Lex and Verum

The National Association of Workers' Compensation Judiciary

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A Fond Farewell

By Hon. David Torrey*

The Bible (1 Kings 1:34), tells us that, many years ago, Zadok the Priest and Nathan the Prophet anointed Solomon as King of Israel. It was via this same type of act – anointment – that I was honored to become leader of the National Association of Workers' Compensation Judiciary in January 2013. On that occasion it was not Zadok and Nathan who undertook the task but, instead, John and Dave – to be precise, NAWCJ founders Judges John Lazzara (Tallahassee), and Dave Langham (Pensacola).

Delusions of grandeur aside, my two-year term is up and I certainly thank Judges Lazzara and Langham for their confidence in me. I also thank Judge Ellen Lorenzen (Tampa), my predecessor, for her guidance; and Pennsylvania Judge Todd Seelig (Philadelphia), who connected me with NAWCJ at ABA Workers' Comp New Orleans back in April 2008. Without that introductory effort I do not think I would have had the opportunity to have served as President of this excellent group! And, of course, I thank the dynamic WCI leaders Jim McConnaughhay, Steve Rissman, and Gerry Rosenthal, whose quiet support is well-known to all of us at NAWCJ and is much appreciated.

During the last two years I think we have moved forward as an organization in a number of material ways. We have developed a relationship with the International Association of Accident Boards & Commissions (IAIABC), researched and published in our monthly periodical and at our website several comparative studies, and established our ability to decamp to another jurisdiction (Tennessee) and provide helpful guidance on the task of administrative law judging of workers' compensation cases. Meanwhile, mainly through the efforts of Judge Langham, we have continued to undertake outreach and provide education through *Lex & Verum* and our can't-be-missed Judicial College in Orlando.

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Your 2013-14 NAWCJ Board of Directors

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A Fond Farewell, *from page 1.*

A project for me at this point is assisting in the commemoration of the June 2015 Centennial of the Pennsylvania Workers' Compensation Act. Inspired by the 2011 IAIABC and Massachusetts celebrations, two lawyers and I, some time ago, successfully recommended to the state bar association that we form a committee to note the centennial. Our information-filled website is www.wc100pa.org. I mention this activity because I can assure you that my involvement with NAWCJ and my exposure to the laws, practices, and legal cultures of other states has been of untold intellectual benefit as I try my hand at editing a book about 100 years of workers' compensation in my state. It is perhaps a platitude to say that one's involvement in national bar or judicial association activities is "enriching," but my experience happens to show that the assertion is entirely true.

I am pleased to continue to stay in touch (my e-mail is DTorrey@pa.gov), and serve as Immediate Past President. I wish the best to my friend and successor, Mike Alvey, Chairman of the Kentucky Workers' Compensation Appeal Board, as he takes office as President!

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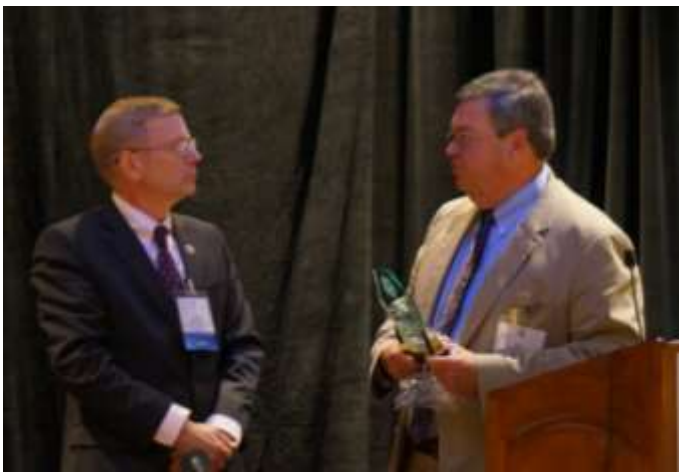
*Judge David Torrey is the President of the National Association of Workers' Compensation Judiciary. He is a Workers' Compensation Judge in Pittsburgh, PA and an Adjunct Professor of Law, University of Pittsburgh School of Law.



Incoming 2015 President Michael Alvey (R) presents the NAWCJ's recognition award to outgoing President David Torrey (L) at the 2014 Judiciary College in Orlando.

New NAWCJ Officers and Board take the Reins

The NAWCJ Annual Business meeting was held on Tuesday, August 19, 2014. The bylaws were amended, and new leadership elected. The main amendment to the Bylaws refines the Board terms of office, which previously were defined merely by "a term of one year from the date of appointment." The new terms are "two (2) years from the date of appointment. Terms shall begin on October 1 in the year of election and shall expire two years later on September 30, except that those Directors elected in 2014 for terms expiring in odd-numbered years shall serve for only one (1) year from the date of election, subject to re-election in 2015."

The term for Officers was also amended. The Bylaws were previously clear as to election and succession of Officers. The amended Bylaws provide that the term for our officers begin "the day following the officer selection." Officer elections have been held at our Annual Meeting, and it has been our tradition for the new Officers' terms began the following January first. Thus, at the end of December 2014 we bid farewell to President Torrey of Pennsylvania, following the pre-amendment tradition, and welcome President Alvey of Kentucky. Judge Alvey will serve for the next 20 months, a slightly truncated term under the new Bylaw provisions, and his successor will take office the day following the 2016 elections at the annual Judicial College in Orlando.

Therefore, the new Board of Directors became official on October 1, 2014. The *Lex and Verum* has continued to publish the former Board in a monthly side-bar, in keeping with the transition from old tradition to the new definition. With this issue, the *Lex* bids adieu to the former Board and welcomes the 2015 Board. Half will serve for two years, coinciding significantly with President Alvey's term, although Board terms extend to September 30 following elections for a brief overlap and therefore achieve continuity. The other half will serve only the next ten months, and therefore the search will be on for fresh faces willing to serve beginning October 1, 2015. Over the course of 2015, the *Lex* will publish photographs and biographies of the Board and Officers.

On January 1, 2015 Michael Alvey will take the NAWCJ helm. President Alvey is the Chair of the Kentucky Workers' Compensation Board. He was appointed in 2010. Judge Jennifer Hopens will become President-Elect, serving as President Alvey's second-in-command and chairing the Long-Range Planning Committee. She has been a Hearing Officer for the Texas Department of Insurance, Division of Workers' Compensation (TDI-DWC) since 2007. Judge James Szablewicz will become Secretary. Judge Szablewicz is the Chief Deputy Commissioner of the Virginia Workers' Compensation Commission and has been in that position since April 2004. Judge Robert Cohen was re-elected Treasurer. Judge Cohen serves as the Director and Chief Judge of the Florida Division of Administrative Hearings.

The Board of Directors for 2015 includes six members who were elected in August to two-year terms. The following will serve through September 30, 2016. Commissioner Karl Aumann has served as Chair of the Maryland Commission since October 2005.

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Chair Michael Alvey

Hon. Jennifer Hopens

Hon. James Szablewicz

Hon. Robert Cohen

New Officers and Board Take the Reins, from page 3.

