific proofs but also by a number of subjective factors. These include bias, actual or subliminal, for or against a particular party or personal distaste for awarding or denying a particular type of claim. Considerations of this sort are the essence of the "legal realism" analysis made popular most recently by Judge Richard Posner.[34]

Medical (Scientific) Analysis

Medical evaluations must be thorough and include determination of the facts of the injury, the preexisting status, the clinical history, and the current condition. When there is a fall, the evaluator must determine the specific cause of the fall and what occurred. The individual being evaluated may state, "I fell"; the examiner needs to determine why that person fell. A fall that was preceded by loss of consciousness requires determination of whether it was due to a fit (e.g., a seizure with loss of consciousness attributable to abnormal brain electrical activity) or a faint (e.g., loss of consciousness attributable to a decrease in blood flow to the brain). The cause of the fit or faint needs to be defined; if it was a preexisting condition, the trigger (if any) needs to be determined. The examiner needs to fully define what occurred during the fall and what injuries were sustained. The assessment includes analysis of medical records (prior to and following the injury) and review of documentation of the injury.

Evaluating physicians must approach causation analysis from a scientific perspective, rather than simply provide expert opinions.[35] The first step is to definitively establish a diagnosis. This is followed by application of relevant findings from epidemiological science to the individual case. Step 3 is to obtain and assess the evidence of exposure. This is followed by consideration of other relevant factors and then analysis of the validity of the evidence. The final step is to evaluate the results from the prior steps and generalize conclusions. The physician should be able to fully explain the basis for the conclusions, including reference to current science.

Conclusion

Assessing work causation in the "idiopathic fall" case involves analysis from both medical (scientific) and legal perspectives. Compensability determinations involve several considerations and may vary by jurisdiction.

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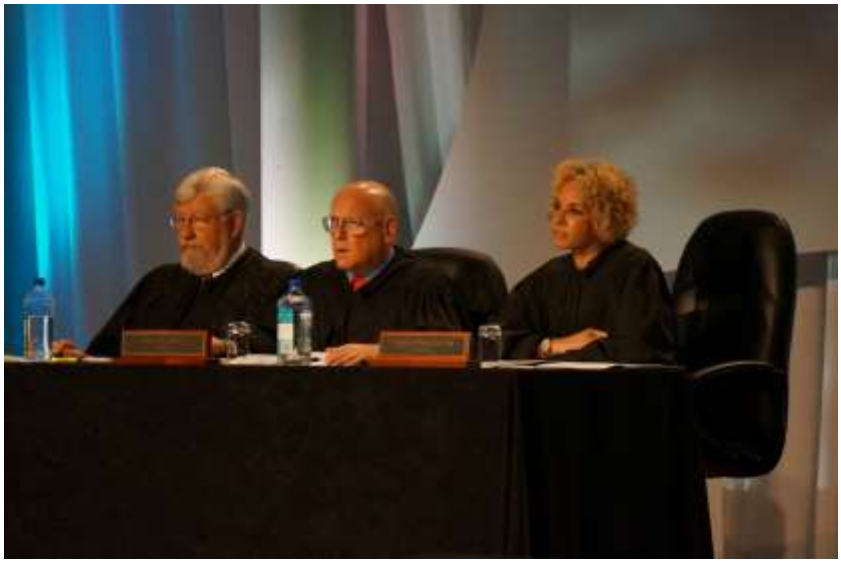
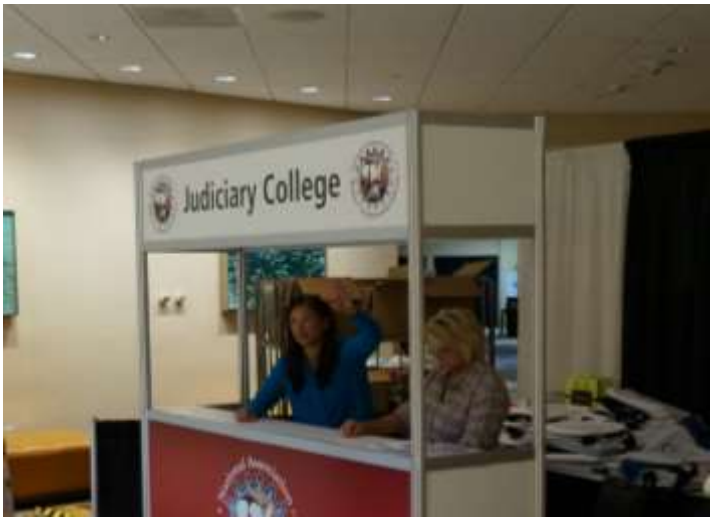
For more information on AMA publications, visit their website www.amastore.com.

