Lex and Verum

The National Association of Workers' Compensation Judiciary

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February 2015

The State of the Association

By Hon. Michael Alvey*

Throughout my career I have been blessed with friendships forged through the practice of workers' compensation law, whether with clients, opposing counsel or judges before whom I practiced. The same is true of the friendships developed through involvement in the NAWCJ. Participation in our association has provided the opportunity to meet and work with some of the finest judges I have ever known. It is comforting to know I can send an e-mail or pick up the telephone to discuss issues with judges elsewhere who may have already dealt with the same or similar situation. Although the law varies from state to state, there are some basic factors which are common to all.

At this time I would like to take the opportunity to thank and provide best wishes to two of my very good friends I have met through the years, Hon. J. Landon Overfield, Chief Administrative Law Judge from Kentucky, and Hon. Stephen Farrow, from Georgia. First, I bid farewell to Chief ALJ Overfield who decided to retire effective December 31, 2014 after more than twenty years of service as an administrative law judge in Kentucky. I have a unique relationship with Chief ALJ Overfield in that I practiced cases against him for over five years before he was first appointed as a judge. I then practiced cases before him for over sixteen years before I was appointed to the Kentucky Workers' Compensation Board. To my adversary, mentor and most importantly, friend, I wish you Godspeed and hope you have a long and happy retirement. I note Judge Robert L. Swisher has replaced Judge Overfield as chief administrative law judge. We wish good luck to Chief ALJ Swisher in his new position.

Next, I attended my first NAWCJ judicial college in August 2010. At that time, I met Judge Farrow who was then serving on the Georgia Workers' Compensation Board.

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Since then I have had the opportunity and honor to work with Judge Farrow on multiple projects. Judge Farrow is a great friend who never hesitated to contribute his time and talent to the NAWCJ. In late December 2014, I learned Judge Farrow was leaving his post as judge to return to private practice. Judge Farrow will be greatly missed. I wish my friend Steve all the best in his new endeavor. He will be greatly missed.

Finally, I direct your attention to the article included in this newsletter, *The Top 10 Bizarre Workers' Compensation Cases*. We all deal with unique situations and strange cases. I'm confident we as a group could supplement the article with cases stranger and more bizarre than those listed. As we all know, the truth is stranger than fiction. When reading this article, as the author suggests, remember these cases involve real people, with real problems having a direct impact on their lives. Nevertheless, these case summaries reflect situations we are all confronted with more often than those outside our profession can appreciate.

Thanks for all you do.

Teams and Judges Sought for Moot Court 2015

The NAWCJ is a proud sponsor of the E. Earle Zehmer National Moot Court Competition. This is the only workers' compensation moot court competition with all rounds judged by workers' compensation adjudicators.

Organizers need your help recruiting out-of-state law schools for the competition held in Florida. Please email Barbara Wagner, Esquire barbw@sportsinjurylaw.com with contact information for your alma mater and your local law schools with moot court teams. Invitation letters will be mailed this month so don't delay!

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10 Challenges Ahead for Workers' Compensation

INSURANCE JOURNAL

By Andrea Wells*

Ed. Note: The TRIA reauthorization noted on page 8 has since been signed into law.

Today's challenges are also tomorrow's opportunities depending on the viewpoint. Those same opportunities could also remain tomorrow's challenges. This special report highlights 10 current workers' compensation issues and offers opinion on why they could be tomorrow's challenges for the line.

Wage & Salary Stagnation

Average U.S. base salary increases for 2014 held steady at 3 percent for the second year in a row, but pay raises still are roughly one percentage point below pre-recession levels, according to the annual Compensation Planning Survey by Buck Consultants.

Low to moderate pay wages haven't helped the workers' compensation market. "Salary stagnation or low growth of wages will have a telling impact on the workers' comp industry in the future for the simple reason that payroll growth is necessary in order to have premium growth," says John Leonard, president and CEO of MEMIC, a Super Regional workers' compensation specialist insurer based in Portland, Maine. "If you consider that payroll is one of the basic components of developing a premium for a risk, once you have no growth or low growth that has a capping effect, so to speak, in terms of premium growth."

Therefore the problem for tomorrow's workers' comp market will be not enough premium growth to cover the costs associated with the medical component of the claim dollar, Leonard says. "We have seen over the past 20 to 30 years, a shift in terms of the split between medical cost and indemnity costs as outlined in a claim dollar. It used to be that 60 percent of a claim dollar was attributable to indemnity payments and 40 percent was attributable to medical. Now, in many jurisdictions, you're seeing that medical is 60 percent or more of the claim dollar and 40 percent is part of the indemnity dollar," he says. "So if, in fact, there is a slow or no wage growth, we're going to see a continuing imbalance in terms of the growth of the medical component with no growth on the indemnity side."

Technology and Innovation

When it comes to technological innovations, the health care industry's advancements dwarf anything that's developed in the workers' comp industry for years, says Thomas Lynch, founder and CEO of Lynch Ryan & Associates Inc., a management consulting firm for workers' compensation cost control based in Wellesley, Mass., and publisher of the blog WorkersCompInsider.com. "The P/C insurance industry is very slow to innovate and is lagging behind other industries, as well as other parts of the insurance industry, in adoption and rapid movement to technology usage and innovation," he says.

In Lynch's view, the workers' comp industry is way behind and it must catch up. "For example, there's a huge move now in the Veterans Administration called the Blue Button Project, where if you're a patient you have a portal. You can go in and you can see all your medical records. You can communicate with your doctors. It's a great back and forth system." There's nothing quite like it the workers' comp industry, he says. "That kind of patient back and forth could really be a benefit in, wellness programs, in claims administration."

The workers' comp industry also lags in providing mobile claims reporting technology. "Even now, today, the usual way is that when you have a claim, you'll go online and file a report online or you'll make a phone call.

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Why couldn't you take out your smartphone, have a voice activated app that could allow you to report directly into your carrier's system which would, in real time, display for a claims adjuster?" he says. "Why can't you, at the same time, take a picture of the incident on your smartphone and include that with the report – the whole claim reported and done in five minutes. We can't do that now and yet we can do it in other areas."

Jonathan Gruber, professor of economics at the Massachusetts Institute of Technology (MIT), believes the workers' compensation system must align itself with the rest of the changing health care system to avoid increased costs.

Gruber, who was involved in creating Obamacare and the Massachusetts health insurance system, said that while workers' compensation carriers should see fewer claims as a result of more Americans obtaining health insurance, there are other forces at play that could mean higher costs and other challenges for workers' compensation. "As more people have health insurance there is less need for them to have injuries covered by workers' compensation and this should lower workers' compensation costs," he said.

However, that effect could be offset by employers moving to high-deductible plans and limiting provider networks as well as by health plans capping reimbursements to medical care providers. "Other payors are going to get tougher at a quicker rate than workers' compensation is and that is a challenge for this group and the workers' compensation community," Gruber says. "Workers' comp and the rest of P/C (property/casualty) has to get its act together, has to rededicate itself to delighting the customer, to having a dynamic relationship with the customer, and understanding that the customer is the most important thing in its universe," Lynch says.

Opioid Abuse

The biggest issue facing the workers' compensation industry and for years to come is long-term use of opioids, says Joseph Paduda, principal of Health Strategy Associates LLC, a national consulting firm specializing in managed care for workers' compensation and group health. "There are probably more than 200,000 workers' comp claimants who have been on a high dose of opioids for more than six months. The vast majority of those are addicted," he says.

While the industry is doing a better job of preventing inappropriate use of opioids on the front end for new claims, there are few success stories with long-term users. Aside from addiction concerns, hundreds of workers' comp claimants die each year as a result of opioid poisoning, Paduda says. "We – the workers' comp industry – have become the addiction creation industry."

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NAWCJ Board of Directors

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The concerns over opioid addiction will plague the industry for many years to come. First, claimants addicted to opioids are not going back to work. "Therefore, their claims are going to continue and that runs up employers' costs, and taxpayers' costs, quite significantly," according to Paduda. The other, more troubling challenge associated with opioid abuse is the societal cost. Aside from the thousands of opioid overdoses, and the hundreds of deaths, evidence shows drug diversion from workers' comp related injuries. "The data indicates that about 19 percent of claimants who are prescribed opioids, when they're drug tested, there's no evidence of the drug in their urine," he says. That means that those opioids prescribed to workers' comp claimants are getting in the hands of people who are going to use them for illicit purposes.

Another societal concern: opioid addiction is leading to a dramatic rise in heroin usage. "It's a problem that is challenging the workers' comp industry, but it's also bleeding over into and having a very definite negative impact on society as a whole," Paduda says. So far the workers' comp industry has moved slowly in addressing the crisis. In Paduda's view, a lot of players have yet to fully understand the financial impact of opioids.

"I've talked to actuaries and claims people both payers and also at large research organizations. I don't know anybody who's done research that separates out the impact of opioids from non-opioids," he says. "When the actuaries calculate how much more expensive claims are when the patient has opioids than when they do not, and they have a similar type of claim, I think there are going to be some jaws dropping and some clamor for action," he says. But that has yet to happen.

Marijuana in the Workplace

The use of medical marijuana is a highly publicized development that could present a number of concerns for workers' compensation in the coming years. First is the issue of legality, the experts say, because marijuana is considered an illegal substance under federal law, listed as a Schedule I drug under the Controlled Substances Act. However, 20 states and the District of Columbia have legalized marijuana for medical use and several others are considering legislation.