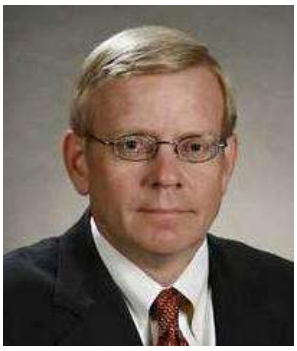
Commissioner Scott Beck has served on the South Carolina Workers' Compensation Commission since June 30, 2008, and as Chair since 2010. Judge Melody Belcher is an Administrative Law Judge, and former Deputy Chief Judge in Georgia. Chief Judge Sheral C. Kellar has served at the Louisiana Workforce Commission (formerly the Louisiana Department of Labor) as a Workers' Compensation Judge since 1991 and as Workers' Compensation Chief Judge since 1999. Judge John Lazzara has served a Florida Judge of Compensation Claims since 1990, and as interim Deputy Chief Judge in 2005-06. Judge Ellen Lorenzen has served as a Florida Judge of Compensation Claims since 2004.

The Board of Directors for 2015 also includes seven members who were elected in August to one-year terms. The following will serve through September 30, 2015. Judge Steven Farrow is an Administrative Law Judge with the Georgia State Board of Workers' Compensation; He formerly served as a Director with the Appellate Division of the Georgia State Board since 2009. Judge Luann Haley is an Administrative Law Judge for the Industrial Commission of Arizona and has served since 1998. Judge Melissa Jones is an Administrative Appeals Judge with the D.C. Compensation Review Board. She formerly served as a workers' compensation Administrative Law Judge between 2006 and 2010. Judge David W. Langham is the Florida Deputy Chief Judge of Compensation Claims. Judge Deneise Turner Lott has served as an Administrative Judge with the Mississippi Workers' Compensation Commission since November 1988. She is currently senior judge and is the first woman to hold that position. Judge T. Kent Wetherell serves on the Florida First District Court of Appeal, and previously served as an Administrative Law Judge with the Florida Division of Administrative Hearings from 2002-2009. Judge Jane Rice Williams is an Administrative Law Judge with the Kentucky Department of Workers Claims.

A Special Thanks to our NAWCJ Former Presidents!

Hon. John Lazzara
2008-2010

Hon. Ellen Lorenzen
2011-2012



Hon. David Torrey
2013-2014

Judiciary College 2015

August 23-26, 2015
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Employers/Insurers Who Treat Ebola as Occupational Disease Do So at Their Peril

*By Thomas A. Robinson, J.D.**

Employers and insurance carriers who treat Ebola as an occupational disease and who think that they are "immune" from comp claims because the risk of contracting the deadly virus is not "peculiar" to their industry, do so at their peril. While the risks of Ebola do appear to be greater among health care workers, its suddenness of onset, even in the face of significant precautions, suggests that ordinary workers' compensation rules related to injuries by accident arising out of and in the course of the employment will apply and not those related to occupational diseases. Where there is a clear causal connection between the Ebola virus and the workplace, a worker may likely establish a compensable claim.

The Argument That the Risk of Ebola Must Be "Peculiar" to the Employment Is Incorrect

I point this out because I've read multiple posts by employer representatives and insurance execs during the past few days saying that employers, other than those in healthcare, need not be unduly concerned with Ebola claims since they are so clearly non-compensable. While I generally agree with my esteemed colleagues—there won't likely be a flood of compensable claims—I don't agree with their rationale. Let me explain.

The typical employer/insurer argument that I'm hearing goes as follows: first, in order to recover workers' compensation benefits for an illness or disease, the exposure must be "occupational," that is to say, it must arise out and be contracted in the course of the employment (the classic "AOE/COE" formula), and second, that the ultimate compensability of an illness or disease depends upon the work or occupation of the employee; the illness or disease must arise out of or be caused by conditions "peculiar" to the work.

The argument continues that the first rung in the recovery ladder—qualifying as "occupational"—is an easy step. The problem, say the insurance analysts, is with the second rung— that the employee be able to show that the risk of illness or disease was "peculiar" to their work. The experts reason that since the risk of Ebola lies mainly within the health care field, employers in other industrial sectors do not face significant risk.

Let's Be Clear: Ebola Is Not an Occupational Disease

The above-described employer/carrier contention treats Ebola as an occupational disease. With all due respect to my colleagues, *it is not*. Indeed, as indicated by various analysts, an occupational disease is one whose risk is generally "peculiar" to a particular industry—e.g., brown lung (byssinosis), within the cotton textile industry (when the United States had a textile industry); black lung (pneumoconiosis), within the coal industry; asbestosis or mesothelioma, for those whose work involved contact with asbestos; certain instances of hearing loss.

Rather than occurring predominantly within a particular industry, Ebola is a disease that currently occurs predominantly in one geographical area: West Africa. And in West Africa, it has no peculiar vocational characteristic at all. It has become, unfortunately, a disease of common life. And unlike brown lung, black lung, and many occupational diseases, Ebola isn't contracted over an extended time frame; it strikes quite quickly.

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Ebola, from Page 6.

Ebola as Accidental Injury Rather Than Occupational Disease

I suggest that because Ebola is not an occupational disease, an infected claimant need not establish that his or her risk of contracting the horrific condition is "peculiar" to the employment, but rather that the claimant must prove the work connectedness of the disease (the standard AOE/COE formula) [see *Larson's Workers' Compensation Law*, §§ 5.05, 51.01 *et seq*.]. To do so in many states, the employee need not show that he or she faced any sort of *increased* risk of disease; they may recover if they can show that they faced an *actual* risk. Consider, for example, the following diseases/conditions:

Polio?

In the time period before widespread inoculation, was the risk of contracting polio "peculiar" to the nursing industry? Close call, perhaps, but in reality, the disease was quite pervasive, attacking even New York politicians who would later be President. But, for the sake of the argument, let's assume for the moment that the risk of contracting polio was "peculiar" to the medical care professions. One wouldn't be surprised, therefore, if a nurse in a polio ward was awarded workers' compensation benefits, as was the case in *Industrial Comm'n v. Corwin Hosp*., 126 Colo. 358, 250 P.2d 135 (1952). One should recognize, however, that the rationale for the court's decision was that the nurse had sustained an *accidental* injury arising out of and in the course of her employment—not that she had contracted an occupational disease.

Ocular Herpes?

Is the risk of contracting ocular herpes "peculiar" to kindergarten teachers? I think not, and yet the claimant in *Portman v. Camelot Care Ctrs., Inc.*, 2000 Tenn. LEXIS 96 (Tenn. Special Workers' Comp. App. Panel Mar. 2, 2000), *adopted and affirmed*, 2000 Tenn. LEXIS 95 (Tenn. Mar. 3, 2000) recovered benefits for the disease following an incident in which a child spit in claimant's eye. Evidence tended to show that the worker had normal ocular health prior to the incident and had only developed irritation and other symptoms several days after the incident. While claimant's medical expert could not definitively say that the spitting incident caused the herpes, the doctor did testify that there was no evidence that the herpes condition was caused by anything else. That testimony was sufficient to support a finding that the herpes condition arose from the employment, held the court.

Coccidioidomycosis (Valley Fever)?