Judiciary College 2014

Barbara Wagner, Esq., explained the processes and procedures for judging the Zehmer Moot Court competition. The Zehmer competition is unique in that all judging is performed by current or former judges.

The final round of the Zehmer Moot Court Competition is judged by members of the Florida First District Court of Appeal.





In the midst of the largest workers' compensation conference of its kind, the NAWCJ Judiciary College is the only judiciary college specifically designed to address the needs of the adjudicators who address the complex and intriguing questions raised by our varied and complex workers' compensation laws.

From the Pages of workcompcentral

WCRI: Fear of Being Fired, Level of Education Can Predict Injured Workers' Outcomes

By Ben Miller

Want to predict how well an injured worker will do after an on-the-job injury? Claimants with little education, who have poor English skills, suffer other ailments and who are afraid of getting fired are more likely to do poorly, according to research by the Workers Compensation Research Institute.

Drs. Bogdan Savych and Vennela Thumula presented the findings of the first phase of a study on worker outcome predictors during a webinar Thursday. The research analyzed responses from more than 3,000 workers in eight states who were injured in 2010. The researchers collected data on the speed and sustainability of claimants' returns to work, their recovery of physical health and function, their earnings recovery and their access to and satisfaction with their medical care. They then looked for patterns to see which of more than 15 factors ranging from marital status to the size of the company they worked for could be used to predict those outcomes.

They found that claimants generally had worse outcomes when they didn't have a high school degree, feared for their job safety or had a physical comorbidity. Those who elected to take the survey in Spanish also showed more trouble with their medical care. The information, Savych said, could come in handy for many purposes – identifying which claims have a higher potential for poor outcomes, helping workers' compensation stakeholders target their interventions into claims or bringing forward cases where special accommodations might help speed up the return to work.

For instance, the study showed that 20% of the injured workers surveyed who didn't have a high school degree were not working at the time of the interview in 2013, three years after the date of injury. For those with a high school degree, that number dropped to 14%. About 13% of those with some college were not working at the time of the interview, compared with 11% for those with a college degree.

The survey counted only claimants who said their work status was due to their work injury, taking out people who weren't working because of outside factors, such as child care or returning to school. "If you're an employer, you might want to think (about) what is the composition of … your work force," Savych said during the webinar. "(People) who don't have a high school degree might have greater difficulties getting back to work." One of the most stark differences in outcomes were between those who feared being terminated after their injury versus those who didn't. When asked whether they were afraid of that happening, 52% said they strongly disagreed with the sentiment, 9% said they somewhat disagreed, 12% somewhat agreed and 27% strongly agreed.

Savych said there was a strong correlation between the relationship the workers had with their supervisors and how strongly they felt they might be fired. "Maybe workers actually correctly feared being laid off. Maybe the firm or the company was shrinking so they say 'well everybody is getting fired I might be getting fired too.' Or it may be that they had a poor relationship with their supervisor," he said. About 21% of those who strongly agreed weren't working due to their injury at the time of the interview, compared with 10% for those who strongly or somewhat disagreed. The disability lasted an average of 13 weeks compared with nine weeks for those who disagreed, and 16% reported earning "a lot less" compared with 3% of those who disagreed. Those who feared firing also had greater dissatisfaction with their medical care.

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Fear of Being Fired, from Page 20.