The real issue when it comes to workers' comp, according to MEMIC's Leonard, is that so far there's no proof that using medical marijuana to treat injured workers works. "In other words, there's a lot of commentary regarding it but there's no empirical evidence to support that it actually is effective in treating conditions that we see in workers' compensation," he says. "It's somewhat of a mystery right now to many of us who handle this line of insurance."

While there's a lot of talk so far there is no claim activity. "Medical marijuana is a tempest in a teapot," says Paduda. No one has had any claims. "It is probably one of the most widely discussed issues right now in the area of workers' compensation," Leonard says. "We are the fourth largest workers' comp carrier in New England and all six New England states currently legalize the use of medical marijuana, and yet, we have not been hit with a single claim."

Leonard says that doesn't mean there won't be an influx of medical marijuana claims in the future. If and when those claims begin to come in, the workers' comp industry will have much to consider. "We've got conflicts all over this issue," he says. "I can only forecast that over the next couple of years, you're going to see an awful lot of commentary regarding the use of medical marijuana in the workplace. Many of us at this point in time simply haven't had the experience or the insight to clearly outline how it's going to impact the workers' comp industry."

Manufacturing

The United States is once again a "rising star" of global manufacturing thanks to falling domestic natural gas prices, rising worker productivity and a lack of upward wage pressure, according to a recent report by the Boston Consulting Group. The report found that while China remains the world's No. 1 country in terms of manufacturing competitiveness, its position is "under pressure" as a result of rising labor and transportation costs and lagging productivity growth.

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The United States, meanwhile, which has lost nearly 7.5 million industrial jobs since employment in the sector peaked in 1979 as manufacturers shipped production to low-cost countries, is now No. 2 in terms of overall competitiveness, BCG found.

The biggest factor driving the U.S. rebound, according to BCG: cheap natural gas prices, which have tumbled 50 percent over the last decade as a result of the shale gas revolution. Also contributing to the country's attractiveness, according to BCG, is "stable wage growth" – a euphemism for the fact that, in inflation-adjusted terms, industrial wages here are lower today than they were in the 1960s even though worker productivity has doubled over the same period of time.

The trend is great for the U.S. economy but MEMIC's Leonard sees some challenges ahead for the workers' comp line as a result of new workers entering into the manufacturing process. "The reality of it is studies confirm that new workers are more subject to injury than experienced workers," Leonard says. "There is a potential for an uptick in terms of frequency brought on by the expansion of manufacturing for that simple reason alone, the influx of new and perhaps untrained workers taking on these jobs as the economy expands."

While Lynch agrees the rise in manufacturing will lead to higher loss costs for workers' comp due to the increased exposures that come with more workers, he also predicts a future with higher-educated workers in manufacturing that could result in few injuries overall.

Many business leaders realize that manufacturing is the future, he says, and have invested in technical trade schools that develop students with advanced technology skills suitable for tomorrow's manufacturing jobs. "Manufacturing in the U.S. means advanced technology yet we were not turning out high school graduates who could compete for the jobs that that advanced technology was going to require," he says.

Now, vocational high schools are popping up across the country with high-tech programs that cater to advanced manufacturing concepts. That means a "better educated workforce, which means that we'll have fewer injuries," he says.

Affordable Care Act

Most research surrounding the Affordable Care Act's (ACA) impact on the property/casualty markets points to modest changes, at best. However it's still far too early to estimate the ACA's effect on the workers' compensation line, according to MEMIC's Leonard. "We hear arguments that it should create a more healthy workforce, which would benefit us; it would have an impact on cost shifting," Leonard says.

However, the other side of that story could be more people inclined to file for non-work related injuries through the worker's comp system. "A lot of people injured over the weekend, they simply hold off until Monday to make sure that it is qualified as a workers' comp injury (also known as the Monday Morning Syndrome)," he says. "But again, I think the jury is still out. We haven't had enough experience with the ACA to clearly determine trends that will have either a positive or a negative impact on workers' comp results."

A bigger concern is the expectation that Medicare might start reducing its reimbursement rates as a result of ACA rules. If that happens, medical providers could start feeling a pinch, says Harry Shuford, NCCI chief economist. "Combined with the growth in Medicaid – where reimbursement rates are quite low – there is some concern that providers might start to find ways to get their patients' injuries covered by workers' comp, a concept called cost shifting," he says. "That is potentially a bigger concern, but right now the whole thing is uncertain."

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At least for the near term, the ACA is not likely to have a material impact on the workers' comp market, according to NCCI. The longer-term impact could bring some positive results, Shuford says. "The most important impact will be the ACA's efforts on what they are calling comparative effectiveness – essentially doing scientific research to determine best practices for treating injuries and illnesses," Shuford says.

Shuford says there's considerable diversity in how doctors treat common workplace injuries. "Our data shows that for a standard diagnosis, a rotator cuff or a knee injury, if you look across the states the percentage of those injuries that require surgery can vary from one-third to almost two-thirds depending on the state you are in. That suggests that there is not clarity in terms of what is the most appropriate way to treat these injuries. Is surgery a good thing and if so when is it a good thing?"

The initiatives in the ACA on identifying best practices through comparative effectiveness could result in significant positive implications for workers' comp in the future, Shuford says.

Workplace Safety

One area of the workers' comp system that has seen tremendous change over the past 30 years and will continue to see change in the future is workplace safety. "People may not notice but safety in the workplace has continually improved since the 1972 passage of OSHA," Lynch says. On the other hand, there are still pockets in various industries where bad things happen because people are trying to cut corners.

One trend over the past several years that Lynch says will continue in the future is increased prosecution of the worst offenders. "OSHA is focusing on working with the Justice Department and people are going to jail for doing things that are willfully unsafe in the workplace – where people are getting killed," he says.

There have also been more advances made in auto safety than anywhere else, he notes. Those efforts have led to safer workers on the roads.

Workplace safety is not something that happens overnight. "It's a multi-generational effort to change a culture of unsafe workplace practice. To change that takes a long time," he says. "On one hand we've come far, and on the other hand we still have a ways to go with keeping workers safe. We will always have this kind of problem."

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Gov. Heineman Appoints Julie Martin to Nebraska Workers' Compensation Court

In December, Gov. Dave Heineman announced his appointment of Julie Martin of Omaha for the Nebraska Workers' Compensation Court.

Since 2004, Martin has been an attorney at Nolan, Olson & Stryker. Prior to that, she served in the law firm Rehm, Bennett & Moore. She serves clients involved in litigation pertaining to workers' compensation, personal injury, wrongful death and other matters.

She earned her Juris Doctor from Creighton University in Omaha and has been a member of the Nebraska Bar Association since 1994. She is also a member of the Iowa Bar Association, the United States District Court for the State of Nebraska and for the Southern District of Iowa.

Martin volunteers in the Omaha community through her church, including serving communion to the homebound and serving meals in local shelters. She is also active in children's youth sports activities, serving as coach and team manager.

The vacancy is due to the resignation of Judge Michael K. High. The Workers' Compensation Court administers and enforces all provisions of the Nebraska Workers' Compensation Act, except those provisions that are committed to the courts of appellate jurisdiction or as otherwise provided by law.

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Terrorism Risks

Absent Congressional action, the Terrorism Risk Insurance Program Reauthorization Act (TRIPRA) of 2007 will expire on Dec. 31. The possible expiration of the federal backstop has driven the issue to the top of priority lists of a wide swath of stakeholders, including the workers' compensation industry. "TRIA is absolutely essential to the continuation of worker's comp insurance," says MEMIC's Leonard. "There's no question, but it has to be renewed in some form."

"The expiration of the federal backstop would likely result in the scenario that played out both in the insurance industry and across the broader economy in the period between the 9/11 attacks and the enactment of TRIA in 2002," wrote Tim Tucker, NCCI Washington Affairs Executive, in his April report titled "The Future of Terrorism Insurance Backstop." "Carriers limited capacity or excluded the terrorism risk from property coverage altogether. Regarding workers' compensation, the inability of carriers to exclude any peril resulted in growth in the residual market," Tucker wrote.

"The problem that we have with TRIA right now it it's viewed as an insurance industry problem. That's not the entire story. This is an economic problem for the United States," Leonard says. "Absent the renewal of TRIA, it will have a major impact on the economy of the United States going forward." The federal terrorism backstop is essential to the workers' comp industry because in many cases, "we cannot simply terminate a policy," he says. "We cannot reduce the coverages handed to us by statute. You cannot, in workers' comp, tell somebody that your injury isn't covered because it resulted from a terrorist attack. That's just not the way the statute reads. We cover you for any and all workplace injuries" – terrorism related or not.

Workers' comp could be in trouble without the federal backstop for terrorism coverage. "It would be catastrophic to the insurance industry and it would have a major negative impact on the U.S. economy," he says.

Workforce Demographics

While many in the workers' compensation world discuss the aging workforce and health challenges such as obesity impacting the bottom line, NCCI's Shuford sees the younger generation as a growing concern.

"When you talk about age demographics, I actually think we need to be more concerned about young people than old people, particularly young men," he says. "They are not participating in the labor force the way that they used to. Their labor force participation rates are down. Many of them are not even looking for work. Many do not have job skills or can't pass a criminal background check or a drug test. We are simply not getting the flow of young and vibrant workers into the workforce like we used to."

That's a concern for everyone, he says. "As a nation and as an industry we need to be thinking about that every bit as much as we think about older workers," Shuford says. "Our own research shows that for the older people that are still in the workforce, their injury rates are about the same as workers in their mid-30s to mid-40s and the average cost of a claim is the same as it is for workers in their mid-30s and mid-40s."

That means older workers – at least those still in the workforce – do not appear to be imposing a significant burden on the workers' comp system.