In *Pacific Employers Ins. Co. v. Industrial Acci. Comm'n*., 19 Cal. 2d 622, 122 P.2d 570 (1942), the Supreme Court of California affirmed an award of benefits to a coffee salesperson who was hired to travel through California, Arizona, New Mexico, and Texas. The commission found that the employee had contracted the disease while in the San Joaquin Valley on the business of his employer. The court also found that the evidence that the disease was endemic to the San Joaquin Valley, that the spores causing it were found in the soil there, that it was acquired by an inhalation of those spores that were borne on the wind, that the employee contracted the disease, and that the employee had not been in the San Joaquin Valley except in the course of his employment, supported the commission's finding. The court found that where an employee's duties required him to travel and he suffered injuries in the course of that travel, the injury arose out of and occurred in the course of employment.

More recently, in *Jacobs v. Western Municipal Water Dist*., 2011 Cal. Wrk. Comp. P.D. LEXIS 74, again on AOE/COE grounds, not occupational illness grounds, the California Workers' Compensation Appeals Board held that there was substantial evidence to support the WCJ's finding that a senior operation tech II met the burden of proving that he suffered injury AOE/COE in form of disseminated coccidiomycosis (valley fever), when he worked in an area where coccidiomycosis fungus was known to exist, applicant's testimony, which was found to be credible, showed that he had worked outside his plant during excavation on many days exposing him to dusts and fungus, and a qualified medical evaluator opined that it was very highly medically probable that this exposure caused applicant's injury.

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Ebola, from Page 7.

Flesh-eating Bacteria?

How about school cafeteria cooks? Is the risk of contracting necrotizing fasciitis, sometimes called "flesh-eating bacteria," "peculiar" to that profession? It would not seem so. In *Heaton v. Board of Educ*., 2000 Tenn. LEXIS 39 (Tenn. Special Workers' Comp. App. Panel Jan. 14, 2000), *adopted and affirmed*, 2000 Tenn. LEXIS 33 (Tenn. Jan. 14, 2000), a cafeteria cook apparently suffered a wound while preparing turkeys at work that resulted in her contracting the unusual disease, which quickly led to her death. The court found that it was immaterial whether the decedent received the cut from a turkey bone, a knife, or a plastic tie. If the cut provided access for the infection, her death was work-related. No occupational disease here—the decision was based on accidental injury grounds.

Tuberculosis?

Consider *Middleton v. Coxsackie Correctional Facility*, 38 N.Y.2d 130; 341 N.E.2d 527; 379 N.Y.S.2d 3 (1975), in which the appellate court reinstated an award of workers' compensation benefits to a state prison employee who contended he contracted tuberculosis from an infected inmate while working for the prison. The New York court specifically found that compensation for diseases resulting from industrial accidents, *including those caused by germs*, had earlier been sustained and would again be sustained in the court's decision.

Mumps?

How about mumps? Is the risk of contracting that disease "peculiar" to elementary teachers? Some might say, "yes," but a New York court did not need to rely upon the peculiarity of the risk faced by a claimant in *McDonough v. Whitney Point Central School*, 15 A.D.2d 191; 222 N.Y.S.2d 678 (1961). The claimant, a first grade teacher in a school that suffered an outbreak of mumps, contracted the disease and subsequently developed encephalitis. Her physician testified that the claimant contracted mumps from close contact with one of her pupils. The Board found that the disease was compensable because it was contracted accidentally.

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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/

Ebola, from Page 8.

The court stated that a disease contracted at employment was compensable when it was assignable to a determinate or single act, identified in space or time and when it was assignable to something *catastrophic or extraordinary*. Sound like Ebola? The court also found that the outbreak of mumps was an epidemic of sufficient gravity to constitute the disease as an accidental injury.

Rare Condition, Such as Meningococcal Sepsis?

Pennsylvania, whose statute does not require a showing of added risk, has produced a case in which even a momentary exposure to a rare disease was sufficient to establish work-connection. In *City of New Castle v. Workmen's Comp. App. Bd.*, 118 Pa. Commw. 51, 546 A.2d 132 (1988) the deceased, a supervisor for the city, died as a result of a rare, *non-occupational* disease, meningococcal sepsis, which the supervisor apparently contracted when he kissed a co-worker on the cheek prior to her leaving for maternity leave.

According to testimony elicited at trial, the disease is caused by an organism, which survives only in the nasal pharynx and is transmitted through inhalation of droplets of infected nasal pharyngeal secretions. Not every person exposed to the organism, however, is susceptible to the ill effects of the disease. Statistics indicate that 70 percent of the adult population exposed to the disease are not susceptible to its ill effects, while approximately 30 percent have no immunity to it. Between 7 and 10 percent of the persons become carriers of the disease.

The city refused the claim filed by the deceased's surviving spouse. The Appeal Board affirmed an award of death benefits, and the city appealed. The commonwealth court affirmed. The court reasoned that the deceased employee had not stepped outside the employment when he gave the co-employee an innocent reflection of goodwill. Specifically following the reasoning of *Larson* [current § 5.05], the court held that, because the Pennsylvania Workers' Compensation Act did not require added or peculiar risks, but simply compensated for injuries arising within the course of employment, the "injury" was compensable.

Other Cases Where No "Peculiar" Risk Was Required

There have been a number of other cases in which courts have awarded workers' compensation benefits to employees based upon a showing of work-connectedness between the disease and the workplace, without a special showing that the vocation faced some sort of "peculiar" risk. Consider the following:

- Rocky Mountain Spotted Fever - *Roe v. Boise Grocery Co.*, 53 Idaho 82, 21 P.2d 910 (1933)
- Infectious viral hepatitis contracted in Bolivia because of insanitary conditions - *Lothrop v. Hamilton Wright Organizations, Inc.*, 45 A.D.2d 784, 356 N.Y.S.2d 730 (1974)
- Death resulting from mosquito bite/sting while in Africa - *Lepow v. Lepow Knitting Mills, Inc.*, 288 N.Y. 377; 43 N.E.2d 450 (1942)
- Typhus from tick bite - *Oalmann v. Brock & Blevins Co.*, 428 So. 2d 892 (La. App. 1983)
- Amoebic dysentery contracted by a worker who used the same tools and water container as an infected co-worker - *Allen v. Public Service Co.*, 122 Ind. App. 421, 104 N.E.2d 756 (1952). Here no award was made; plaintiff's negligence action against employer for allowing the conditions was found barred by exclusivity.

Employers Beware: Workers in Any Profession Stand a Good Chance of Prevailing When Causal Connection Shown Between Workplace and Ebola

Historically, the two crucial points of distinction between industrial injuries (AOE/COE-type claims) and occupational disease claims have been (i) the element of unexpectedness and (ii) the matter of time-definiteness [See *Larson*, § 52.03]. In former years, what set occupational diseases apart from accidental injuries was both the fact that they could not honestly be said to be unexpected, since they were recognized as inherent hazard of continued exposure to conditions of the particular employment, and the fact that they were gradual rather than sudden in onset.

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Ebola, from Page 9.