Thumula said that for some workers, the same pessimistic attitudes that would make them more likely to fear being fired could also have an impact on their physical response to medical treatment. "There is some literature in that area which (shows an) association between … patients who are more pessimistic, who have a more pessimistic (way) of explaining things to having poorer outcomes after certain surgeries or when they have certain procedures done," she said.

Comorbidities – specifically diabetes, high blood pressure and heart conditions – were also significant influences on the outcomes of claims, according to the researchers. About 13% of those without comorbidities responded that they were not working due to their injury at the time of the survey, but that number rose to 16% for those with high blood pressure, 17% for those with diabetes and 21% for those with heart problems.

Diabetes also appeared to play a role in how much workers earned after their injury. According to the research, 14% of respondents with diabetes said they earned "a lot less" than they did before their work injury, compared with 6% among those with no comorbidity.

Of the three comorbidities, only high blood pressure appeared to play a role in the duration of the patient's disability. Those without comorbidities reported an average disability duration of 10 weeks, while those with hypertension reported an average disability duration of 14 weeks. The survey only targeted workers who missed at least seven days of work following their injuries. Hypertension was the most common comorbidity on the list. According to the study, 33% of respondents reported having high blood pressure.

While English language proficiency didn't appear to have a significant impact on duration of disability, post-injury earnings or return-to-work status, the study showed a sharp increase in troubles with medical care among those respondents who chose to take the survey in Spanish. Among that group, which made up 4% of all respondents, 26% reported "big problems" receiving the medical care they desired, while 20% said they were "very dissatisfied" with their medical treatment. For those who took the survey in English, 13% told interviewers that they had problems accessing their desired care and 11% said they were "very dissatisfied."

The institute will continue to conduct research on the matter. The second phase of the study will add four more states, while the third will bring the total count of states studied from 16 to 20. The fourth phase will repeat the study for all states. The full reports are available for each of the study states on the WCRI website. the studies cost $15 for members or $35 for non-members. The states covered are Indiana, Massachusetts, Michigan, Minnesota, North Carolina, Pennsylvania, Virginia and Wisconsin.

Study Shows Pre-Surgery Physical Therapy Can Reduce Post-Op Costs

By Ben Miller

Though Physical Therapy is nothing new in workers' compensation, a study in the Journal of Bone and Joint Surgery suggests that a rare form of rehabilitation – that which is performed before surgery takes place – can help patients avoid post-hospital medical care and drive down costs.

The practice, known as prehabilitation, largely involves identifying and planning for the problems a patient might encounter after a surgery and managing expectations – things like teaching the patient how to use crutches and letting him know that he won't necessarily need to go to a rehabilitation center after the procedure. The study, published in the Oct. 1 edition of the journal, showed that 54.2% of the members in a group of Medicare patients who went through prehabilitation before total hip or knee replacement used post-surgical care services such as home health and skilled nursing centers. But among patients who didn't go through prehabilitation, 79.7% used post-surgical care. The entire episode of care cost $1,215 less per patient when they went through pre-surgery physical therapy, according to the results. The average cost of pre-surgery physical therapy per patient was about $100.

Pre-Surgery Physical Therapy, from Page 21.

Because the research focused on Medicare patients with a mean age of 71.2 years, study co-author Ray Wasielewski said a direct comparison can't be made to the average injured worker. Members of the study group had more problems with mobility and more comorbidities that prehabilitation needed to address. However, he said the concept of managing expectations could be useful in occupational medicine as well. "My (workers') comp patients often times require a great deal of post-op care and we're not exactly sure why, but ... a lot of them want to go to these facilities, they want to go to rehab because a lot of them have the perception that they're going to need that," said Wasielewski, an orthopedic surgeon in Ohio. "And if you talk to them beforehand, you may be able to make them realize that they will be able to go home."