"Our research suggests that what we ought to be worried about is not the older workers but instead the middle aged workers. Over the last 15 years what we have observed is injuries that used to be prominent amongst older workers – rotator cuffs and knee injuries are now becoming very prominent in workers in their mid-30s to mid-40s." Those injuries tend to be high cost and often permanent disabilities. "Everybody talks about the aging baby boomers putting pressure on the workers' comp system when in reality we need to be concerned with middle aged workers," Shuford says.

Mobile Workforce

The use of telecommuters – or the mobile workforce – has grown by nearly 80 percent since 2005, according to Global Workplace Analytics, a San Diego-based consulting and research firm that focuses on the business case for emerging workplace strategies. While telecommuting grew by 3.8 percent from 2011 to 2012, the size of the overall the non-self-employed workforce actually declined 1.5 percent, according to Global Workplace Analytics statistics.

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"For the period from 2005 to 2012, the telecommuter population grew by 79.7 percent while the non-self-employed workforce grew by only 7.1 percent." A mobile workforce presents both challenges and opportunities for businesses and their workers' compensation insurers. "If you consider that in 2013, 26 percent of all automobile crashes in the United States involved the use of a cellphone that brings home the idea that if you're working in a building, the employer can control a lot of things. But once you leave that building and get into your own little car or your employer's car and you drive somewhere, that arm of control isn't quite there like it used to be," says Lynch.

According to Lynch, the jury is still out on whether growth in the mobile workforce will continue. "Companies are beginning to realize that it might be more in their best interest to bring people back together, in a cohesive work environment, rather than having them off site so much," he says. "For example, if your commute is from 20 feet from your bedroom to your home office, that's really nice and all that but when you get up from your desk and you step around a corner and you trip on your son's skateboard and you land on your face and get hurt, what does that mean for workers' compensation?" he jokes.

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* Andrea Wells is the Editor in Chief of the Insurance Journal and Claims Journal magazines. She is a graduate of the University of Texas at Austin.

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The Top 10 Bizarre Workers' Compensation Cases for 2014

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

For the past five or six years, I've shared with readers my annual list of bizarre workers' compensation cases for the prior year. In doing so, I reenact, at least in part, a tradition that my mentor, Arthur Larson, and I shared prior to his death some years ago. Each January, Arthur and I would meet in Arthur's home on Learned Place, near Duke University's campus and review our respective lists of unusual or bizarre workers' compensation cases reported during the previous 12 months. Usually our respective lists would overlap a bit, but he'd always have several with truly quirky fact patterns that I had missed. One thing we always kept in mind: one must always be respectful of the fact that while a case might be bizarre in an academic sense, it was intensely real. The cases mentioned below aren't law school hypotheticals; they affected real lives and real families. And so, to continue in the spirit of that January ritual, here follows my list (in no particular order) of 10 bizarre workers' compensation cases during 2014. I'm gratified that the annual list's popularity has grown over the years. It's even been featured on National Public Radio's Saturday morning show, "Wait, Wait … Don't Tell Me." If you know of other cases that should have been included in this year's list, let me know. Send them—along with questions or comments—to trob@workcompwriter.com.

CASE #1: Undocumented Worker's Fatal Heart Attack While Fleeing Immigration Service Raid on Employer Was Not Compensable. The death of a lumber mill employee, who came to the United States from Mexico, who had used falsified documentation to obtain employment, and who suffered a fatal heart attack as he and other undocumented workers ran from the employer's premises in an effort to avoid what they thought was an imminent raid by officials from the Immigration and Naturalization Service, did not arise out of the employee's employment, held the Court of Appeals of North Carolina. Moreover, the appellate court agreed with the state's Industrial Commission that competent evidence supported the state Industrial Commission's finding that there was no increased risk to the employee of an immigration raid as part of his employment with the employer; the employee's death was caused by a risk which was neither "inherent or incidental to the employment" nor a risk to which the employee "would not have been equally exposed apart from the employment." See *Paredones v. Wrenn Bros.*, 2014 N.C. App. LEXIS 468 (May 6, 2014). See generally *Larson's Workers' Compensation Law*, §§ 4.02, 66.03.

Case #2: Family Argument Over Nigerian Investment Scam Turns Ugly, Injury Claim Not Compensable. An Iowa appellate court affirmed a finding that a worker's injuries were not accidental—and, therefore, not compensable—when she fell to the floor after being "bumped" by her brother, who was also a co-worker. Evidence suggested the employer was owned by the worker's husband and the worker's brother, that her husband had been convicted of tax fraud in the wake of his use of company funds in a Nigerian investment scam, and that the worker's brother had assisted in the prosecution of the case, which resulted in the worker's husband serving eight months in a federal prison. Further evidence suggested that following her husband's conviction, the worker had apparently asked a friend to find her brother and "break his legs," that the worker and her husband tried to have criminal charges brought against the worker's brother for an incident involving another relative, and finally, after the worker's "fall," both the worker and her husband told law enforcement officials that the worker's brother intentionally knocked the worker down.

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The court indicated the evidence was sufficient to persuade a reasonable person that the worker's brother acted intentionally and for reasons personal to the worker. See *Dillavou v. Plastic Injection Molders, Inc.*, 2014 Iowa App. LEXIS 873 (Aug. 27, 2014). See generally *Larson's Workers' Compensation Law*, § 42.01.

CASE #3: Food Store Manager's Murder by Jealous Assailant Arose Out of and In Course of Employment. A Florida appellate court held that fatal injuries sustained by a food store manager who was struck and run over by a car driven by a man who claimed to have been reacting to the decedent's alleged sexual harassment of the man's girlfriend, who worked as a cashier at the food store, were held to have arisen out of and in the course of the employment in spite of the personal animosity that triggered the event. Reversing a decision of a state Judge of Compensation Claims and quoting *Larson's Workers' Compensation Law*, the appellate court found that the nature of the work environment—at the time of the attack, decedent was collecting shopping carts in the employer's parking lot—did, indeed, place the decedent at risk incident to the hazards of his industry and that while the decedent had no apprehension of personal animosity of a co-worker's jealous boyfriend, there was no question that the "genesis" for the dispute giving rise to the fatal injuries was in the workplace. See *Santizo-Perez v. Genaro's Corp.*, 138 So.3d 1148 (Fla. 1st DCA 2014). See generally *Larson's Workers' Compensation Law*, § 8.01.

CASE #4: Gun-Wielding Store Manager's Death While Attempting to Stop Robber Found Compensable. A Pennsylvania appellate court, reversing a decision of the state's Workers' Compensation Appeal Board, determined that a convenience store manager did not abandon his employment and, in fact, was actually furthering the business affairs of his employer when he was severely injured—the injuries eventually resulting in his death—while attempting to stop a thief from leaving the employer's premises after an attempted robbery at the store. The employer contended that the employee, who was struck and run over by an automobile being driven by the would-be robber as the latter fled the scene, had violated a positive work rule by possessing a gun on the employer's premises.

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Michigan Board of Magistrates Appointments

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On January 23, 2015, Governor Rick Snyder announced eight reappointments to the Workers' Compensation Board of Magistrates.

The 17-member board hears administrative claims for benefits and works to resolve disputes arising under the Workers' Compensation Act.

"These appointees have decades of valuable work experience and I am confident they will continue to fairly and effectively serve the people of Michigan," said Snyder.

Reappointed:

Lisa Klaeren is reappointed chair of the board and has more than 27 years of experience in workers' compensation. Klaeren earned her law degree from Thomas M. Cooley Law School.

Brian Boyle was appointed to the board in 2011 and has more than 34 years of experience in workers' compensation. He earned his law degree from Thomas M. Cooley Law School.

David Grunewald has more than 37 years of workers' compensation experience. He earned his law degree from Detroit College of Law.

Beatrice Logan has more than 22 years of workers' compensation experience. She earned her law degree from the Detroit College of Law.

Luke McMurray has specialized in workers' compensation for 34 years. McMurray earned his law degree from the Detroit College of Law.

Louis Ognisanti was first appointed to the board in 2011. He earned his law degree from Wayne State University.

Chris Slater has specialized in workers' compensation for 19 years. He earned his law degree from the University of Michigan.

Robert Tjapkeshas specialized in workers' compensation for 22 years. He earned his law degree from Marquette University.

Members will serve four-year terms expiring Jan. 26, 2019. Their appointments are subject to the advice and consent of the Senate.

Top 10 Bizarre, from Page 12.

The employer also contended that the employee "had embarked on a vigilante mission" to apprehend the fleeing suspect in an already foiled robbery attempt, that the employee and others had been told, "not to be heroes," and that the actions of the employee removed him from the course and scope of the employment. The employee's dependents countered that there had been many robberies in the area, that the employee had actually shot a thief robbing the employer's store in 2007, and that the employer knew that the employee carried the gun and condoned the action. The appellate court emphasized that the entire incident had been fast-moving, that the employee had been pursuing his employer's interests—not his own—and that the employee's pursuit of the robber was not so far removed from his duties as a manager as to constitute a deviation from the employment. See *Wetzel v. Workers' Comp. Appeal Bd. (Parkway Service Station)*, 92 A.3d 130 (Pa. Commw. Ct. 2014). See generally *Larson's Workers' Compensation Law*, §§ 28.01, 33.01.