Workers' compensation law has always recognized the possibility that what might ordinarily be an occupational disease could be converted to an accidental injury by an unusual and sudden dosage of the same kind of dust or fumes that, absorbed gradually over a long period, would produce a typical industrial disease. Additionally, occupational disease might be transformed to accidental injury by the presence of some untoward little incident or breakage or abnormality, like absorbing harmful fumes because of an accidental defect in a gas mask [see *Dailey v. River Raisin Paper Co.*, 269 Mich. 443, 257 N.W. 857 (1934)], or in one of the situations (like Rocky Mountain spotted fever) described above.

Because of the suddenness of the outbreak of Ebola, because the nurses who have so far contracted the disease were wearing specialized medical gear that may or may not have malfunctioned, because there may have been a lapse in emergency protocols or even a shifting of those protocols by the Centers for Disease Control, the Ebola situation has a great deal more in common with classic accidental injury cases than with pneumoconiosis or silicosis claims. Employers who rely upon the apparent safety of occupational disease definitions, particularly employers outside the health care industry do so without solid ground beneath them. Where a worker—in any profession—can show a clear causal connection between the workplace and the Ebola, he or she stands an excellent chance of prevailing in their workers' compensation claim.

Thomas A. Robinson, J.D., the Feature National Columnist for the LexisNexis Workers' Compensation eNewsletter (www.lexisnexis.com/wcnews), is a leading commentator and expert on the law of workers' compensation, and the Co-Editor-in-Chief of *Workers' Compensation Emerging Issues Analysis* (LexisNexis) (http://www.lexisnexis.com/legalnewsroom/cfs-file.ashx/__key/communityserver-components-sitefiles/Documents-WCLC+Documents/WCEIA-P1874-R2014-Discount.pdf).

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Researchers Show Psychological Factors Can Worsen Pain, Delay Return to Work

By: Ben Miller
November 17, 2014

Physical damage might be the reason a worker has pain in the first place, but psychological factors can prolong pain and keep employees away from the job longer, according to a pair of articles published in this month's issue of The Spine Journal. The team of researchers who published the articles, mostly representing the University of Zurich in Switzerland, conducted a review of previous studies and found that two psychological phenomena –catastrophizing and fear-avoidance beliefs – are associated with return to work and levels of pain among patients with lower back pain.

Catastrophizing is essentially a thinking pattern that elevates perceptions of problems to catastrophic levels, according to past president of the American Academy of Pain Medicine Steven Feinberg. Fear avoidance is refraining from engaging in behaviors out of concern that it will increase pain. "The fear-avoidant patient (might have) a mild sprain; they do nothing and then they become deconditioned," Feinberg said.

There are two common methods used to determine a patient's level of fear avoidance. A team of researchers led by Gordon Waddell, a professor at Glasgow, Scotland's Western Infirmary, created a fear-avoidance belief questionnaire in 1993 that creates a number score. The questionnaire asks patients to agree or disagree based on a numbered scale with statements such as "I should not do physical activities which make my pain worse" and "my work might harm my back." The Tampa Scale of Kinesiophobia, developed in 1991, is structured in a similar way and asks comparable questions to produce a score.

The score a patient gets based on those responses, according to the University of Zurich researchers, is associated with the outcomes patients had. Several studies included in the review found higher pain levels and fewer patients returning to work when they had higher scores. When patients went through interventions targeting those problems, they had better outcomes. A series of studies from the Workers Compensation Research Institute bolstered the evidence supporting that theory in June. The studies, which examined predictors of worker outcomes in eight states, surveyed more than 3,000 workers in those states. When asked whether they feared being fired because of their injury, 52% said they strongly disagreed, 9% somewhat disagreed, 12% somewhat agreed and 27% said they strongly agreed.

The survey was conducted in 2013, and the participants were all injured in 2010, meaning they had been in the workers' compensation system for at least three years. Of those who said they strongly agreed that they might be fired because of their work injury, 21% weren't working at the time of the interview. For those who strongly or somewhat disagreed, the number was 10%. Further, the disability of those who strongly agreed lasted an average of 13 weeks, compared with nine weeks among those who disagreed that their injury might lead to being fired.

Darrell Bruga, chief executive officer and founder of the national care network LifeTeam Health, said one problem is that people who take time off work after an injury have a lot of time to dwell on their pain and fear. "If people have too much time to sit around on the couch, ruminate about their condition, watch TV, that's not going to be a healthy environment for those people," Bruga said.

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Psychological Factors, from Page 11.

LifeTeam Health uses a model called the Progressive Goal Attainment Program to address psychological factors behind pain and disability – two of the largest of which are catastrophic thinking and fear-avoidance beliefs. The program seeks to keep people busy and get them to engage in the activities they did before they were injured. The result, he said, is often that patients feel more positive about their condition and are more willing and able to go back to work.

The American Chronic Pain Association's 2014 guide to treating chronic pain lists cognitive behavioral therapy programs as another way to address such issues. However, Feinberg said, the use of such programs in workers' compensation is generally low, and most injured workers with pain do not receive interventions targeting catastrophizing and fear-avoidance beliefs. That's because most physicians aren't trained in the biopsychosocial model of pain, which recognizes psychological and social components of pain. "Your average physician is more trained on ... the bio-medical model, which is (to) find what's wrong, cut it out, fix it, medicate it, inject it – but with a lot of people, you really need to find out why they're behaving (in certain ways)."

Bruga said he believes more workers' compensation carriers are headed toward considering such problems when managing claims. The California State Compensation Insurance Fund is considering working with that company to implement that model in its case management. Washington's Department of Labor & Industries, which holds a monopoly on that state's workers' compensation insurance market, is implementing a pilot program with others outside of LifeTeam trained in the Progressive Goal Attainment Program. LifeTeam is also working with large employers in California, such as Costco and Kaiser Permanente, he said.

Feinberg said that if more of the people involved in the care of injured workers were to address psychological factors such as catastrophizing and fear avoidance earlier in the process, a lot of lost time, disability and the expenses that come with them could be mitigated. "If you deal with these things early on, you basically avoid people developing chronic pain syndromes," he said.

Governor Bashear Appoints and Reappoints

Kentucky Gov. Steve Beshear has reappointed Franklin A. Stivers to the state's Workers' Compensation Board and has appointed Stephanie L. Kinney as an Administrative Law Judge (ALJ) in the Department of Workers' Claims. Commissioner Stivers is in the final months of his first four year term. His new term will begin Jan. 5, 2015, and expire on Jan. 4, 2019.

Judge Kinney will begin her new role on Jan. 1. She'll fill the vacancy created when Chief ALJ J. Landon Overfield's resignation takes effect on Nov. 30. Judge Overfield is retiring at the end of the year. Robert L. Swisher, an ALJ since 2009, will replace Overfield as chief judge effective Nov. 1. Kinney's term will expire on Dec. 31, 2017.

Survey Shows Payers Inattentive to Training, Predictive Analysis

By: Ben Miller
November 19, 2014

Payers often pay close attention to cost drivers such as prescription painkillers and unnecessary diagnostic tests, but the results of a survey released this week by Rising Medical Solutions suggests they may want to take a closer look at their own claims shops.

While 83% of the respondents include staff development in their strategic goals, the survey showed that fewer companies managing workers' compensation claims are spending time and resources on staff development.

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Survey, from Page 12.