Steven Moskowitz, senior medical director for the care management company Paradigm Outcomes, said pre-surgery physical therapy also shows promise for patients who will have mobility issues as a result of surgery. "If I teach you how to walk with crutches before the surgery, it's sure going to be easier to get up and walk around after the surgery," he said. Moskowitz said prehabilitation is not often used in workers' compensation. Rather, he said, physical therapy most often comes in the form of function restoration or symptom relief techniques, such as electrical stimulation. "I'm sure there are good doctors who have this as part of their protocol, (but) in the workers' comp field, I don't see a lot of preparation done for surgeries, for successful surgical outcomes," Moskowitz said.

Mary Jane DeMille, chief operating officer for the workers' compensation cost containment services firm NextImage Medical, said physical therapy is often not used to its fullest effect for injured workers. Many times, she said, therapists will treat the patient without consideration for the specific duties they will need to perform on the job. "If you don't know what the patient was doing prior to the injury and you're just treating, you may not get a successful return to work," she said.

NextImage purchased WorkWell, a company whose services include training physical and occupational therapists, in March. DeMille said that the program is meant to promote "aggressive" physical therapy targeted to individual workers early in the process. "It's a different mindset than what is out there now but it's a change that's needed in the marketplace and I think it comes at the optimal time," DeMille said. She said the study highlights the uses physical therapy can have in workers' compensation. While the test group in the journal article was elderly, she pointed out that many injured workers are aging as well.

Moskowitz said the cost savings presented in the study – $1,215 per patient – isn't very high and that an ideal outcome is to avoid hospital-based care altogether. "I think the Holy Grail is if you can help somebody not need so much in-patient care, because that's really expensive," he said.

Wasielewski said any money saved on the expensive process of sending a patient through surgery is a good thing. "We spend a lot of money on these things," he said. "So if we can spend a little less money and get the same results and have better patient satisfaction, (that's desirable)."

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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Tennessee's First Firsts of Many

Tennessee has made some marked changes to its workers' compensation adjudication process recently. Until legislation was passed in 2013, most workers' compensation litigation occurred in the state's constitutional court system, just as a personal injury case would have been. The Workers' Compensation Reform Act of 2013 (SB20/HB194) changed the Division of Workers' Compensation, and created therein the Tennessee Court of Workers' Compensation Claims. There were a great many statutory amendments also included in this reform, including changes to statutory construction, a more exacting definition of the term "injury," access to medical care, and calculation of indemnity benefits.

The new adjudication process includes the Court of Workers' Compensation Claims (TCWCC) and a Workers' Compensation Appeals Board (TWCAB). Trial judges are distributed throughout the state in the cities of Chattanooga, Jackson, Kingsport, Knoxville, Memphis and Nashville. The TWCAB has sole jurisdiction over interlocutory appeals. Appeals from TCWCC final compensation decisions may be appealed to the Workers' Compensation Appeals Board or the Tennessee Supreme Court.

The transfer of workers' compensation to "a specialized administrative tribunal" was "a momentous event" according to NAWCJ President David Torrey.[1] Judge Torrey noted that the decision to adopt a court or administrative process "was an issue from the earliest days of workers' compensation programs."[2] The court model was adopted by England and fourteen states, according to Judge Torrey. Historically, the Tennessee decision in favor of a court process in 1919 was "partially because of the erroneous belief that the program would be primarily self-administering, and in part because of the over-reaction of the bar association who feared that the advent of workers' compensation would eliminate litigation."[3]

On October 2, 2014, the Appeals Board issued its first decision in the case of *Jane Hosford v Red Rover Preschool*, case 2014-05-0002. The Board affirmed the decision of the trial judge, who by luck of the draw was Chief Judge Kenneth Switzer, Nashville.

Judge Switzer was assigned the case when an August 29, 2014 Request for Expedited Hearing was filed with the TCWCC. The injured worker in this case was "pro se" or "self-represented." She sought medical benefits from her employer for a July 2014 accident. There was dispute as to who owned the preschool at the time of the accident, whether "the employee sustained an injury that arose primarily out of and in the course and scope of employment" and whether "the Employer is obligated to provide medical benefits." Judge Switzer rendered a nine-page opinion and found for the injured worker.