CASE #5: Assistant Manager's PTSD Claim Tied to Murder-for-Hire Scheme Found Compensable. A New York appellate court, affirming a decision of the state's Workers' Compensation Board, held that the exacerbation of a supermarket assistant manager's preexisting PTSD arose out of and in the course of his employment when, after he called a coworker at her home to discuss a work-related matter, the coworker's husband, who thought that the manager and his wife must be having an affair, targeted the manager in an unsuccessful murder-for-hire scheme. The irate husband also contacted the assistant manager's supervisor regarding the suspected affair, resulting in an investigation and the subsequent decision by the assistant manager to seek a transfer to another store. The appellate court indicated that if there was any nexus, however slender, between the motivation for the assault and the employment, an award of workers' compensation benefits was appropriate. Here, the work-related phone call from claimant to his coworker's home was the basis for the subsequent harassment of claimant at his place of employment, the employer's internal investigation and claimant's request for a transfer—all of which exacerbated claimant's preexisting PTSD. See *Matter of Mosley v. Hannaford Bros. Co.*, 119 A.D.3d 1017, 988 N.Y.S.2d 303 (2014). See generally *Larson's Workers' Compensation Law*, § 8.02.

CASE #6: Recreational Drug User Entitled to Inpatient Care to Treat Worsening Drug Problem Following Robbery and Work-Related Shooting. A retail employee was shot multiple times by assailants who returned to the employee's place of business after a robbery in apparent retaliation for the employee's reporting the incident to police. The employee claimed to have developed PTSD as a result of the incident. The Supreme Court of Nebraska held that the employee was not only appropriately awarded medical and disability benefits for his PTSD condition, but the employee was also entitled to inpatient care to treat a pre-existing non-prescription drug problem that the employee claimed had worsened due to his anxiety over the shooting. Evidence suggested that even after the shooting, the assailants contacted the employee yet again, threatening the employee and his family. The court held that the employee, who admitted he was a recreational drug user prior to the shooting, was entitled to additional benefits to treat his worsening addiction. See *Kim v. Gen-X Clothing, Inc.*, 287 Neb. 927, 845 N.W.2d 265 (2014). See generally *Larson's Workers' Compensation Law*, § 66.03.

CASE #7: Attorney's "Rainmaking and Networking" in Connection With Harley-Davidson Rally Was Not Sufficiently Connected to Employment to Support Claim. A Wisconsin appellate court affirmed a finding by the state's Labor and Industry Review Commission that concluded an attorney was not performing services growing out of and incidental to his employment at the time he was involved in a motorcycle accident that rendered him a quadriplegic. The attorney contended his compensation at the firm was based on two components: (a) the work he performed; and (b) clients brought into the firm, regardless of who performed the legal work. He contended that in order to stir up business for the law firm he joined a poker group comprised of small business owners, including Franken, a real estate appraiser. The law firm reimbursed him for snacks he supplied for the poker nights and the attorney indicated his participation was part of the overall marketing that he did for the firm. He sustained serious injuries while riding Franken's motorcycle as the two traveled, along with their wives, to a Harley-Davidson motorcycle rally.

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North Carolina Industrial Commission Appoints Deputy Commissioners

North Carolina Industrial Commission Chairman Andrew T. Heath has announced the appointment of seven deputy commissioners; all appointments are for six-year terms.

Deputy Commissioners are the Industrial Commission's trial-level judges and hold hearings in contested workers' compensation cases, state tort claims, and other matters. "I am pleased to appoint these qualified individuals to serve as deputy commissioners," said Chairman Heath. "Their past experiences and qualifications will prove beneficial to the Industrial Commission as well as to the state's workers and businesses."

Lori W. Gaines has more than 15 years of legal experience including workers' compensation. Gaines is a graduate of Campbell University School of Law.

Melanie Wade Goodwin has served as a Deputy Commissioner since July 2011. Goodwin is a graduate of the University of North Carolina.

Sumit Gupta has served as a Deputy Commissioner since October 2014. He previously served as the Industrial Commission's General Counsel. He earned his J.D. and MBA degrees from Wake Forest University.

Robert J. Harris has served as a Deputy Commissioner since 2005. Harris is a graduate of North Carolina School of Law.

Christopher C. Loutit was sworn in as Chief Deputy Commissioner in January 2014. He previously served as the Industrial Commission's Administrator. Loutit is a graduate of the American University Washington College of Law.

William "Bill" Shipley has practiced workers' compensation since 2012, and is a former prosecutor. He graduated the University of South Carolina Law School.

Michael Silver currently serves as an Assistant District Attorney in Forsyth County. He is a graduate of the North Carolina Central University School of Law.

Top 10 Bizarre, from Page 13.

The appellate court agreed with the Commission's determination that even if the poker games could be considered client entertainment, it did not necessarily follow that every trip or activity the attorney and Franken undertook together was client entertainment or business-related networking. Based on the court's review of the record, it concluded that there was credible and substantial evidence to support the Commission's conclusion that the motorcycle trip was "simply a social outing among friends who occasionally did business together." See *Westerhof v. State Labor and Indus. Review Comm'n*, 354 Wis. 2d 621, 848 N.W.2d 903 (2014). See generally *Larson's Workers' Compensation Law*, § 22.01.

CASE #8: Attendant Care-Providing Mother's Injuries at Hands of Knife-Wielding Son Are Compensable. Reversing a decision by the state's Workers' Compensation Appeal Board, a divided Pennsylvania appellate court applied the bunkhouse rule to support an award of benefits to a woman employed under a state-funded program to provide attendant care services at her residence for her adult son when she was brutally attacked by the knife-wielding son while she slept. The son, who needed care because his leg had been amputated, had previously suffered from drug dependency, but had shown no signs of violent behavior. Quoting *Larson's Workers' Compensation Law*, the majority of the appellate court reasoned that the mother's attendant care duties required that she be on the premises. That she was sleeping and not performing actual services at the time of the attack did not control. See *O'Rourke v. Workers' Comp. Appeal Bd. (Gartland)*, 83 A.3d 1125 (Pa. Commw. Ct. 2014). See generally *Larson's Workers' Compensation Law*, § 24.03.

CASE #9: Traveling Employee Rule Doesn't Save Drunken Employee's Dune Buggy Claim. A claims adjuster who had been assigned remote duties in connection with the devastation to Galveston Island caused by Hurricane Ike, and who drank one evening to the point of intoxication, did not remain within the scope of employment under the traveling employee doctrine, held a Washington appellate court.

Continued, Page 15.

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Top 10 Bizarre, from Page 14.

Accordingly, injuries sustained when he apparently fell from some sort of vehicle while "riding in [the] dunes" were not compensable. The court acknowledged that a traveling employee is generally considered to be in the course of employment continuously during the entire trip. There is an important exception, however, if the employee engages in a distinct departure on a personal errand. The court added that the proper inquiry in determining if a traveling employee has left the course of employment is "whether the employee was pursuing normal creature comforts and reasonably comprehended necessities or strictly personal amusement ventures." The employee admitted that on the evening of the injury he had been drinking heavily and could not really recall the circumstances leading up to the incident. The court held that becoming intoxicated was not necessary to the employee's health and comfort. Moreover, without evidence as to how the accident occurred, any theory offered by the employee was purely speculative. See *Knight v. Department of Labor and Indus.*, 181 Wn. App. 788 (2014). See generally *Larson's Workers' Compensation Law*, § 25.01.

CASE #10: Court Affirms PTSD Award to Physician's Assistant Threatened by Surgeon During Surgical Procedure. A New York appellate court affirmed a decision of the state's Workers' Compensation Board that awarded workers' compensation benefits for a stress-related injury sustained by a cardiothoracic physician's assistant ("PA") who contended she was threatened with physical violence by a surgeon during an hours-long procedure in the operating room. The PA sought psychiatric treatment shortly thereafter and filed a claim for PTSD and adjustment disorder. Following a hearing, the Workers' Compensation Board concluded that claimant had sustained a compensable injury due to work-related stress. The employer contended that the surgeon's verbal threat could not have given rise to a compensable stress claim, noting mitigating factors such as the presence of others in the operating room and the PA's familiarity with the surgeon's "difficult" personality. Acknowledging that in New York, in order for a mental injury premised on work-related stress to be compensable, the stress must be greater than that which usually occurs in the normal work environment, the appellate court indicated the Board's decision was supported by the evidence. The Board found that threats of physical violence made by the surgeon constituted greater stress than that which normally occurs in similar work environments. The court said it could not "reject the Board's choice simply because a contrary determination would have been reasonable." See *Lucke v. Ellis Hosp.*, 119 A.D.3d 1050, 989 N.Y.S.2d 528 (3rd Dept. 2014). See generally *Larson's Workers' Compensation Law*, § 56.04.

Thomas A. Robinson, J.D., M.Div. is lead staff writer for Larson's Workers' Compensation Law (LexisNexis) and Larson's Workers' Compensation, Desk Edition (LexisNexis), working with noted legal author, Lex K. Larson, since 1987. He is also a contributing writer/editor for several LexisNexis publications, the Feature National Columnist for the LexisNexis Workers' Compensation eNewsletter, and an active blogger at http://workcompwriter.com.

NAWCJ JUDICIARY COLLEGE 2015 SCHOLARSHIP OFFER

The National Association of Workers' Compensation Judiciary is offering scholarship opportunities to adjudicators attending the 2015 Judicial College in Orlando, Florida, August 23-26, 2015!

Scholarship may be awarded to any currently presiding workers' compensation adjudicator, who is also a member of NAWCJ. Scholarships may include hotel accommodations, waiver of the conference registration fee and one-half of travel expenses to and from the college. No scholarship funds are available for meals, although there are two lunches and two receptions with heavy appetizers included in the registration. The evaluation of scholarship applications will include whether the applicant is eligible for funding for the employing agency and preference will be given to adjudicators who have not previously attended the college and who are interested in becoming more actively involved in NAWCJ.