About 48% reported that they have a dedicated training and development group, down from 54% last year. About 36% said that they train new hires, down from 42% in the 2013 survey. More companies – 51% compared with 49% last year – conducted training for senior-level staffers, but those levels still fall short of the number of companies that list development as a priority.

Rising Medical noted that previous research suggests a "talent gap" in insurance claims management. A 2006 study from Deloitte Consulting showed that about 70% of claims adjusters at the time were 40 years old or older. The study also projected the need to hire 84,000 more claims adjusters industry-wide by the end of 2014, based on current employees vacating their positions and a 17%-per-year average growth in new hires.

However, the survey showed that new hires coming into the workers' compensation industry are less likely to receive training than senior staffers. Of the 36% of respondents who reported having a training program for new claims adjusters, 42% said the training took less than 40 hours. About 22% of all respondents had no budget for training and development. A lack of training – for experienced adjusters or new hires – could lead to worse performance in the industry, the Rising authors said. "For the workers' compensation industry, the business risk for not investing in a talent development strategy is significant," the report says. "Claims examiners are an organization's primary face to customers, and they make decisions on a daily basis that can considerably impact business profitability."

Another obstacle that could block greater effectiveness among claims adjusters is a lack of predictive data analysis, meaning the use of historical data to form a picture of outcomes in the future. Research has shown that many factors in a claim are associated with how fast an injured employee will return to work. The shorter the duration of a claimant's leave from work, the less money payers will dole out in indemnity. For example, a series of eight studies from the Workers' Compensation Research Institute released in June showed that employees who don't have at least a high school degree or have a medical comorbidity such as diabetes or heart disease were less likely to be working three years after the date of their work injury.

Only 24% of respondents in the Rising Medical survey said that they use predictive analytics, down from 25% in last year's survey. The authors of Rising's report said payers that don't use such programs could be at a disadvantage. Denise Algire, director of managed care and disability corporate risk for Safeway and the principal researcher behind the survey, said that such analysis can be used to identify which claims are likely to cost more and last longer. "One of the things that drives the claim costs is the long-term nature of the claim, and if we can predict ... (claim behavior) up front I think that will save money in the long term," she said.

The report also concluded that the use of such analysis appears to lead to savings. "A cross-tabulation of the data reflects that the organizations that utilize predictive modeling report a more favorable claims resolution ratio," Rising Medical said. Algire said that one barrier to companies using more predictive analytics is a lack of understanding about the effectiveness of those programs. Some managers may prefer to hear from seasoned claims adjusters about which claims are likely to have a long duration and high costs, but she said predictive modeling can bolster that knowledge base. "I think there's a perception that it can be a significant investment in terms of cost," she said. "So understanding whether there's a clear (return on investment is important.)"

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Survey, from Page 13.

The survey showed a lack of adoption of technology in general among claims adjusters. About 42% said they used some form of claims system workflow automation, compared with 46% in 2013. One-third said they had no integration between various parts of their claims systems, meaning that information isn't shared between segments such as bill review, utilization review, medical care management and fraud detection. "Most claims organizations use multiple isolated systems, often capturing duplicate information in the daily management of claims," the report says. "This results in ineffective and inefficient business practices that can lead to higher costs, and more importantly, delayed care for injured workers."

Further, the survey results showed that most respondents don't monitor the effectiveness of the physicians treating claimants – though more companies were doing so in 2014 than in 2013. About 29% said they have performance measures for medical care, up from 26% the prior year. One reason for that trend, the authors said, is that payers make decisions about which physicians to send injured workers to based on cost instead of performance. "Traditional medical management strategies in workers' compensation are based on a fee-for-service model with discount methodology," the report says. "Providers are selected based on their willingness to treat workers' compensation patients and, often, other subjective factors."

However, research suggests that choosing physicians with a history of producing "superior outcomes" can save payers money. In July, Harbor Health Systems presented a study showing that medical costs dropped about 20% during a five-year period when such "high-performing" doctors treated patients.

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In Memoriam

Chair Glen Schilling, Kentucky Workers' Compensation Board

Glenn L. Schilling, 89, passed away on October 24, 2014 in Louisville. Glenn had a long and distinguished legal career in Louisville. He was appointed to the Kentucky Workers' Compensation Board by four different governors and served as Chairman of that Board. He also served as Commissioner of the Kentucky Department of Workers' Claims. Glenn served as the United States Commissioner in the Western District of Kentucky, and as Special Master in Louisville, Kentucky during the desegregation case. He was widely recognized for his expertise in Workers' Compensation law. In addition to his long service on the Kentucky Workers' Compensation Board, he served as President of the International Association of Industrial Accident Boards (IAIABC).

Glenn graduated in 1943 from Walnut Hills High School in Cincinnati. He enlisted in the U.S. Navy, attended midshipmen's school at Middlebury College and Northwestern University, served in the Pacific during World War II and was honorably discharged as a second lieutenant. Glenn completed his college education at the University of Cincinnati where he also earned his law degree.

Glenn was active in politics early in his career including being Co-Chairman for Citizens for Johnson in Jefferson County during President Johnson's campaign in 1964. He survived two wives, E.B., who died in 1984, and Pat, who died in 2010. Glenn is survived by three sons, Geoffrey, Baxter (Carla), and Lee Schilling, four step-children, Jamie Broome (Jim), Anne Garvey (Wayne), Tommy (Clare) and Peter (Tyler) Burkhart, 10 grandchildren and five great-grandchildren.

Smoking Linked to Chronic Pain

By: Per Curium

There was a time when physicians actually recommended smoking. The American medical community now agrees that smoking is not a good idea, and smoking rates are dropping - less than 20% of the adult population currently. A significant majority of physicians surveyed sees merit in medical marijuana, but the news is not clear as to whether they approve of smoking it as opposed to consuming the plant's derivatives. It would be interesting to know if those doctors see the benefits outweighing dangers if the substance was smoked.

Smoking may be a bigger issue than just the various diseases linked to it by the Center for Disease Control (CDC), including cancer, asthma, COPD, diabetes, heart disease and stroke (to name a few). It may also be a comorbidity, or at least an aggravating factor for pain. A recent study from Northwestern University concludes "Smoking is a Pain in the Back." There are a significant number of workers' compensation cases that involve pain from a work injury and a variety of modalities employed to combat it. Pain has received attention in articles like *Chronic Pain Workers' Comp Claims Increasing for Employers* and *Opiod Epidemic Plagues Workers' Comp*.

The Northwestern study is "a longitudinal observational study of 160 adults with new cases of back pain." A longitudinal study gathers data "for the same subjects repeatedly over a long period of time;" and such studies can "extend over years or even decade," according to the website Whatis. The point is that various people are studied as they live their lives, as opposed to studying various sets or groups of people at selected times. A longitudinal study is similar to a movie with successive scenes, as opposed to taking snapshots ("selfies" for those in the next generation) of different subjects at specific times.

This study, published in the journal *Human Brain Mapping*, studied "thirty-five healthy control participants and 32 participants with chronic back pain" over the course of a year. It was a study that involved examination of the human brain using objective diagnostic testing. A magnetic resonance image (MRI) was administered to each study participant on five occasions during the study. The MRI, according to *Medical News Today* "uses a magnetic field and radio waves to create detailed images of the body." A technology that is well familiar to the workers' compensation industry, the MRI can help physicians see how a patient's internal physiology is functioning. Unlike an x-ray which creates images of bones, the MRI creates images of soft-tissue.