There was a significant volume of documents admitted into evidence, including the sales agreement by which the current owner obtained the preschool on July 3, 2014, days prior to the accident. Testimony was received from four witnesses in the form of affidavits. Medical and other business records were received.

Judge Switzer detailed the standard by which his decision would be made:

> When determining whether to award benefits, the Judge must decide whether the moving party is likely to succeed on the merits at trial given the information available. *See generally, McCall v Nat'l Health Care Corp*., 100 S.W. 3d 209, 214 (Tenn. 2003) and Tenn. Code Ann. sec. 50-6-238 (2012).

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Tennessee's First Firsts, from Page 24.

> In a workers' compensation action, pursuant to Tennessee Code Annotated section 50-6-239(c)(6), Employee shall bear the burden of proving each and every element of the claim by a preponderance of the evidence. An injury is "accidental" only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence. See Tenn. Code Ann. § 50--6-102(13)(A). An injury "arises primarily out of and in the course and scope of employment" only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes. See Tenn. Code Ann. § 50-6-102(13)(B).

He concluded that the Employer was the proper party based upon the sales agreement in evidence. Noting that the contract was plain and unambiguous, he afforded it the effect of establishing the sale date of the business. He additionally concluded that Tennessee precedent defines "arises primarily out of" as:

> if it is apparent to the rational mind, after considering all of the circumstances that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury, then such accidental injury "arises out of" one's employment. (Citations omitted).

Judge Switzer then described the responsibility of the trial judge in Tennessee, specifically with the determinations of credibility. He concluded that the employee "gave adequate detail of the incident and its time and place," that the accident was witnessed by a coworker, and that he had "no reason to doubt her credibility." There was an issue of proper notice. Judge Switzer noted, however, that the employer did not deny notice, but merely did not recall being told of the accident.

Upon those findings, Judge Switzer concluded that the employer would pay for medical care and treatment within the confines of Tennessee statutes. The order was to be effective within seven days unless there was an interlocutory appeal.

Continued, Page 26.

Special Thanks to Our NAWCJ Judiciary College Curriculum Committee

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The three Judges of the Tennessee Workers' Compensation Appeals Board are sworn in, from left to right, Abigail Hudgins, Tennessee Workers' Compensation Division Administrator, Judge David Hensley, Judge Tim Conner, Judge Marshall Davidson, and Judge Joseph P. Binkley who officiated.

Tennessee's First Firsts, from Page 25.

The appeal was filed, and the Tennessee Workers' Compensation Appeals Board (TWCAB) affirmed and remanded in an opinion filed October 2, 2014. In its thirteen-page opinion, the TWCAB recited the facts and re-examined Judge Switzer's conclusions regarding the applicable statutory and decisional law. The Board concluded that deference to the trial judge on determinations of credibility is consistent with Tennessee precedents. The Board did listen to the recording of the testimony, and having done so noted, "We have listened to the parties' testimony and conclude that the evidence does not preponderate against the trial court's credibility determinations." The Board thus determined that there was no satisfactory demonstration of error and affirmed Judge Switzer's decision.

As Tennessee proceeds under the new law, it is anticipated that, in the near future, both employees and employers alike will seek appellate review often, to challenge the Reform Act's changes; to seek guidance regarding the applicability of precedent developed under previous versions of the Act; and simply to gain clarity regarding how the new law is to be justly applied. Thus there will be many decisions written by the New TWCAB in years to come, and even more trial decisions by the TCWCC. In addition, undoubtedly there will be great interest in the outcomes of Reform law cases that make their way to the Tennessee Supreme Court, among the bar, lawmakers, Tennesseans generally and legislators in other states as they consider amending their workers' compensation laws.

There will never again be a first "new law" Tennessee appellate opinion, however. For that reason alone, it was worth reviewing with you.

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[1] David Torrey, A New Court for Tennessee Workers' Compensation Cases, 57 *Lex and Verum* 1 (June 2014).
[2] Id.
[3] Id.