The scholarship program is made possible through a grant from the Workers' Compensation Institute as well as annual dues from associate members of NAWCJ (attorneys and other individuals/companies interested in supporting the education of members of the workers' compensation judiciary).

Each interested adjudicator must e-mail a completed scholarship application to NAWCJscholarship@gmail.com by May 15, 2015. Scholarship awards will be announced by June 30, 2015 and successful applicants will be asked to make travel arrangements soon after to help minimize airfares.

College attendees will have an opportunity to meet members of the workers' compensation judiciary from around the country, as well as practitioners and industry leaders. The judicial college is an excellent opportunity to receive continuing education credit in a variety of areas including order writing, evidence, medical issues and other matters that routinely come before workers' compensation adjudicators.

I encourage you to apply for a scholarship to the 2015 judicial conference and look forward to meeting you when the college convenes in August.

Sincerely,

The Honorable Michael Alvey, President

Application for Scholarship, NAWCJ College, August 23-26, 2015

Name: _____

Address: _____

E-mail: _____

Phone #: _____ Fax#:_____

Agency Name and Address:_____

_____

NAWCJ member since _____ (year)

Have you ever attended a NAWCJ Judicial College or WCI Annual Meeting and Conference? ___YES ___NO

If so, what year(s)? _____ Did you receive a scholarship? _____

Have you participated on a NAWCJ panel or committee in the past or would you be willing to do so in the future? ___YES ___NO

Explain how you would like to participate in the NAWCJ:

_____

Will you receive any support from your employer to attend the college? (leave time, payment of expenses beyond registration waiver and partial reimbursement of travel expenses): ___YES___NO If yes, explain support offered by employer:

_____

Please estimate your travel expenses for attending the college:

_____

Current adjudicatory position, dates held and description of duties: _____

_____

Past experience in workers' compensation law (may attach resume):

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_____

How will attending the 2015 NAWCJ Judicial College and FWCI Conference benefit you in the performance of your job:

_____

Would you be willing to write a brief article for the NAWCJ newsletter about the 2015 NAWCJ Judicial College and FWCI Conference and its benefits? ___YES ___NO

From the Pages of workcompcentral

Doctors Finding Ways around Cost Controls when Dispensing Drugs

By Greg Jones

Despite state regulations that were supposed to reign in the cost of physician-dispensed drugs, physicians in California and Illinois are increasingly prescribing more expensive drugs that are formulated in unusual dosages and evading those price controls, according to a report released Thursday by the Workers Compensation Research Institute. Both states set maximum reimbursement rates for physician-dispensed drugs at the average wholesale price established by the original manufacturer, plus a dispensing fee. But repackagers are selling drugs in dosages not made by the original manufacturer, such as 7.5 mg, getting a new National Drug Code number and assigning a significantly higher average wholesale price, according to WCRI.

Dr. Richard Victor, executive director of WCRI, said the report shows the difficulties that regulators and lawmakers will face in controlling what carriers pay for drugs dispensed to injured workers. But other researchers and system observers say the results of WCRI's analysis show that it's time to eliminate physician dispensing in workers' compensation once and for all. The pharmaceutical fee schedule in California was amended in 2007 to cap the maximum reimbursement for a physician-dispensed drug at the same amount as what is paid for the same drugs when dispensed by a pharmacy. This resulted in substantial price reductions in 2008 and 2009. The prices paid per pill for most physician-dispensed drugs were close to what was being paid for the same drugs dispensed by a pharmacy.

That trend held until late 2011 and early 2012, WCRI reports, when doctors appeared to have identified a loophole that led to a rapid escalation in prices paid for the medications they provided directly to injured workers. The average price paid per pill for the muscle relaxant cyclobenzaprine of 43 cents in the final quarter of 2011 increased nearly five times to $2.11 in the first quarter of 2013. The increase was driven by an increase in physicians dispensing the drug in a dosage of 7.5 mg.

The 7.5 mg pill, despite coming onto the market in 2006, was rarely billed for in the workers' compensation system until 2012. During the next year, this dosage grew to account for 47% of physician-dispensed prescriptions for cyclobenzprine. The percentage of physician-dispensed prescriptions for the 5 mg dosage fell about 10% during this period, while the 10 mg pill dropped from almost 70% of prescriptions for cyclobenzaprine at the end of 2011 to less than 40% of physician-dispensed prescriptions for the drug in 2013.

WCRI reports that the price paid per 7.5 mg pill ranges from $2.90 to $3.45, compared to a range of 35 cents to 59 cents for the 5 mg formulation and 49 cents to 70 cents for the 10 mg pill. A similar trend was observed with physician dispensing of the schedule IV opioid tramadol. From the fourth quarter of 2012 to the first quarter of 2013, about half of the physician-dispensed tramadol prescriptions in California shifted from the cheaper 50 mg, regular release formulation to a 150 mg extended-release pill. The average price of the 150 mg pill ranges from $5.94 to $7.41, while the 50 mg pills sold for between 25 cents and 34 cents during that period.

The Workers Compensation Research Institute also reported a growth in physician-dispensed prescriptions for a new strength formulation of hydrocodone-acetaminophen, or Vicodin. For the most part, California was spared the increase in prescriptions for the new formulation with 2.5 mg of the opioid hydrocodone and 325 mg of the nonsteroidal anti-inflammatory acetaminophen.

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Dispensing Drugs, from Page 18.

But Illinois wasn't so lucky. The Illinois Workers' Compensation Commission in November 2012 adopted a final rule that set the price of physician-dispensed drugs at the average wholesale price, plus a dispensing fee of $4.18.

The new formulation of Vicodin accounted for less than 1% of prescriptions in the final quarter of 2012, and jumped to 25% of physician-dispensed prescriptions for Vicodin in the first quarter of 2013, after the reforms took effect. The average price paid per pill was $3.04. The Vicodin formulation most commonly dispensed by Illinois doctors, containing 5 mg of hydrocodone and 325 mg of acetaminophen, accounted for 32% of prescriptions, with an average price paid per pill of $1.29 in the final quarter of 2012 and 66 cents in the first quarter of 2013.

As was the case in California, the 7.5 mg formulation of cyclobenzaprine increased from 2% of physician-dispensed prescriptions for cyclobenzbenzaprine prior to the reforms to 21% of prescriptions after the reforms. And the 150 mg, extended-release formulation of tramadol increased from 3% of physician-dispensed prescriptions for the medication before the reforms to 29% after they took effect. A total of 18 states have adopted rules similar to those in place in California and Illinois, tying reimbursement for physician-dispensed drugs to the average wholesale price set by the original manufacturer. WCRI said the ability of manufacturers to formulate new drugs and assign a new and higher average wholesale price calls into question whether those reforms will work.

"I think the bottom line of this is that when the government regulates prices, the people whose prices are being regulated seek to find other ways to retain the higher revenues they used to have" said Victor. "That raises a question, given what we see in the data, about whether laws that seek to regulate physician dispensing are sustainable, or whether physician dispensing will continue to find new ways to retain their revenues regardless of what regulations are passed." Victor said WCRI did not find any increase in the percentage of prescriptions for these new formulations that were filled at a pharmacy. That fact calls into question whether these drugs are being used because they're more efficacious, or simply because they're more profitable.

The data suggests the latter is more likely to be the case, Victor said. "If the new strengths that are being used by physicians who are dispensing are being used because they're clinically superior, I hope the physician dispensers are informing their colleagues that they're missing an opportunity to deliver better care," he said sarcastically. Victor said he wasn't surprised with the results, but he did find it disappointing that it appears so many physicians are dispensing drugs because of profit.

Joe Paduda, president of pharmacy benefit management consortium CompPharma, expressed similar sentiments. "What is surprising is the creative lengths profiteers will go to suck money out of employers' and taxpayers' wallets," he said. "It is abundantly clear that this industry's sole objective is generating profits. It is also abundantly clear that the only mechanism that will work is to ban physician dispensing." "It's high time insurance companies, employers and chambers of commerce stop screwing around and start taking this seriously," he said. Paduda said there is no discernable reason why physicians would ever have to dispense more than a short supply of medications. There's a pharmacy on almost every corner of every city in the country, he said. And if there isn't, drugs can be delivered by mail.

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Dispensing Drugs, from Page 19.

Frank Neuhauser, a researcher for the University of California, Berkeley, said he believes that the doctors dispensing the new formulations could be putting the health of injured workers at risk and exposing employers and insurance companies to significant liability. Companies manufacturing the new formulations are "basically grinding up a drug they buy somewhere else and putting it into capsules," he said. There's little, if any, regulatory oversight of such practices, he said. Neuhauser said that calls to mind the meningitis outbreak in 2012 that was traced back to steroidal injections prepared by the New England Compounding Center.

Neuhauser said it's important to note that doctors aren't increasingly prescribing these medications for workers to pick up at a pharmacy, which suggests to him that they're dispensing the odd formulations only for profit. Like Paduda, he said he thinks it's time for states to step in and eliminate physician dispensing entirely. In the meantime, he said employers and carriers in California have the ability to tackle the problem themselves by excluding from medical provider networks any doctors who are dispensing high-priced drugs. "My opinion here is that every insurer should be examining their database, and any doctor that dispenses these particular drugs should be immediately eliminated from their MPN (Medical Provider Network)," he said. "If you see this and don't exclude those doctors, you're putting yourself at risk if there are any negative consequences for the worker."

Several States Looking at Adopting Formularies in 2015

By Ben Miller

Spurred on by the success of Texas regulators in reducing the number of opioid prescriptions to injured workers, several states are poised to adopt drug formularies in 2015. State regulators in Tennessee, Arkansas and Oklahoma are writing proposals to establish a formulary based on the Official Disability Guidelines. The Maine Workers' Compensation Board is forming a task force to consider creating a formulary, while California regulators have wrestled with the idea for years.