The researchers used the MRI scans to focus on two areas of the brain, the "nucleus accumbens and medial prefrontal cortex." They concluded that these "two regions of the brain 'talk' to one another" and that the "strength of that connection (between the two) helps determine who will become a chronic pain patient." In other words, the interaction of these brain systems plays a role in how we as individuals perceive pain in our body.

The research supported the proposition that the connection between these two particular brain processes "was very strong and active in the brains of smokers," and that the connection was diminished in "smokers who - of their own will - quit smoking during the study." Essentially, "when they stopped smoking, their vulnerability to chronic pain also decreased." The perception of pain, it seems, is enhanced when the communication between these two brain areas is enhanced. Smoking appears to play a role in increasing the communication and thus enhances the perceptions of pain.

Another interesting component of the test was medication. Patients who took anti-inflammatory drugs did report they were of help in management of pain. However, the medications "didn't change the activity of the brain circuitry." In other words, while the medication had a therapeutic effect on the perception of pain itself, the medication did not decrease the communication or connection between these two portions of the brain. This is certainly not an end to the analysis of pain, but it is interesting. If someone needed yet another reason to discontinue smoking, perhaps this is it. Regardless of the reason for the onset of pain, smoking may increase the perception of it. And, there is evidence that smoking cessation may be of benefit in decreasing the perception of pain after onset.

When Can I Use My WCMSA?

Misunderstanding as to "When" the WCMSA Becomes Effective Ends up Vacating Settlement

By: Mark Popolizio

In *McCarroll v. Livingston Parish Council*, 2014 WL 5439624, -- So.3d – (La. App. 1st Cir., October 27, 2014), the parties believed that the claimant could use his approved WCMSA fund to cover a surgery *prior* to the court actually approving the settlement agreement. Thus, he had the surgery.

However, at some point after the court approved the settlement, the claimant learned that Medicare would not pay for the surgery, and that he could not use his WCMSA monies to cover the costs since the surgery occurred before the court approved the settlement.

After learning this, the claimant sought a court order requiring that the carrier reimburse the surgical costs, or an order nullifying the settlement since the parties both believed that the WCMSA could be used prior to the court's approval of the settlement.

The workers' compensation court ruled for the claimant, and vacated the order approving the settlement. Carrier appealed. On appeal, the Louisiana court of appeals affirmed the WC court's order. This interesting case can be outlined as follows:

Background

This case arose from a compensable workers' compensation claim. The parties reached a settlement in principle, which included a WCMSA to be funded via a structure. The WCMSA contained a specific allocation for a recommended cervical fusion (which up until that point the claimant had declined). The parties then submitted the WCMSA to CMS prior to finalizing the settlement, and the agency approved the proposal as submitted.

Shortly after CMS approved the WCMSA (and before the parties had even executed the settlement agreement) the claimant changed his mind and advised the carrier that he wanted to proceed with the surgery. The carrier refused to pay for the surgery in light of the pending settlement, and the fact that these costs were included in the WCMSA. Ultimately, the claimant had the surgery since the parties believed that the WCMSA could be used to cover the surgery (and that Medicare would cover any expenses above the seed amount) prior to the settlement being approved by the court.

A few weeks *after* the surgery, the parties executed the settlement agreement, and it was formally approved by the Office of Workers' Compensation (OWC) via an order.

Sometime after the court approved the settlement, the claimant learned that CMS would *not* pay for any medical expenses incurred prior to the OWC's order approving the settlement, and would *not* allow him use his WCMSA for this purpose. The carrier also refused to pay for these expenses on grounds that the WCMSA included monies for the surgery.

Thus, the claimant filed a motion seeking a court order to force the carrier to pay for the outstanding medical bills, or in the alternative, an order nullifying the settlement altogether, alleging that both parties had settled under the mistaken belief that the WCMSA could be used prior to the court's approval of the settlement, and therefore, the settlement did not reflect a meeting of the minds.

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My MSA, from Page 16.

How did the court rule?

The OWC court ruled for the claimant and vacated the order approving the settlement. At hearing, the evidence revealed that both sides believed, incorrectly, that the WCMSA could be used prior to the court's approval of the settlement agreement. On this point, the OWC noted:

> [The adjuster] testified . . . that she thought and 'everyone thought' *at that time* that the MSA amount for $21,000 for future surgery could be used to pay for the surgery even if the surgery was done prior to the judge signing the settlement. No one involved in this case at that time envisioned that Medicare would deny coverage because the surgery was done before the settlement was signed by the [OWC]." (Emphasis in original.)

Therefore since the defendant[s] and [Mr. McCarroll] clearly envisioned that the $21,000 could be used to pay for the surgery at issue even if the [OWC] had not yet signed it, and since [Mr. McCarroll] is now prohibited from using the $21,000 in the MSA to help pay for the surgery that was done, and Medicare will not pay for the surgical costs that exceeded the $21,000, this was not the settlement terms that anyone thought they had negotiated or that they were getting.

On appeal, the Louisiana appeals court upheld the OWC's ruling. In reviewing the record, the appellate court reasoned that the OWC must have concluded that this misunderstanding amounted to a "misrepresentation" (albeit unintentional) on the carrier's part which, per applicable Louisiana law, thereby provided the legal basis for the OWC to set aside the order approving the settlement.

In the Bigger Picture

The *McCarroll* case highlights a few important MSP principles and CMS policies operating in real time. On the one hand, CMS' refusal to pay for the claimant's surgery prior to the court's approval of the settlement is a classic example of CMS asserting a secondary payer status under the MSP. Specifically, CMS still viewed the carrier as the primary payer, since the carrier was still arguably (and very likely legally) responsible for the claimant's compensable medical treatment up until the point that its liability was extinguished by the court's order approving the settlement.

From another angle, this case calls into focus the question of "when" CMS actually deems an approved WCMSA "effective." In this regard, CMS' WCMSA approval letters have long stated that the WCMSA is not considered "effective" until the agency actually receives a copy of the final executed WC settlement agreement, which must include the approved WCMSA amount therein. (*See also*, CMS' WCMSA Reference Guide, Section 10.5 as to CMS' stated requirements).

These important principles and policies must be kept in mind when settling cases involving a WCMSA, with special attention being afforded to any specific settlement provisos or language that may be applicable based on the particular facts of your case.

Mark Popolizio is Vice President of MSP Compliance for ISO Claims Partners. He has authored numerous articles on MSP issues and is a regularly featured presenter at national seminars and other industry events. Prior to dedicating his professional focus to MSP compliance in 2006, Mark practiced workers' compensation and liability insurance defense for ten years representing carriers, employers, third party administrators and self insureds. He is a member of the Florida and Connecticut bars. Mark is based out of Miami, Florida and can be reached at mpopolizio@iso.com or (786) 459-9117.

"True freedom requires the rule of law and justice, and a judicial system in which the rights of some are not secured by the denial of rights to others."