The first eight judges of the Tennessee Court of Workers' Compensation Claims at their robing in June 2014. Left to right are Judge Kenneth Switzer, Judge Lisa Knott, Judge Jim Umsted, Judge Thomas Wyatt, Chancellor Ellen Lyles who officiated, Judge Allen Phillips, Judge Pamela Johnson, Judge Joshua Baker, and Judge Brian Addington.

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NAWCJ Comparative Adjudication Systems Project

By: David B. Torrey

An initiative that we have started, and that you have read about in our monthly newsletter, *Lex and Verum*, is comparative study and compilation of state litigation and adjudication practices. Such an activity has long been an interest and occasional occupation of mine. As a consequence, I was pleased that, coincidentally, WCI Board Member Gerry Rosenthal suggested to me that the NAWCJ could play the role of "think tank."

Comparative analysis of state workers' compensation programs is, of course, a time-honored tradition, and is currently undertaken by the WCRI (in partnership with the IAIABC), the U.S Chamber of Commerce, and private companies like the International Risk Management Institute (IRMI). All of these comparisons focus, for the most part, on the substantive and cost aspects of workers' compensation programs. What is not undertaken in these studies is a cataloging of procedural aspects of the law and the nuances of litigation and adjudication.

The following studies are currently available on the website, www.NAWCJ.org.

Authority for Admissibility of Medical Reports Comments, Findings, and a Fifty-State Chart

Finality of Fact-Finding among States: Introduction and Tables

Firefighter Cancer Presumption Statutes in Workers' Compensation and Related Laws: An Introduction and a Statutory/Regulatory/ Case Law Table

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Endnotes from Fit Vs Faint, from Page 18.