Formularies are already in place in Texas, Washington and Ohio, with Oklahoma operating one under emergency rules that expire in September. In those states, doctors prescribing drugs not on the formulary list must argue on a case-by-case basis for why those medications are necessary for the patient. Workers' compensation formularies seek to restrict the prescription of opioids and compounded drugs, leading to reductions in the number of injured workers receiving those drugs.

Texas adopted a closed formulary in 2011. Since then, the number of opioid prescriptions for injured workers in the state has dropped 10%, according to the Workers' Compensation Research Institute. Prescriptions for opioids not on the formulary list have dropped 60%, while scripts for all drugs not in the formulary have fallen 70%. Overall prescription drug costs for injured workers have declined 15%. "Every metric that you look at shows declining opioid use and number of prescriptions for opioids in Texas," Bruce Wood, assistant general counsel for the American Insurance Association, told WorkCompCentral Wednesday. "And the Texas success is what's animating other states to look at adopting a formulary and ODG." AIA supports formularies in a broad sense, he said, and is in contact with regulators in all states considering a formulary to let them know why such systems might be a good idea.

According to a study WCRI published last year, a Texas-like formulary would likely result in savings for other states. The institute's researchers found that if physicians in other states behaved the same as Texas doctors, a Texas-like formulary would cut prescription drug costs 29% in New York, 25% in New Jersey, 18% in Florida, 16% in Illinois and 14% in California. The California Workers' Compensation Institute conducted its own study last year and found that a Texas-like formulary would cut prescription drug costs by $102 million to $541 million annually in California.

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

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WCI Workers' Compensation Institute

Formularies in 2015, from Page 20.

Oklahoma has a formulary in place under emergency rules it promulgated in January last year, but the Workers' Compensation Commission is working on permanent rules. The commission has not published those rules yet. They cannot be adopted without approval by the state legislature.

Oklahoma's formulary is tied to the Official Disability Guidelines, but its policy on legacy claims has drawn some ire from payers. The rules excluded claims filed before Feb. 1, 2014 from the formulary entirely.

The Property and Casualty Insurers Association of America, as well as the medical cost containment firm Prium, asked the commission to include those claims in its definition of legacy claims, which would be subject to the formulary after Nov. 1, 2016. Representatives of the commission did not respond Wednesday to a request to clarify whether it is considering such a change.

The Tennessee formulary faces a long road to approval. According to Abbie Hudgens, administrator of the state's Division of Workers' Compensation, the division's medical advisory committee has written a first draft of the regulations. After it polishes that draft, the rule will go through a public hearing and a two-week written comment period. Then the state attorney general, governor and the legislature's joint Government Operations Committee will all review it. The rule would go into effect 30 days after clearing all those hurdles. Hudgens said the formulary has some significant support behind it — including her own. "I've already approved the concept, and so from this point on it's just procedural issues," she said.

She also said that the division hasn't received any public comments opposing the idea of a formulary. "There's been an awfully good response to this," Hudgens said. "I think a lot of people feel like it's a good thing for everybody involved." She said regulators are set on using the Official Disability Guidelines as its basis for determining which drugs are on and off the list, but the issue of determining how many existing claims will be subject to the formulary is still very much up in the air. Hudgens said the division hopes to have the rule written by February. However, she said, the process could get delayed if the legislature introduces any bills early in the session related to workers' compensation. "Every bill that comes out that has any effect on workers' compensation, we're required to do a bill analysis," she said. The state legislature convened on Tuesday to begin its 2015 session.

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Formularies in 2015, from Page 21.

The Arkansas rule calls for the use of ODG to determine the list of pre-approved drugs and defines legacy claims as those filed before July 1. Prescriptions for legacy claims would be subject to the formulary only if they were written on or after July 1, 2016. James Kennedy, assistant chief executive officer of the Arkansas Workers' Compensation Commission, said regulators are taking written comments on the proposal and will host a public hearing on Jan. 29 to hear more. The commission will consider comments, make any changes it finds necessary and then vote on it later, he said. The commission has received about 10 comments so far, but he said the pace of submissions is beginning to pick up.

Maine is at an earlier stage in the process than other states, but Workers' Compensation Board Executive Director Paul Sighinolfi said he'd like to see a task force formed by February to begin studying the possibility of creating a formulary. He envisions the task force, which will consist of management, labor and medical representatives, to propose a "limited" formulary as well as some form of utilization review, which the state doesn't have. He declined to elaborate on what a limited formulary might look like, saying it's too early in the process to tell. The utilization review component would be put in to give claimants a second option to get drug requests approved. "If you're going to close one door, you're going to have to crack open a couple others," Sighinolfi said.

He hopes to establish the formulary and utilization review package through regulation rather than legislation, he said. Sighinolfi also wants to make it clear to payers in the state that the formulary will be meant to reduce opioid use, not cut medical costs. The WCRI study found that claimants in Texas have used more alternative options such as non-steroidal anti-inflammatory drugs and physical therapy since the state's formulary went into effect in 2011, effectively shifting medical spending away from opioids and toward those treatments. "The real focus is to minimize pain as much as possible and ... bring them back to a functioning level, and I think that's what our focus is really going to be," Sighinolfi said. He has not officially placed anybody on the task force yet, but Sighinolfi said one person he'd like to have involved is Dr. Kevin Flanigan, a representative of the Department of Health and Human Services who helped set up a similar formulary-UR system for the state's Medicaid patients.

Steve Cattolica, a spokesperson for the California Society of Industrial Medicine and Surgery, said the state has never put forward an actual proposal for a formulary. However, Department of Industrial Relations Director Christine Baker told state legislators in 2013 that the department was considering on as part of a package meant to fight the over-prescription of opioids. Baker said regulators are still studying the issue. "We are doing due diligence in terms of researching the benefits both from an appropriate medical care standpoint, because that's really important that injured workers get appropriate medical care and there are formularies that can do that, (and) we are also looking at it from a (cost-benefit analysis) standpoint," she told WorkCompCentral Wednesday.

Cattolica said CSIMS doesn't have a problem with the concept of controlling prescriptions, but is concerned about the idea of adding another middleman into the process of workers receiving medical care. Applicants already must go through utilization review when their physicians submit a request for treatment to the payer, and payers can route any unfavorable UR decisions through the independent medical review process. The third party that promulgates the formulary — in Texas, that would be the ODG publisher — might take some money out of the process, Cattolica said. "The formularies are usually commercially generated, which (means) they're owned or operated by a third party," Cattolica said. "And that means another vendor taking some portion of the payments that are supposed to go to the provider. And I don't just mean the prescriber, but also the pharmacies."

If all of the states considering adopting formularies in 2015 did so, the total number of states using the method to control drug prescriptions would still be a handful — seven out of 50. However, Wood said, the movement toward formularies will likely get stronger as more states adopt them. "I think that more states will look at it in time," Wood said. "Again I think it's fired by Texas' success. States pay attention to what other states do."

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

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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.

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College of Workers' Compensation Lawyers

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

Predictions for Work Comp in 2015

By Joe Paduda*

Once again I'll head out on a limb with saw firmly in hand…

1. **Aetna will NOT be able to sell the Coventry work comp services division.** I'll double down on last year's prediction: even if the giant health plan wants to dump work comp, the network – which is where all the profit is – isn't sellable. The rest of the operation isn't worth much; the bill review business continues to deteriorate (and CWCS is looking for a replacement BR application), competitors are picking off key staff, and customers continue to switch out services and network states.

2. **Work comp premiums will grow nicely,** driven by continued improvement in employment and gradually increasing wages coupled with increases in premium rates in key states (we're talking about you, California).

3. Additional research will be published showing just how **costly, ill-advised, and expensive physician dispensing of drugs** to workers' comp patients is. Following on the excellent work done by CWCI and Accident Fund/Johns Hopkins, we can expect to learn more about the damage done to patients, employers, insurers, and taxpayers by docs looking to Hoover dollars out of employers' pocketbooks.

4. Expect more mergers and acquisitions; there will be **several $250 million+ transactions in the work comp services space,** with more deals won by private equity firms. Of late, most transactions have been "strategics" where one company buys another; the financials of these have been such that private equity firms couldn't match the prices paid. I'd expect that will change somewhat in 2015 as "platform" companies come on the market.

5. A **bill renewing (Terrorism Risk Insurance Act) TRIA will be passed;** the new GOP majorities want to show they can "govern" and this has bipartisan support. (Ed. Note: The TRIA reauthorization has since been signed into law).

6. **Liberty Mutual will continue to de-emphasize workers' comp.** The company's continued focus on personal lines and property and liability coverage stands in stark contrast to the changes in work comp. The sale of Summit, management shifts, and the financial structuring of legacy work comp claims portend more change to come. Recent financial results show the wisdom of this strategy.

7. After a pretty busy 2014, r**egulators will be even more active on the medical management front.** Work comp regulators in **several more states will adopt drug formularies and/or allow payers/PBMs (Pharmacy Benefit Manager) to more tightly restrict the use of Scheduled drugs** via evidence-based medical guidelines and utilization review. While the former is easy, the latter is better, as it enables payers and PBMs to more precisely focus their clinical management on the individual patient. Expect more restrictions on physician dispensing and compounding, increased adoption of medical guidelines and UR, along with incremental changes in several key states (California we hope) to "fix" past reform efforts.

8. There will be at least **two new work comp medical management companies with significant mindshare** by the end of 2015. These firms, pretty much unknown today, are going to be broadly known amongst decision-makers within the year. While they will not generate much revenue this year, they will be attracting a lot of attention.