Jonathan Sacks

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The College of Workers' Compensation Lawyers inducted seven members of the National Association of Workers' Compensation Judiciary at the College meeting in Chicago; (left to right) James Szablewicz (VA), Roger Williams (VA), Sheral Kellar (LA), Dwight Lovan (KY), Melody Belcher (GA), Deneise Lott (MS), and Michael Alvey (KY).

Late-Term Compensation Care for Injured Workers

By: Roger Rabb, J.D.

When comparing the costs associated with providing medical treatment for injuries, even job-related injuries, the "common-sense" conclusion might be that costs for a claim will increase as the claimant gets older. However, that conclusion may not be true. In a January 2013 study, researchers for the National Council on Compensation Insurance (NCCI) found that the average annual workers' compensation medical payments made for late-term care to claimants who were younger than 60 years of age at the time of treatment exceeded the average annual payments for claimants who were older than 60 when treated. In a subsequent research brief published in October 2014, "The Impact of Claimant Age on Late-Term Medical Costs," NCCI researchers examined this cost differential by looking at three variables:

- The number of medical services provided and the overall average prices paid;
- The mix of injury types; and
- Prescription drug use.

For this research, the "late-term care" studied was provided in 2011 and 2012 to workers' compensation claimants for injuries that were sustained 20 to 30 years earlier, between 1983 and 1990. The NCCI divided the workers' compensation claimants into two "cohorts," one group with claimants born between 1920 and 1950 (the "older cohort" of claimants over age 60 at the time of treatment), and a second group with claimants born between 1951 and 1970 (the "younger cohort" of claimants no older than 60 years of age).

Cost Differences by Age

The NCCI research found that 57% of the late-term medical costs during the 2011-2012 period were paid for claims by members of the younger cohort, although that cohort accounted for only 45% of the claims made during that period. Consistent with this data, their research also found that average annual medical costs per claim decreased gradually as the age of the claimant increased, from an average annual cost per claim of about $14,000 for claimants in their early 40s to an average annual per claim cost of about $3,500 for claimants who were in their 80s and early 90s.

Comparing the number of services provided per claim and the average cost of those services, the NCCI found that members of the younger cohort averaged 50 late-term medical care services per claim to 36 on average for the members the older cohort, while the average cost per service was about $213 for the younger group, compared to $183 per service for members of the older group. The researchers concluded from this that the number of services per claim was a greater contributor to the difference in claims payments between the two groups than was the cost per service.

Mix of Injury Types

In looking at the type of injuries for the two groups, the NCCI found that diseases accounted for about 70% of late-term claims for both cohorts, and other injury types were generally distributed in similar percentages in the two cohorts. However, some differences were noted. For example, the percentage of quadriplegic and paraplegic claims was almost 4 times higher for the younger cohort, 2.52% to only .66% for the older cohort.

The NCCI researchers noting that this discrepancy between the incidence of quadriplegic/paraplegic injuries between the two cohorts might be the result of the shorter life expectancy associated with those who have these types of severe spinal cord injuries.

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Asked to comment on the NCCI findings, Vernon Sumwalt, of The Sumwalt Law Firm, Charlotte, NC, a board-certified specialist in workers' compensation law, added that he "would not normally expect to find older workers (60 years+) in heavy labor jobs. This might account for more severe injuries requiring more significant treatment in the younger group. The higher incidence of paraplegia and quadriplegia in the younger group is consistent with this . . .."

The seemingly slight difference in the rate of serious spinal cord injuries between the two groups had a larger impact on claim costs. The data collected by the NCCI showed that despite the small percentage of quadriplegic/paraplegic injuries, the cost of treating those claims was proportionately higher, with 16% of the claim costs in the younger cohort going to treat those injuries, compared to 8% of the claim costs in the older cohort.

As noted more generally in the NCCI report, the mix of injuries accounted for about 60% of the difference in average costs between the two comparison groups. Their calculations indicated that of the $4,200 difference in the average annual medical cost per claim between the two groups ($10,700 for the younger cohort compared to $6,500 for the older cohort), the mix of injuries accounted for $2,400 of that difference, with the greater incidence of quadriplegic/paraplegic injuries in the younger group accounting by itself for $1,400 of the difference. Thus, in simple terms, the younger cohort was found to have a more costly mix of injuries than did the older cohort.

Prescription Drugs

The NCCI research found that the proportion of costs allocated to each service category, such as surgery, general medical, and facility costs, was similar between the two groups, with each category in one age group falling within one or two percentage points of the corresponding category in the other group. The research also showed that prescription drugs was the largest single category of expenses for both age groups, comprising 40% of the costs for the older cohort and 38% of the cost for the younger cohort. In comparison, their research indicated that for early-term care provided *within* 20 years of the date of injury, drug costs only averaged about 10% of the total medical costs.

The NCCI report attributes at least a part of the difference between drug costs in early-term care compared to late-term care to a greater emphasis on pain relief associated with late-term care. Deborah G. Kohl, The Law Offices of Deborah G. Kohl, Fall River, MA (co-author of *LexisNexis Practice Guide Massachusetts Workers' Compensation*), commenting on the NCCI results, also noted that "individuals over the age of 60 even with long-term medical problems arising out of workers' compensation claims tend to have additional medical issues resulting in a decreasing emphasis on the work-related treatment and an increased emphasis on age-related medical treatment."

In looking at the drug data, the NCCI also discovered that 8 of the top 13 drugs prescribed for claimants in the younger cohort were narcotics, compared to only 4 of the top 13 drugs for claimants in the older cohort, with narcotics comprising 32% of the total share of prescription drug costs in the younger group to 26% for the older group.

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Their calculations showed that the younger cohort's average annual prescription drug cost per claim was about $1,000 more than for members of the older cohort, with narcotics making up about half of that difference. Overall, prescription drugs made up about 20% of the difference between the two age groups in average annual late-term medical costs. The NCCI research noted that the difference in patterns of prescription drug use between the two groups might be explained at least in part by the increase in possible adverse drug affects in older claimants, who are more likely to be on multiple prescriptions, as well as by a decrease in the body's ability to absorb drugs as it gets older. As noted by Ms. Kohl, "The NCCI findings reveal that medication expense is once again a primary trigger for increased medical costs even 20-30 years post injury."

Concluding Remarks

As we see from the NCCI research, there are a number of factors that might have contributed to explain why the late-term medical costs were higher per claim, rather than lower, for claimants under the age of 60 than for claimants over the age of 60: the claimants under the age of 60 received a greater number of late-term services for claim than did their older counterparts; the mix of injuries being treated was more expensive on average for the younger cohort, with the largest differential being the higher share of treatments for relatively more expensive quadriplegic/paraplegic injuries in the younger cohort; and prescription drug use, especially the use of narcotics, was higher in the younger cohort than in the older cohort.

It should be stressed that the factors explored in the NCCI report might not tell the whole story, however. As Mr. Sumwalt noted, "the risk of cost-shifting for the age group over 60 years . . . has yet to be studied, particularly for those who are at least 65 years old. How much is Medicare paying for injury-related treatment that was left out from the claims studied? This would be useful information to evaluate, just to make sure that the conclusions reached by the [NCCI] data are valid."