1. Courts in workers' compensation decisions universally use the phrase "idiopathic" as follows: "We use the word 'idiopathic' as it is used by Professor Larson, to mean 'peculiar to the individual' and not 'arising from an unknown cause.' Idiopathic refers to an employee's preexisting weakness or disease." *Patterson v Opelika Foundry Co., Inc.*, 561 So.2d 236 (Alabama 1990). See also, for example, *Youngblud v Fallston Supply Co.*, 951 A.2d 118 (Maryland Ct. Special Appeals 2008; to the same effect). See generally http://www.merriam-webster.com/dictionary/idiopathic (identifying both as definitions).
2. Larson, Workers' Compensation, §9.01 (Desk Ed. 2000).
3. A straightforward discussion of these concepts is found in the recent idiopathic fall case, *Hamilton v Lane Community College*, 302 P.3d 1184 (Oregon Ct. Appeals 2013).
4. See infra.
5. Arthur Honnold, Workmen's Compensation, § 97 (1917).
6. Little JW, Eaton TA, Smith GR. Workers' Compensation: Cases and Materials. 6th ed. West/Thomson Reuters. St. Paul, MN. 2010; p. 250.
7. Larson, supra note 2 [quoting *Wright & Greig, Ltd. v M'Hendry*, 11 B.W.C.C. 402 (1918)].
8. *Youngblud v Fallston Supply Co.*, 951 A.2d 118 (Maryland Ct. Special Appeals 2008).
9. *Hamilton v Lane Community College*, 302 P.3d 1184 (Oregon Ct. Appeals 2013). The court contrasted another precedent. There, the patient/claimant was the driver of log truck. While performing his work, he experienced a seizure, passed out, and wrecked his truck. The resulting musculoskeletal injuries were held compensable. *Marshall v Bob Kimmel Trucking*, 817 P.2d 1346 (Oregon Ct. Appeals 1991).
10. *Pemberton Chevrolet, Inc. v Harger*, 120 P.3d 892 (Okla. Ct. Civ. App. 2005). The court identified a recent precedent on the issue. There, the patient/claimant fell at work due to an epileptic seizure. She happened to be standing near a coffee pot and was burned by the hot coffee when she fell. The court held that the coffee pot was a factor peculiar to her employment that contributed to her injuries from an idiopathic fall. The burn injuries were hence compensable. *Flanner v Tulsa Pub. Schools*, 41 P.3d 972 (Oklahoma S. Ct. 2002).
11. *Hampton v Intech Contracting, LLC*, 2013 Ky. Unpub. LEXIS 17 (Mar. 21, 2013), reversing, 2011 Ky. App. LEXIS 229 (Kentucky Ct. App., Nov. 18, 2011).
12. *Blakesleee v Platt Bros. & Co.*, 902 A.2d 620 (Connecticut S. Ct. 2006).
13. *Urbina v Kindred Hospital*, 103 So.3d 244 (Florida 1st Dist. Ct. App. 2012).
14. *Circle K Stores v Indus. Comm'n*, 165 Ariz. 91, 796 P.2d 893 (1990).
15. *Hypl v Indus. Comm'n*, 210 Ariz. 381, 111 P.3d 423 (2005).
16. *National Auto. & Cas. Ins. Co. v Industrial Acc. Com.*, 75 Cal.App.2d 677 [171 P.2d 594](1946), where numerous authorities are cited.
17. *Employers Mut. Liability Ins. Co. v Industrial Acc. Com.*, 41 Cal. 2d 676, 678-679 (Cal. 1953).
18. *National Auto & Cas. Ins. Co. v I.A.C. (Honerlah)*, 75 Cal. App. 2d 677, 680-681, 11 Cal. Comp. Cases 206, 171 P.2d 594 (1946).
19. *Pacific Emp. Ins. Co. v Industrial Acc. Com.*, 26 Cal.2d 286 [158 P.2d 9, 159 A.L.R. 313](1945).
20. *Pacific Emp. Ins. Co. v Industrial Acc. Com.*, 19 Cal.2d 622 [122 P.2d 570, 141 A.L.R. 798](1942).
21. *Colonial Ins. Co. v Industrial Acc. Com.*, 29 Cal.2d 79 [172 P.2d 884] (1946).
22. *Zemke v Workers' Comp. Appeals Bd.*, 68 Cal. 2d 794 (1968).
23. *Allied Compensation Ins. Co. v Industrial Acc. Com.*, 211 Cal. App. 2d 821 (Cal. App. 2d 1963).
24. Section 301(c)(1) of the Pennsylvania Act, 77 P.S. § 411(1).
25. *Slaugenhaupt v U.S. Steel Corp.*, 376 A.2d 271 (Pa. Commw. 1977).
26. *Good Shepherd Workshop v WCAB* (Caffrey), 555 A.2d 1374 (Pa. Commw. Ct. 1989).
27. *McCarthy v General Electric Co.*, 143 A. 116 (Pa. 1928).
28. *Slaugenhaupt v U.S. Steel Corp.*, 376 A.2d 271 (Pa. Commw. 1977). On page 273, the court declared, "Case law … prior to the 1972 amendments and interpreting what constitutes course of employment remains applicable." See also *Krist v National Home Life & Ass. Co.*, 422 A.2d 1220 (Pa. Commw. 1980) (patient/claimant, a clerk, who suffered from arthritis and "occasional episodes" of dizziness, inexplicably fell backward while at work and hit her neck and back—held: aggravation of spinal arthritis was compensable).
29. *Musicus v Broadway Pastry Shop, Inc.*, 439 N.Y.S.2d 455 (N.Y. S. Ct. A.D. 1981).
30. Larson, supra note 2, § 9.02.
31. *Panyko v WCAB (U.S. Airways)*, 888 A.2d 724 (Pa. 2005).
32. *City of Burlington v Davis*, 624 A.2d 872 (Vermont S. Ct. 1993).
33. *Yarter v S.R. Beltrone, Inc.*, 454 N.Y.S.2d 35 (S. Ct. A.D. 1982).
34. Posner RA. How Judges Think. Cambridge, MA: Harvard University Press; 2010.
35. Barth RJ. Determining injury-relatedness, work-relatedness, and claim-relatedness. AMA Guides Newsletter. May/June 2012.