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9. **Outcomes-based networks will continue to produce much heat and little real activity**. After predicting for years that small, expert-physician networks will gain significant share, I'm throwing in the virtual towel. There's just too much money being made by managed care firms, insurers, and (Third Party Administrator) TPAs on today's percentage-of-savings, huge generalist network/bill review business model. Yes, there will be press releases and articles and speeches; No, there won't be more than a very few real implementations.

10. **Medical marijuana will be a non-event.** Amidst all the discussion of medical marijuana among workers' comp professionals, there's very few (as few as in none) documented instances of prescribing/dispensing of marijuana for comp claimants. Yes, there will likely be a few breathless reports about specific claims, but just a few. And yes, there may also be a few instances of individuals under the influence of medical marijuana incurring work comp claims, but these will be few indeed.

There you have it – here's hoping I'm more prescient this year than I was last.

2015 Health Care Predictions

By Joe Paduda

I've decided to split my predictions into work comp stuff (where I do most of my work) and health care stuff not directly related to work comp. Here are my health care predictions…

1. **Health care cost inflation will remain low.** After five years of growth at or below 4 percent, health care costs remain relatively stable at 17.4 percent of (Gross Domestic Product) GDP. It is possible that health care costs for 2014 will come in below that benchmark due to increasing productivity and stable health care costs. In the interest of setting a metric, I'll predict costs remain at 17.4% of GDP.

2. (Affordable Care Act) **ACA will be less of a story.** The healthcare.gov website appears to be working well – at least on the front (enrollment/consumer) end. Work on the back end (communications with internal governmental programs and agencies, financial links, and ties to health plans) continues but seems to be proceeding apace. We'll base evaluation on the volume of news stories this year vs. 2014.

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THE COLLEGE OF WORKERS' COMPENSATION LAWYERS

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Indiana

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Virginia

David Torrey
Pennsylvania

Roger Williams
Virginia

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3. **Employer take-up of health insurance will remain stable;** if it drops it won't do so by more than a percentage point. Despite the hysteria from ACA opponents claiming employers would drop insurance en masse, it hasn't happened. And it won't.

4. **Expect 11 million plus enrolled via the Exchanges this year** (federal and state). Initial enrollment in late 2013 was strong in key states, and the outreach efforts are paying off.

5. **More ACOs will close down or suspend operations, while others will grow and expand.** Net is we will see more lives covered via (Accountable Care Organization) ACO-type models. For those of us old enough to remember the halcyon days of (Health Maintenance Organization) HMOs this is hardly surprising. The number of HMOs reached 640+ in the late eighties before market forces led to consolidation via merger/acquisition, failure of some, and expansion of the successful ones into new markets. This is how it works – **a decreasing number of ACOs is not an indication that the model doesn't work.**

6. **More hospitals will close** as the reduction in Medicare and private pay reimbursement hits those unable to adapt. While there will be pain in affected local communities, this is inevitable as a sixth of our economy goes thru restructuring. It happened in the oil industry in Pennsylvania in the 1940s, shipbuilding in the 1960s, textiles, clothing, clothing, furniture, automobiles.

7. **More doctors will work for very large multi-specialty groups and health systems.** Currently about three-fifths of physicians are employed; expect that to bump up by a couple percent.

8. **Care extenders will get more care authority.** This is going to be contentious, at times nasty, politically charged. It is also inevitable. (Physical therapists) PTs can do a lot of things orthopods currently do; nurse practitioners are already delivering a lot of primary care, and nurse midwives are increasing their scope of practice in many areas.

9. **Specialty drugs will continue their meteoric rise in cost and prevalence.** I know, an easy one, but absolutely worthy of note as they will become an even larger portion of medical spend, forcing payers and policymakers to make some very hard decisions about coverage.

10. **Ebola will disappear from American mass media.** If it's not here, we don't care, and it won't be here. Yet another example of the American public and American media's obsession with really bad things only when they directly affect us.

How Important is Workers' Compensation?

Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of business, and the pocketbooks of consumers are affected daily by it.

Judge E.R. Mills, *Singletary v. Mangham Construction*,
418 So.2d 1138 (Fla. 1st DCA, 1982)

Pennsylvania Centennial Special

(Revisiting the Scholarship of Workers' Compensation)

Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Georgia Law Review 775 (1981-1982).

By Hon. David Torrey*

I.

In this 1982 article, originally a formal academic address, the author considers recent national case law developments in workers' compensation which exhibited courts allowing major exceptions to the exclusive remedy. These exceptions were under the dual capacity doctrine and the intentional tort exception.

Epstein asserted that allowing employees to assert such tort actions against their employers would upset the integrity of the system and threaten its reason for being. In his view, the viability of the system could be in question, particularly when expansion of benefits and in injuries covered had made many employers dissatisfied with the system.

In brief remarks at the end of his article, he suggests that allowing the parties to opt out of the system on a voluntary basis, and agreeing to their own plans (as under what we now refer to as carve-outs), may be an answer to these problems. This would be quite an innovation (carve-outs have in fact been allowed in some states), particularly as major change in how work injuries are compensated had not been addressed in many decades. The introduction of workers' compensation had, he says, since the teens been "relegated to a minor role, worthy of a problem that had been solved."

II.

Epstein, who teaches law at the University of Chicago, prefaces his analysis of the current controversies noted above by analyzing the law of work accidents as it existed prior to workers' compensation. Much of his analysis treats the British experience, which was much like that of the U.S.

Epstein first discusses the case *Priestley v. Fowler* (1837), which was influential in both countries in establishing the Fellow Servant Rule ("common employment"), that is, the rule that an employer is not vicariously liable when an employee is injured because of the negligence of another. He proceeds to discuss and critique at length the influential Massachusetts decision to the same effect, *Farwell v. Boston & Worcester Railroad* (1842). Epstein, however, turns the usual analysis of these cases on its head, stating that these cases were actually "plaintiffs' decisions."

This is so because the opinions remark upon instances when an employer *actually could be liable* for workplace injuries. Prior to these cases, the lack of any authority of any kind showed that an employer could never be liable under any condition.[1] These cases, according to Epstein, "ushered through the backdoor unheralded changes that were in their own way as important as those wrought by the workmen's compensation statutes of a later day." For example, Justice Shaw in *Farwell* "intimated that a cause of action properly lay against the employer if there had been some defect in the design of the tracks, in the choice of equipment run on them, or in the selection and supervision of the employee…."

In any event, the early thinking (as expressed in *Farwell*), was that workers assumed the risks of their occupations in an implied contract to the effect that, in exchange for increased wages, workers knowingly took on the hazards of work.

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Epstein posits that this theory was misguided, stating that the many nuances implicated by the employment relationship nullifies such an idea. "There is no reason," he states, "why express contractual provisions [never mind *implied* contractual provisions] on loss allocation must be constant across different agreements of the same general class, much less across different classes of relations." Meanwhile, many other explanations exist for wage differentials: "Any inference from the wage differential to the selection of the proper liability rule" is unjustified. And finally, "The ceaseless elaboration of the tort law of industrial accidents shows how fruitless it is to think that any one set of rules will do suitable service in the many separate conditions to which it will have to be applied."

In general, Epstein agrees that the common law system was unsatisfactory. However, he reaches this conclusion not from the standpoint of morality or justice but from the analysis of whether costs of injuries were really being assigned with any rationality. Indeed, at one point he seems cross that workers as a class were dissatisfied with the inability to recover: "To be sure, there was some sharp economic compulsion, but this is hardly removed by driving employers from the marketplace [by imposing liability for work injuries]." Still, he does seem to think that the industrial accident situation was so severe in the 19th century that some sort of change was inevitable, given the situation's "apparent social and economic consequences, not to mention its sheer emotional importance."

III.

In the second part of his article, Epstein inquires whether the early employer liability statutes, which removed, in certain contexts, the defenses of the Fellow Servant Rule and assumption of the risk, generated any superior result. He believes that they did not. Here the author sets forth at length an analysis of early British law (1880), which, he points out, formed the basis for many of the U.S. employer liability laws, like Pennsylvania's Casey Act. He summarizes British cases that reveal employees *still unable* to recover because of the vagaries of the new law. (This was also the Pennsylvania experience.)

Epstein is, however, intrigued by the fact that the parties were able to opt out, with employers providing voluntary no-fault workers' compensation-like programs, a condition of which being that workers agree in advance that they could not sue. Epstein ventures that these types of agreements between workers and employers reflected the market at work – a "market solution." He praises the courts for upholding the ability of the parties to opt out and for enforcing injured worker tort waivers: "[T]he great contribution of the English common law judges in response to the Employers' Liability Act was not to erect obstacles that limited contractual freedom." In Epstein's view, given the battles over whether immunity did or did not survive the Employers' Liability Act, "individual workers were well advised to abandon their rights under [that law] in order to secure the relatively fixed and certain benefits that alternative voluntary plans afforded."

IV.

From the point of view of allocating accident costs, Epstein believes that the eventual reform of workers' compensation, specifically the all-important British law of 1897, and those of the U.S. which followed the same, most accurately achieves the goal of rational accident cost allocation. He reiterates that the law is in effect a market solution that best does the job, even if imperfectly; and even if, because of its mandatory nature, it is against the "voluntary ideal."

The major factor in this calculus is *no-fault liability*, which takes away the transaction costs of trying to determine whether or not the employer has committed a negligent act. "Workers' compensation rules," he states, "are in most instances a closer approximation to the consensual ideal than the negligence rules to which they are opposed. The test of efficiency is what the market 'would have' demanded were transaction costs low. By that standard negligence is an inefficient system, notwithstanding the flawed theoretical arguments offered in its support."