**Roger Rabb, J.D. is a Special Correspondent for the LexisNexis Workers' Compensation eNewsletter, www.lexisnexis.com/wcnews, and a contributing writer for Workers' Compensation Emerging Issues Analysis, 2014 Edition (LexisNexis).*

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"At his best, man is the noblest of all animals; separated from law and justice he is the worst."

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Certain Uncertainty

By: David DePaolo*

As the token Californian on the Blogger's Panel at the National Workers' Compensation and Disability Conference in Las Vegas yesterday, I drew fire from moderator Mark Walls, and a bit of derision from my fellow panelists. "Mark, you know why California is so expensive?" I countered to his question to me about the cost of work comp in California. "Because it's worth it..." At least I got the most laughter out of the attendees for the session.

But in all seriousness, California's issue isn't that the system is so expensive - as I implied to the audience in my quip to Walls: the state has always ranked high relative to costs. That's not the issue. The issue is whether the California system delivers adequate and timely benefits to injured workers at a reasonable cost to employers. It doesn't have to be the cheapest, it doesn't have to deliver the most. It just has to be reasonable, and in order to be reasonable it must be consistent, dependable, reliable; in other words, certain.

Utilization Review (and Independent Medical Review) is one of those things that was intended to bring some certainty to the medical treatment delivery process, but as we have seen that mission doesn't seem to be making it into operations. Recently, the Workers' Compensation Appeals Board certified an opinion as "Significant Panel," meaning it can be citable authority, about UR again, reinforcing the concepts discussed in the WCAB's second *Dubon* opinion about timeliness of a UR request: that a UR decision made within the time frame allowed by the Rules of the Administrative Director, but issued to the worker one day too late, is invalid.

Ergo, the WCAB gets to decide the necessity of the medical treatment at issue. In *Bodam v. San Bernardino County*, Timothy Bodam was injured on March 24, 2011. His primary treating physician referred him for a consultation with orthopedic surgeon Wayne K. Cheng. After examining Bodam, Dr. Cheng determined that surgery would improve his condition and on Oct. 28, 2013, he faxed a request to the county's adjuster for authorization to perform a three-level fusion. The adjuster from the State Compensation Insurance Fund forwarded the request to utilization review that same day. The reviewer made the decision to deny the request on Oct. 31, but the SCIF didn't mail written denial letters to Cheng, Bodam and Bodam's attorney until Nov. 5.

Labor Code Section 4610 requires a payer to issue a UR decision on a request for prospective treatment within five days from the point in which the reviewer receives the necessary information to issue a decision. Thus, the UR decision on Cheng's request – coming three days after the request was submitted – clearly was timely. However Section 4610(g)(3)(A) imposes further mandatory time requirements for communicating a UR decision, obligating the payer to communicate the UR decision to the requesting doctor within 24 hours of the decision. The statute also requires that this initial notification be followed by a written notice within two business days.

The Board panel said that Section 4610(g)(3)(A)'s 24-hour time limit begins to run from the date the UR decision is made, even if the UR decision is made in less than five days. As there was no evidence that SCIF informed Dr. Cheng of the UR denial within 24 hours of the decision being made on Oct. 31, the WCAB said that the decision was "untimely and invalid for that reason." The decision was also untimely because the written notice didn't get sent within two business days after the decision was made, the board added. Okay, so now the courts get to decide whether or not medical treatment is reasonable and necessary, but what the Boden case is really about is the failure of the system to meet the mission; the Boden case is all about failing to deliver medical care, and costing a whole lot more than is necessary.

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Boden was injured 191 weeks ago, almost four years. It took until October 2013 to get to the point where a physician decided surgery was needed. The board didn't decide on the failed UR until December 2013.

Now, here we are, almost a year later trying to decide what the right thing to do is. SCIF has spent tons of money fighting the obligation to give this poor man the treatment he needs, deserves, and is entitled to. It would have been cheaper to authorize the surgery, particularly if one looks at all of the ancillary costs to the employer (a governmental entity for which its citizens pay taxes so this impacts all citizens) such as lost productivity, employee replacement costs, overtime, etc.

This case is an indictment against The System, against the carriers, and against the medical providers – everyone is complicit and everyone is guilty. In the end, this poor fellow still doesn't have what he needs – treatment for a workplace injury. The WCAB "kicked the can down the road" by requiring additional medical evidence the surgery is necessary. Worse, the "burden of proof" has transferred to the employee.

In the end – nothing was accomplished. The UR rules are the same as they were ten years ago, the WCAB affirmed. SCIF blew it and I suspect they knew it. In the end, the injured worker still isn't going to get the treatment a Board Certified Medical Doctor determined was needed, and the costs have piled up (and continue to pile up). And there still is no certainty.

David DePaolo founded and grew WorkCompCentral into the most respected news and education service in the workers' compensation industry. He is a regular public speaker on workers' compensation to industry trade shows, educational seminars, radio and television, and has been quoted or cited in general media publications such as Fortune Magazine, the LA Times and Wall Street Journal. He has been published in leading industry journals and scholarly publications on topics ranging from the underlying financial issues that led to an historic makeover of the California workers' compensation system, to the new paradigm in work injury protection and national trends in the workers' compensation industry.

NAWCJ Leaders to Present at ABA Conference

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Naples, Florida

The American Bar Association Section of Labor and Employment Law and the Tort, Trial and Insurance Section ("TIPS") joint workers' compensation committee will present a continuing education program next March in Naples, Florida. Judge Melodie Belcher will moderate a panel discussion, "The Quality of Evidence – Relevance and Persuasive Value." The panel will include NAWCJ Board members Chief Judge Sheral Kellar (LA), Senior Judge Deneise Lott (MS), and Chief Judge Jim Szablewicz (VA).

The types of evidence discussed may include social media, text messages, prior medical history, spousal testimony, co-worker testimony, doctor testimony/depositions, video depositions, medical questionnaires, standardized medical records, hospital records, criminal convictions, personnel records and more.

The focus will not be on the admissibility of the evidence per se, but more on the relevance of the evidence with regard to the decision-making process. The judges will provide their perspectives and experiences regarding the persuasive value of the different types of evidence – that is, when, if ever, is a particular type of evidence likely to sway a judge to rule in a particular party's favor.

These issues confront trial judges regularly, and the experience of these four experts will be from a broad perspective of four jurisdictions, and hundreds of actual trials conducted and decided.

Register now
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The American Bar Association Section of Labor and Employment Law and the Tort, Trial and Insurance Section ("TIPS") Presents:

The Workers' Compensation Committee Midwinter Seminar and Conference

Topics will include A Look to the Future of Workers' Compensation, A Primer on Texas and Oklahoma Law, Unusual Medical Care, the Interplay of Workers' Compensation and Labor Law, Workers' Compensation and Medicare/Medicaid/ACA, a Judges' Panel, presented in conjunction with the CWCL, and numerous others.

March 19-21 2015

Naples Grande Beach Resort

Naples, Florida

Details at:
http://shop.americanbar.org/ebus/ABAEventsCalendar/EventDetails.aspx?productId=137172674

College of Workers' Compensation Lawyers

The College of Workers' Compensation Lawyers 2015 Induction Dinner will be March 21, 2015.

THE NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY

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