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Another efficiency he identifies is the usual singularity of the defendant in a compensation case – that is, the employer which has employed the worker. Were workers still suing their employers in tort, the opportunity would exist for the complex and costly process of impleading other entities said to be responsible for the injury or death. "Whatever the appropriate liability regime for industrial accidents," he asserts, "the system operates better when the proper defendant is the immediate employer and not some remote party to the case."

Epstein also admires the economic/behavioral "incentives" of workers' compensation. True, injured workers will likely receive less when a negligence case could have been made out. Still, he states the following:

> The low level of the benefits doubtless proved nettlesome to workers *after* injuries. But to concentrate on that point is to miss the central role. First, low damages [sic] help keep down the overall costs of the plan, which will induce employers to continue to hire labor. Second, low benefits help prevent fraud against the plan, as there is less to gain by pretending that an injury, or its consequences, is work-related. Third, the low awards create additional incentives upon the worker for self-protection and therefore act as an implicit substitute for assumption of risk and contributory negligence.[2]

Returning to the 1897 law, Epstein notes what he views as its unsatisfactory aspects, such as restricting the employer's ability to continue to opt out and maintain its own plan (the process was, he states, over-regulated to the point of driving such plans out of the system.) Further, an injured worker could still sue his employer, subject to an apparent set-off in event of compensation recovery (this was not changed until 1923), though if the worker sued a third party he thereby elected out of *any remedy* against the employer.

V.

Epstein asserts that the integrity of the exclusive remedy is essential for the system to operate properly vis-à-vis rational allocation of accident costs. Thus, courts which allow tort actions based on exceptions like dual capacity and intentional tort threaten the viability of the workers' compensation laws.

We know now that the dual capacity doctrine has largely failed to develop since Epstein's article (1982), and in Pennsylvania it completely fizzled. Still, the intentional tort exception has continued to be an issue in many states (though not in Pennsylvania, where the Supreme Court has unequivocally rejected the cause of action). For this reason, Epstein's article remains highly relevant in ongoing consideration of the issue.

The author, importantly, would allow the intentional tort claim only when "infliction of harm for its own sake," can be shown. In the interests of the original bargain, including keeping employers out of tort actions, all other lesser "intentional torts," like those based upon theories of "substantial certainty to cause harm" should be rejected. He insists, "The goal of the compensation statutes was that uncertain remedies should be replaced by certain ones, so as to prevent litigation from becoming a grotesque imitation of global war. Those goals to compensation can be obtained only if the temptation is resisted to look behind the veil in individual cases. The exception for intentional harms must be limited to its narrowest possible scope …."

As noted at the outset, Epstein suggests that allowing opt out of the system on a voluntary basis (as with modern carve-outs), may be an answer to a total collapse of employer immunity.[3]

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He assumes that most workers will not be taken advantage of in the process, protected (presumably), as they are by organized labor. He would also have any such plan be consistent with state-mandated benefits as a "floor."

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[1] Epstein states, ironically, "To say that there was no law on the subject before these epic cases were handed down would be an error. The utter dearth of cases upon the subject indicates, clearer than any judicial opinion could proclaim an ironclad rule of breathtaking simplicity: no employee could ever recover from any employer for any workplace accident – period." The author does not find this fact surprising. As if influenced by Hobbes, he states that just staying alive was hard enough, and if a worker was lucky enough to be off the farm and have a job, the last thing he would want to do would be to sue his employer for injury.

[2] *Epstein* at pp. 800-01. When we talk about the "Grand Bargain" of workers' compensation we usually think as did one court: The law "constitutes a grand bargain in which injured workers forego the possibility of larger awards potentially available through the tort system (the quid) in exchange for a no fault system that provides more certainty of an award (the quo)." Epstein would presumably agree (p. 800), insisting that "the basic structure of the bargain was well understood with the passage of the Act." However, when he describes the "certainty of the award" (the worker's benefit of the bargain), he immediately looks to the subtle economic incentives noted above, and he omits any mention of income maintenance, benefit adequacy, expert medical care, and rehabilitation. Both in the past and in the present, the bargain is only met when an injured worker has, via workers' compensation, these items available to him.

[3] Epstein remarks that problems have developed because "the original legislative bargain … was rigid and not capable of self-correction."

A Worthy Goal for 2015? Alaska Reduces Accidents Almost 50%

By: David Langham

In 1983, the movie *War Games* was released, starring Matthew Broderick. In it, a United States Defense of Department ("DOD") scientist programs a computer to simulate possible outcomes from various hypothetical scenarios of global nuclear war. Remember, back in the 1970s and 80s there was still a Cold War and computers were not as universally accessible as they are today. The movie was topical then, and quite popular.

Having run through a very rapid succession of potential beginnings and endings of a "game" simulation called "global nuclear war," the computer, named JOSHUA, concludes that nuclear war is inadvisable. This conclusion perhaps makes us feel superior to JOSHUA in that most of us humans had already intuitively concluded that war is a bad idea. JOSHUA explains his conclusion to the scientist saying, "a strange game. The only winning move is not to play. How about a nice game of chess?"

Over the course of the last several decades, I have held a multitude of jobs. I have seen workers' compensation from the perspective of being an injured worker, a manager, a coworker, an attorney, and judge. I have invested a significant portion of my adult life in this thing we call comp. I have studied it, written about it, and lectured others on it.

Work accidents and illness affect so many people, some more profoundly than others. The scope of workers' compensation is amazing. See How Huge is it Anyway[1]. The workers' compensation industry focuses ample attention on dealing with those accidents and illnesses, how and where they are treated, etc.

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A recent story[2] trumpets that "*Alaska Notches 46% Decrease in Workplace Accidents in 2014*."

We are used to seeing stories in the news[3] describing how various efforts reduce the costs of workers' compensation claims that do occur. A recent reminder is the Tennessee announcement that it will be working toward a prescription drug formulary. Its idea may be modeled on the Texas formulary.[4] Essentially, the state creates tiers of medication, some more available than others. The result in Texas has been cost savings in the medication segment of those claim that do occur.

Statutes across the country restrict or limit access to certain medical specialties, limit chiropractic care, define periods of entitlement to various indemnity classifications, and limit payment of attorney's fees in claims that do occur. Employers may be precluded from terminating an employee in retaliation for claiming workers' compensation, limited in the defenses they may raise to benefit claims, and may face presumptions in favor of various employees. The industry is replete with examples of constraints, limitations, and parameters for the claims that do occur.

The various state law parameters define what is and what is not comp and what it will cost. Significant effort is focused on these various definition and constraint subjects every year in legislative committee rooms and chambers from coast to coast, much in the same way that JOSHUA tried scenario after scenario testing the possible outcomes of global nuclear war in the movie. As with JOSHUA's evaluation, there will be outcomes in claims that do occur that will be better than other outcomes. But none of them is a "win."

The win in workers' compensation, or "win-win" if you will, is just as JOSHUA concluded, not playing the game. In other words, both the employer and the employee are better off if the employee is simply not injured or ill to begin with. The best way to save all of the frustrations that can be workers' compensation is to simply avoid the accident or illness. As Benjamin Franklin posited, "an ounce of prevention is worth a pound of cure."

According to the National Council on Compensation Insurance, NCCI, workers' compensation "frequency" has been decreasing for the last 25 years. The decrease in "accident year 2013" was two percent. An NCCI report[5] documents that "from 1990 through 2009 claim frequency declined at an average rate of more than four percent per year." If there were 100 accidents in 1990, then in 2009 it would be about 46 calculated at that rate of decline. The average of 4% annually would result in an aggregate reduction of about 54% over those 19 years.

That is a significant result, and likely represents a positive outcome. Fewer injuries are a benefit to employers and employees alike. As an aside, a note of caution; there are those who argue that frequency figures like this may signal something other than reduced accidents and injuries. Some claim that frequency is down, in part at least, not because injuries have decreased but because injured workers have become increasingly reluctant to report their injuries or illness.

Proponents of this logic contend that all of the parameters, restrictions, and complications that can be workers' compensation are discouraging reporting. They argue that many injured workers are electing to handle their medical treatment under a group health and possibly short-term disability plans because there are fewer restrictions, greater physician choice, and greater patient control. Some also claim that there is a stigma attached to being a workers' compensation recipient.

So, counting things, like accidents in a given year, is relatively easy. But deciding the validity of what is counted, the "why" of the volume can also be relevant. It can also be more difficult than the counting itself. So, if those who raise the non-reporting argument are correct, then the decrease in claims may be less impressive than at first blush.

With that in mind, it is pretty impressive to see a state's work accident/illness frequency drop 46% in a single year. Despite this progress, Alaska remains one of the most expensive states for workers' compensation premiums. The Workcompcentral story, *Alaska Notches 46% Decrease in Workplace Accidents in 2014*, notes that Alaska's premiums are still in the top five in the nation. The story notes that the high price of medical care is partly responsible. Alaska is a significantly rural state and access to medical specialists can involve significant travel. They note that some procedures are 200% to 400% more costly in Alaska than in other surrounding jurisdictions.

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So, there may remain issues of access to care, cost of care, and the resulting progression or regression of the cost of obtaining workers' compensation insurance that will result. In other words, even with reductions in the volume of claims that do occur, there may be room to work on how the claims are effectively treated and compensated.

However, as we conclude 2014 and look to 2015 with anticipation and expectation, why don't we make it a collective goal to do better next year at just not playing the game, and doing that the right way, meaning legitimately fewer work accidents and illness? It would be a "win-win" for employees and employers alike.

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